# Montana Code Annotated

# ANNOTATIONS

# 2024

Land Resources & Use • State Lands • Agriculture
Livestock • Minerals, Oil & Gas • Water Use • Fish & Wildlife
Planning, Research & Development

VOLUME 13

# 2024
# ANNOTATIONS
# to the
# MONTANA CODE ANNOTATED

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## PREFACE TO VOLUME 13
### (Annotations — September 2024)

Annotations to this volume include:

Case notes of applicable court decisions through:

- public domain citation 2023 MT 177
- volume 413 Montana Reports page 356
- volume 535 Pacific Reporter (3rd Series) page 1133

Digests of Montana Attorney General's opinions through:

- volume 59 opinion number 1 of the Report and Official Opinions of Attorney General

Amendment notes listed under compiler's comments are intended to explain only amendments made in the year indicated and may not accurately reflect current statutory language because of subsequent amendment.

The annotations are provided as a convenience to the user and are not intended to be an exhaustive compilation of the law under a given statute or in a given area.

# TITLE 76
# LAND RESOURCES AND USE

## CHAPTER 1
## PLANNING BOARDS

**Chapter Compiler's Comments**

*Severability Clause:* Section 21, Ch. 273, L. 1971, was a severability clause.

**Chapter Administrative Rules**

ARM 36.15.204 Local flood plain regulations — requirements.

**Chapter Case Notes**

*County Zoning Map Amendment — Board Abused Discretion — Conflict Between County and City Growth Plan Not Addressed — Traffic Concerns Not Addressed:* The District Court did not err by holding that a county's zoning map amendment was invalid for failing to comply with statutory requirements. In view of clear conflict between the Board of County Commissioners of Flathead County's proposed zoning map amendment and the stated growth purposes expressed in the city of Kalispell's growth plan for property that was immediately adjacent to the city, it was incumbent on the Board to more broadly consider this issue and assess the impact of the proposed zoning map amendment on the city's growth plans. The proposed application of the mitigated commercial zone for use on major highways in the county would have permitted banks, retail shops, and other businesses along the highway, clearly impacting traffic, posing a potential for further strip development, and potentially conflicting with planned growth in close proximity to the city. However, the Board's consideration only cursorily addressed commercial growth goals in the growth policy, did not address potential conflicts over disfavored development, only briefly addressed traffic and traffic safety concerns, and failed to assess the possible conflict with planned city growth. Although the Board did not need to address every aspect of the growth policy in detail, it was required to give sufficient consideration to the policies that raise pertinent and significant concerns. For these reasons, the Supreme Court concluded that the Board abused its discretion in implementing a zoning map amendment, and the District Court's ruling invalidating the zoning map amendment was affirmed. Citizens for a Better Flathead v. Flathead County Bd. of County Comm'rs, 2016 MT 325, 385 Mont. 505, 386 P.3d 567.

*Text Amendments and Floating Zones Allowed — Legal Test for Floating Zones — Public Allowed to Be Heard:* The District Court did not err by failing to invalidate a text amendment based on an alleged violation of statutory obligations and state and county public participation requirements. The Board of County Commissioners of Flathead County enacted a zoning regulation that created a commercial zoning classification within the county zoning regulations, containing certain specifics regarding location, lot size, use, setback, building height, and others. The text amendment made no actual changes on the ground to any property, or to the zoning map, and created a classic floating zone. Section 76-2-203 provides the substantive requirements for all zoning regulations enacted by a county without distinguishing between text and map amendments. These provisions do not prohibit float zoning or otherwise require all zoning ordinances to apply to a particular property or location when enacted. Rather, the statutes require that certain considerations and analyses be undertaken and that zoning regulations be in accordance with the county's growth policy. In a legal challenge to a county text amendment or floating zone that makes no on-the-ground changes, the question is whether the new zoning category could satisfy statutory requirements anywhere in the county. The Supreme Court held that because locations existed in the county where the zoning regulation would satisfy those requirements, the zoning regulation was not invalid on its face. As applied, the Supreme Court also determined that the Board satisfied the statutory obligation to permit the public to be heard and, further, satisfied the obligations of the county public participation ordinance by summarizing the concerns raised and explaining its position in light of those concerns, and thus the text amendment was not invalid. Citizens for a Better Flathead v. Flathead County Bd. of County Comm'rs, 2016 MT 325, 385 Mont. 505, 386 P.3d 567.

*"Substantial Compliance" With Growth Policy Standard Not Abrogated by 2003 Amendment — Purpose of Statutory Requirements:* In a dispute over the necessity for the city to substantially comply with its growth policy, the Supreme Court held that the 2003 amendments to this section did not abrogate the "substantial compliance" standard adopted by the Supreme Court in Little

v. Bd. of County Comm'rs, 193 Mont. 334, 631 P.2d 1282 (1981), and affirmed in N. 93 Neighbors, Inc. v. Bd. Of County Comm'rs, 2006 MT 132, 332 Mont. 327, 137 P.3d 557. The Supreme Court held that the 2003 amendments simply clarify that strict compliance with the growth policy is not necessary. The court also pointed out that the substantial work that goes into a growth policy pursuant to Title 76, chapters 1 and 2, would be undercut if the courts were not to require that a governing body substantially comply with its own growth policy. Heffernan v. Missoula City Council, 2011 MT 91, 360 Mont. 207, 255 P.3d 80.

**Chapter Collateral References**

Montana Planning Board Member's Handbook, Montana Department of Commerce, 2020.

## Part 1
## General Provisions

**Part Compiler's Comments**

*Validating Clause Not Codified:* Section 11-3855, R.C.M. 1947, a validating clause, was not codified. The section has not been repealed and is still valid law. Citation may be made to sec. 55, Ch. 246, L. 1957, as amended by sec. 24, Ch. 247, L. 1963.

*Saving Clause:* Section 25, Ch. 247, L. 1963, was a saving clause.

**Part Case Notes**

*Denial of Request to Void Neighborhood Plan Proper — Neighborhood Planning Committee Not Agency:* In a suit filed by several property owners against a planning committee for alleged violations of Montana's open meeting laws, the District Court declined to void the neighborhood plan that was subsequently adopted by the planning board and the County Commissioners. The Supreme Court affirmed, concluding that while the property owners were deprived of certain information generated early in the process, the meetings were ultimately opened to the public, the property owners had the right to participate in the process for approximately 2 years before the County Commissioners approved the plan, and the planning committee was not an agency whose decision could be voided under 2-3-114 or 2-3-213. Allen v. Lakeside Neighborhood Planning Comm., 2013 MT 237, 371 Mont. 310, 308 P.3d 956, distinguishing Bryan v. Yellowstone County Elementary School District No. 2, 2002 MT 264, 312 Mont. 257, 60 P.3d 381.

**Part Attorney General's Opinions**

*Authority of Self-Governing Local Government to Enforce Master Plan (now Growth Policy):* A local government unit with self-governing powers may not refuse to file a certificate of survey because the involved parcel encompasses less than 40, but equal to or more than 20, acres even if its master plan (now growth policy) prohibits divisions of land of such size. A local government that has adopted a master plan (now growth policy) to regulate future land-use planning and zoning may condition issuance of permits for the construction, alteration, or enlargement of structures upon compliance with such plan. 42 A.G. Op. 16 (1987).

### 76-1-101. Planning boards authorized.

**Compiler's Comments**

*Validation Clause Not Codified:* Section 11-3802, R.C.M. 1947, validating preexisting planning boards and actions taken by such boards, was not codified. It has not been repealed and is still valid law. Citation may be made to sec. 2, Ch. 246, L. 1957.

**Case Notes**

*Adoption of Comprehensive Development Plan (now Growth Policy) as Prerequisite to Zoning Authority:* The clear and unambiguous language of 76-2-201 requires that a county adopt a comprehensive development plan (now growth policy) for an entire jurisdictional area. Only after the adoption of such a plan may a county adopt zoning regulations. Allen v. Flathead County, 184 M 58, 601 P2d 399, 36 St. Rep. 1839 (1979). See also Little v. Bd. of County Comm'rs, 193 M 334, 631 P2d 1282, 38 St. Rep. 1124 (1981).

### 76-1-103. Definitions.

**Compiler's Comments**

*2007 Amendment:* Chapter 455 inserted definition of land use management techniques and incentives and definition of market incentives; and made minor changes in style. Amendment effective May 8, 2007.

*2003 Amendment:* Chapter 599 in definition of growth policy at end substituted "that was adopted pursuant to this chapter before October 1, 1999, or a policy that was adopted pursuant to this chapter on or after October 1, 1999" for "that meets the requirements of 76-1-601"; deleted definition of units of government that read: ""Units of government" means any federal, state, or regional unit of government or any county, city, or town"; and made minor changes in style. Amendment effective May 9, 2003.

*1999 Amendment:* Chapter 582 substituted growth policy for master plan as defined term, after "means" inserted "and is synonymous with", and substituted "master plan, or comprehensive plan that meets the requirements of 76-1-601" for "or any of its parts such as a plan of land use and zoning, of thoroughfares, of sanitation, of recreation, and of other related matters"; inserted definition of neighborhood plan; in definition of plat substituted "on a map or plan" for "upon the earth and represented on paper"; and made minor changes in style. Amendment effective October 1, 1999.

*Saving Clause:* Section 35, Ch. 582, L. 1999, was a saving clause.

*Transition:* Section 36, Ch. 582, L. 1999, provided: "A governing body that adopts a master plan pursuant to Title 76, chapter 1, before October 1, 1999, may adopt zoning regulations that are consistent with the master plan pursuant to Title 76, chapter 2, part 2 or 3, until October 1, 2001."

**Administrative Rules**

ARM 17.36.101 Definitions.

**Attorney General's Opinions**

*No Legal Effect of Comprehensive Plan Adopted Before October 1, 1999, as Basis for New Zoning Regulations:* Pursuant to the transition and applicability language in Senate Bill No. 97 (1999) (Ch. 582, L. 1999), a comprehensive plan adopted prior to October 1, 1999, has no legal effect as the basis for new local zoning or subdivision regulations unless it meets the requirements of a growth policy under 76-1-601. Zoning regulations that were adopted pursuant to master plans, comprehensive plans, and comprehensive development plans prior to October 1, 2001, are enforceable, but county and municipal zoning regulations may not be adopted or substantively revised after October 1, 2001, unless a growth policy is adopted for the entire area of the planning board having jurisdiction. Application of previously adopted zoning regulations does not constitute the adoption of zoning regulations, so rezoning is not precluded, and routine minor revisions that do not have any impact on growth policy may be made. 49 A.G. Op. 23 (2002).

## 76-1-106. Role of planning board.

**Compiler's Comments**

*2003 Amendment:* Chapter 599 in (1) near middle after "community development" inserted "if requested by the governing body"; and made minor changes in style. Amendment effective May 9, 2003.

*1999 Amendment:* Chapter 582 in middle of (1) substituted "growth policy" for "master plan"; and made minor changes in style. Amendment effective October 1, 1999.

*Saving Clause:* Section 35, Ch. 582, L. 1999, was a saving clause.

*Transition:* Section 36, Ch. 582, L. 1999, provided: "A governing body that adopts a master plan pursuant to Title 76, chapter 1, before October 1, 1999, may adopt zoning regulations that are consistent with the master plan pursuant to Title 76, chapter 2, part 2 or 3, until October 1, 2001."

**Case Notes**

*Zoning in Substantial Compliance With Growth Policy Not Illegal Spot Zoning:* Upon receiving a citizens' petition, the Lewis and Clark County Board of Commissioners adopted a special district and zoning regulations that prohibited sand and gravel mining. Helena Sand and Gravel, Inc., (HSG) owned land within the boundaries of the special district that included both active gravel pits and land where mining had not yet occurred. HSG filed suit and argued that it had been subject to illegal spot zoning when the Board adopted the mining prohibition because it was the only landowner affected by the regulations. The Supreme Court disagreed and held that HSG's claim failed all three prongs of the test in Little v. Bd. of County Comm'rs, 193 Mont. 334, 631 P.2d 1282 (1981): the Board lawfully found the prevailing use of land within the special district to be rural residential, and the zoning regulations were in substantial compliance with the growth policy, so the zoning was not in the nature of special legislation. Because HSG could not demonstrate that its property was singled out for a use classification that was totally different from the surrounding area, it was not subject to illegal spot zoning. Helena Sand & Gravel, Inc. v. Lewis & Clark County Planning & Zoning Comm'n, 2012 MT 272, 367 Mont. 130, 290 P.3d 691. See also Hartshorne v. Whitefish, 2021 MT 116, 404 Mont. 150, 486 P.3d 693.

*Impermissible Spot Zoning — Little Test Applied:* The Supreme Court found illegal spot zoning by applying three prongs of the Little test and determined: (1) a proposed power plant constituted a heavy industrial use and differed significantly from agricultural uses that dominated the surrounding area; (2) the area to be rezoned was relatively small both in absolute size and in terms of landowners affected; and (3) the proposed rezone smacked of special legislation that would accrue to a single landowner to the detriment of surrounding farmers and ranchers. Moreover, the fact that the power plant could have pursued a special use permit from the board of adjustment did not undermine the spot zoning claim. Plains Grains L.P. v. Bd. of County Commr's, 2010 MT 155, 357 Mont. 61, 238 P.3d 332, following Little v. Bd. of County Comm'rs, 193 M 334, 631 P2d 1282 (1981).

*Zoning Arguments Based on Expired County Growth Policy Dismissed as Moot:* Plaintiffs raised issues concerning a 2005 zoning amendment that were dependent upon a 1987 Flathead County growth policy. While the case was pending, the policy was subsequently replaced by a new growth policy in 2007, which provided that land use zoning in existence at the time the 2007 policy was adopted would remain in place. Because the issues were dependent on an expired growth policy, any decision by the Supreme Court on appeal would not grant effective relief or return plaintiffs to their original position, so the appeal was considered moot and was dismissed. Country Highlands Homeowners Ass'n, Inc., v. Flathead Bd. of County Commr's, 2008 MT 286, 345 M 379, 191 P3d 424 (2008), explained in Plains Grains L.P. v. Bd. of County Commr's, 2010 MT 155, 357 Mont. 61, 238 P.3d 332.

*Expansion of Anchor Institutions Part of Neighborhood Plan — Approval of Zoning Proposal Affirmed:* Plaintiffs contended that allowing expansion of a grocery store and a hospital did not comport with the goal of a neighborhood plan to maintain a sense of history and protect key landmarks, that the expansion would increase traffic congestion and create a pedestrian unfriendly environment, and that the scale of the big box style store was inconsistent with the character of the neighborhood, which the neighborhood plan sought to preserve. Defendants argued that the expansion stabilized two of the neighborhood's most important anchor institutions, thereby fulfilling a goal of the neighborhood plan to expand and enhance existing businesses. The City Council approved the expansion, and plaintiffs sued. The District Court granted summary judgment to defendants, and plaintiffs appealed, also contending that the zoning proposal constituted illegal spot zoning. The Supreme Court affirmed. Not every zoning proposal will be consistent with every goal and objective expressed in a city's growth plan documents. However, the modified zoning proposal in this case complied with the growth plan by improving existing businesses and enhancing the growth of the anchor institutions, which was considered to be in the public interest. In addition, similar businesses had historically used the area, so the zoning proposal did not constitute illegal spot zoning. Citizen Advocates for a Livable Missoula, Inc. v. City Council, 2006 MT 47, 331 M 269, 130 P3d 1259 (2006), following Little v. Bd. of County Comm'rs, 193 M 334, 631 P2d 1282 (1981).

## 76-1-107. Role of planning board in relation to subdivisions and plats.

### Compiler's Comments

*1999 Amendment:* Chapter 582 at beginning of (1) inserted exception clause and after "adopted" substituted "a growth policy pursuant to this chapter" for "a comprehensive plan"; inserted (2) authorizing planning board to delegate to staff responsibility to advise governing body on proposed minor subdivisions; and made minor changes in style. Amendment effective October 1, 1999.

*Saving Clause:* Section 35, Ch. 582, L. 1999, was a saving clause.

*Transition:* Section 36, Ch. 582, L. 1999, provided: "A governing body that adopts a master plan pursuant to Title 76, chapter 1, before October 1, 1999, may adopt zoning regulations that are consistent with the master plan pursuant to Title 76, chapter 2, part 2 or 3, until October 1, 2001."

### Attorney General's Opinions

*Growth Policy Required Prior to Annexation of New Territory but Not for Continued Subdivision Review:* Under 7-2-4734, a growth policy covering an area proposed for municipal annexation is required before a municipality may extend corporate limits under Title 7, ch. 2, part 47, but the requirement does not apply to annexations conducted under 7-2-4201, 7-2-4301, 7-2-4401, 7-2-4501, or 7-2-4601. A growth policy is also required before certain subdivision review procedures and city powers of annexation are authorized. However, a growth policy is not required to continue subdivision review unless the city or county wishes to qualify for streamlined review processes. 49 A.G. Op. 23 (2002).

## 76-1-110. Cooperation with planning board by state and local governments.

**Compiler's Comments**

*1999 Amendment:* Chapter 582 in (1) substituted "growth policy" for "master plan"; and made minor changes in style. Amendment effective October 1, 1999.

*Saving Clause:* Section 35, Ch. 582, L. 1999, was a saving clause.

*Transition:* Section 36, Ch. 582, L. 1999, provided: "A governing body that adopts a master plan pursuant to Title 76, chapter 1, before October 1, 1999, may adopt zoning regulations that are consistent with the master plan pursuant to Title 76, chapter 2, part 2 or 3, until October 1, 2001."

## 76-1-111. Representation of county or additional cities or towns on existing boards.

**Compiler's Comments**

*2001 Amendment:* Chapter 574 in (3) near beginning of second sentence after "county" inserted "or town" and deleted former last sentence that read: "The tax may not exceed the maximum levy authorized in 76-1-402 through 76-1-407"; and made minor changes in style. Amendment effective July 1, 2001.

*1999 Amendment:* Chapter 584 in (3) inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

*Severability:* Section 172, Ch. 584, L. 1999, was a severability clause.

*Retroactive Applicability:* Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

## 76-1-112. Joint or consolidated planning boards.

**Compiler's Comments**

*1997 Amendment:* Chapter 274 in (3)(c), near middle after "may", inserted "subject to subsection (6)"; inserted (6) requiring consistent representation on a city-county board; and made minor changes in style. Amendment effective July 1, 1997.

*Retroactive Applicability:* Section 2, Ch. 274, L. 1997, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to all joint or consolidated city-county planning boards created after July 1, 1985, which are still in existence. [This act] does not affect any action taken by a joint or consolidated planning board prior to the effective date of [this act]." Effective July 1, 1997.

**Attorney General's Opinions**

*Number and Terms of Board Members — Determination:* The number of members and length of their terms on a consolidated planning board may be determined by the interlocal agreement creating the board. (See 1997 amendment.) 39 A.G. Op. 75 (1982).

## 76-1-113. Effect of chapter on natural resources.

**Compiler's Comments**

*1991 Amendment:* At beginning of (1) inserted exception clause; inserted (2) making use, development, or recovery of a mineral by a sand and gravel operation and a concrete mixing or asphalt batching operation subject to local zoning regulations; and made minor changes in style. Amendment effective April 9, 1991.

*Applicability:* Section 5, Ch. 408, L. 1991, provided: "(1) [This act] [76-1-113, 76-2-209, 82-4-431, and 82-4-432] does not apply to:

(a) an area for which a contract was issued prior to [the effective date of this act] [effective April 9, 1991] or for which an application for contract or contract amendment was filed with the department of state lands [functions now transferred to department of natural resources and conservation] prior to February 23, 1991; or

(b) an area:

(i) that is contiguous to an area described in subsection (1)(a);

(ii) for which the holder of the contract has the legal right to mine on [the effective date of this act] [effective April 9, 1991]; and

(iii) for which the contract holder files with the department on or before January 1, 1992, on a form provided by the department, a legal description of the area, evidence of the legal right to mine, and certification that the contract holder holds the property for the purpose of future sand or gravel mining.

(2) Before June 1, 1991, the department shall mail notice of the provisions and passage of [this act] [76-1-113, 76-2-209, 82-4-431, and 82-4-432] and the form described in subsection (1)(b)(iii) to each person who holds a current contract on [the effective date of this act] [effective

April 9, 1991] or who had, prior to February 23, 1991, submitted an application for contract or contract amendment that the department had not approved or denied as of February 23, 1991.

(3) The department shall maintain a list of areas for which certifications have been filed pursuant to subsection (1)(b) and shall provide a copy of the list to any person who requests the list."

**Case Notes**

*Board of County Commissioners Compelled to Follow Clear Statutory Language and Allow Gravel Pit in Nonresidential Area:* Plaintiff owned agricultural property adjacent to a school and sought to develop a gravel pit on the property. Plaintiff applied for the appropriate special review with the Board of County Commissioners. The Board determined that a gravel pit would interfere with surrounding property uses and would violate the rights of people who lived and attended school nearby to a clean and healthful environment, citing 82-4-431 and 82-4-432 as authority for the Board's right to deny the special review. Plaintiff argued that under 76-2-209 and this section, local planning boards may not prevent the operation of a gravel pit in a nonresidential area. The District Court concluded that plaintiff accurately construed the statutes and that the Board could not deny a gravel pit in a nonresidential area. The Supreme Court affirmed. The Board ruled as if either 76-2-209 did not exist or the statute unconstitutionally deprived residents of a clean and healthful environment, but as an Executive Branch agency, the Board violated the separation of powers doctrine by ruling on the constitutionality of the statute. The statutory language was clear and unambiguous, and the Board was compelled to follow the legal mandate and allow the gravel pit. Further, because the statutes were clear, the District Court was not required to reach the constitutional question and did not err in failing to address the constitutionality of the statute. Merlin Myers Revocable Trust v. Yellowstone County, 2002 MT 201, 311 M 194, 53 P3d 1268 (2002). See also St. v. Still, 273 M 261, 902 P2d 546 (1995), and Goldman Sachs v. District Court, 2002 MT 83, 309 M 289, 46 P3d 606 (2002).

*Excavation and Processing of Gravel — County Zoning and Planning Inapplicable:* Part of the legislative purpose of this section is clear and unambiguous. It demonstrates the Legislature's awareness that a range of activities must occur on-site in order for the owner of mineral, timber, or agricultural resources to benefit, and that the Legislature did not intend counties to have the power to prevent the owner from having that benefit. However, the range of activities that cannot be prevented is by no means clear and unambiguous. There is ambiguity in the interpretation and construction of the phrase "complete use, development, or recovery of any mineral . . . resources" and in its application to defendant's gravel extraction and processing. A reasonable construction depends, to some extent, on the circumstances to which this section is applied. Therefore, the court must look to industry practices to discern the extent to which the Legislature intended the owner of the resource to benefit. A county must at least allow the activities necessary to develop the resource to a point at which it can be effectively utilized. In the case at bar, the District Court found that processing occurs at the site of gravel extraction because the cost of transporting the material elsewhere for processing would render the mining economically unfeasible. The District Court also found that gravel processing on-site included washing, crushing, screening, and concrete and asphalt batching and that these activities were part of the recovery of gravel resources. The record supported the District Court's findings. The District Court properly held that 76-1-113 and 76-2-209 exempt the defendant from county zoning and planning. The record concerned gravel mining in a particular geographic location. The Supreme Court declined to announce a broad, sweeping interpretation on such a narrow record and restricted the holding of this opinion accordingly. (See 1991 amendment.) Missoula County v. Am. Asphalt, Inc., 216 M 423, 701 P2d 990, 42 St. Rep. 920 (1985).

**Attorney General's Opinions**

*Prohibition of Sand and Gravel Operations and Certain Concrete and Asphalt Operations in Residential Areas:* The effect of the 1991 amendment to this section, through enactment of subsection (2), was to allow a municipal zoning authority to prohibit sand and gravel operations and operations that mix concrete and batch asphalt in areas zoned as residential, within the applicability provisions of sec. 5, Ch. 408, L. 1991, as long as the zoning authority is exercised in accordance with constitutional principles. 44 A.G. Op. 47 (1992).

*Zoning of Patented Mining Claims:* County Commissioners have the authority to zone land areas which include patented mining claims subject to the mandate that natural resources thereon be allowed to be used, developed, or recovered. 36 A.G. Op. 33 (1975).

**76-1-114. Consolidated land use boards — zoning commission, planning board, and board of adjustment.**

**Compiler's Comments**

*Effective Date:* This section is effective October 1, 2023.

## Part 2
## Membership

**Part Case Notes**

*Consolidated City-County Government — Holdover Plan — No New Planning Board:* A zoning ordinance enacted after city-county consolidation based upon a comprehensive plan (now growth policy) adopted by the old City-County Planning Board prior to consolidation was proper in that the new consolidated government had not by that time formed a Planning Board having the same jurisdictional area as the consolidated local government. Martz v. Butte-Silver Bow, 196 M 348, 641 P2d 426, 39 St. Rep. 149 (1982).

**76-1-201. Membership of city-county planning board.**

**Compiler's Comments**

*2007 Amendment:* Chapter 151 in (1)(e) near beginning after "member" substituted "to be appointed by" for "to be selected by the eight officers and citizen members hereinabove provided for from the members of" and at end inserted "from the members or associate members of the board of supervisors, subject to approval of the members provided for in subsections (1)(a) through (1)(d)"; in (2) in first sentence near middle after "member" inserted "or associate member"; and made minor changes in style. Amendment effective April 6, 2007.

*Transition:* Section 3, Ch. 151, L. 2007, provided: "(1) The members of a city-county planning board, established pursuant to 76-1-201, or a county planning board, established pursuant to 76-1-211, who are members on [the effective date of this act] may continue to serve the remainder of their terms as described under the provisions of 76-1-203.

(2) Appointments to a city-county planning board after [the effective date of this act] must be made as described in 76-1-201. Appointments to a county planning board after [the effective date of this act] must be made as described in 76-1-211." Effective April 6, 2007.

*1985 Amendment:* At beginning of (1) inserted exception clause; in (1)(e) after "hereinabove provided for" substituted "from the members of the board of supervisors of a conservation district provided for in 76-15-311" for "with the consent and approval of the board of county commissioners and the city council"; and inserted (2) establishing procedure for selection of ninth member of city-county planning board when no member of board of supervisors of conservation district is available.

*1985 Preamble:* The preamble to Ch. 509, L. 1985, read:

"WHEREAS, House Bill 275, Chapter 349, Laws of 1973, amended section 11-3810(2), R.C.M. 1947, to require membership of conservation district board members in Montana on all county planning boards; and

WHEREAS, most subdivisions are close to the major metropolitan areas or within the 4.5-mile limits; and

WHEREAS, conservation districts are charged with stopping erosion caused by either runoff or wind erosion; and

WHEREAS, many states require a sign-off of subdivision plats by the conservation district boards.

THEREFORE BE IT RESOLVED, that section 76-1-201, MCA, be amended to require membership of a conservation district board member on each city-county planning board."

**Attorney General's Opinions**

*Planning Board Appointees — Residency — Law Not Retroactive:* Members of a City-County Planning Board appointed prior to July 1, 1979, remain qualified to serve out their appointed terms although new residence requirements were enacted after they began their terms. A statute must be expressly declared retroactive to be retroactive. The amended residence requirements statute had no such declaration and so has only prospective application. 38 A.G. Op. 28 (1979).

**76-1-211. Membership of county planning board.**

**Compiler's Comments**

*2007 Amendment:* Chapter 151 in (1) in second sentence near middle after "chapter 15" inserted "or an associate member of a conservation district designated by the governing board of a conservation district, or a member of" and near end after "either" inserted "of the districts or the designated associate member of a conservation district"; and made minor changes in style. Amendment effective April 6, 2007.

*Transition:* Section 3, Ch. 151, L. 2007, provided: "(1) The members of a city-county planning board, established pursuant to 76-1-201, or a county planning board, established pursuant to 76-1-211, who are members on [the effective date of this act] may continue to serve the remainder of their terms as described under the provisions of 76-1-203.

(2) Appointments to a city-county planning board after [the effective date of this act] must be made as described in 76-1-201. Appointments to a county planning board after [the effective date of this act] must be made as described in 76-1-211." Effective April 6, 2007.

**Attorney General's Opinions**

*County Planning Board Not to Serve as County Zoning Commission:* Because of differences in membership requirements and jurisdictional areas, a County Planning Board may not be designated to serve as the County Zoning Commission. However, members of one board may serve as members of the other if they meet the requirements for membership of each board. 43 A.G. Op. 18 (1989).

### 76-1-221. Membership of city planning board.

**Compiler's Comments**

*Redundant Provision Not Codified:* The last sentence of section 11-3804, R.C.M. 1947, is redundant with 76-1-224(1)(b) and was therefore not codified. The provision has not been repealed and is still valid law. Citation may be made to sec. 4, Ch. 246, L. 1957, as amended by sec. 1, Ch. 271, L. 1959.

### 76-1-222. City council member of city planning board.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 76-1-223. County representative for city planning board.

**Compiler's Comments**

*2003 Amendment:* Chapter 269 in first sentence near middle after "board" inserted "or when a vacancy occurs in the county's membership on the city planning board" and in third sentence at beginning inserted "The mayor may not reject or refuse to appoint to the city planning board a representative designated by a board of county commissioners as provided in this section"; and made minor changes in style. Amendment effective October 1, 2003.

## Part 3

## Organization and Administration

### 76-1-304. Quorum — official action.

**Compiler's Comments**

*2007 Amendment:* Chapter 172 in (2) near middle after "unless" inserted "a quorum is present and unless the action is" and after "majority of" substituted "the quorum" for "members of the board"; and made minor changes in style. Amendment effective April 10, 2007.

**Attorney General's Opinions**

*Power of and Control Over Subcommittee of Board:* Harmonizing this section and 76-1-305 and 76-1-306(2) to avoid ambiguity, it appears that: (1) a subcommittee of the planning board may handle administrative functions of the board; (2) the board should exercise general supervision over the subcommittee and write regulations governing the subcommittee's actions; and (3) any official action of the subcommittee carrying the board's recommendation must be approved by a majority of the board at a properly called meeting. Actions specifically delegated to the board by statute must be viewed as official actions and must be considered by the full board. Ministerial acts may be performed by employees or a subcommittee. 39 A.G. Op. 75 (1982).

### 76-1-305. Administration of board.

**Attorney General's Opinions**

*City-County Planning Board May Contract With City for City-Supervised Professional Services:* A city-county planning board may contract with a city for the professional services of a planning director and staff. The planning board's power to hire and supervise staff pursuant to 76-1-306 applies only to employees of the planning board; therefore, city employees provided under the contract are subject to the supervision of the city manager rather than the planning board. 50 A.G. Op. 1 (2003).

*Power of and Control Over Subcommittee of Board:* Harmonizing this section and 76-1-304 and 76-1-306(2) to avoid ambiguity, it appears that: (1) a subcommittee of the planning board may handle administrative functions of the board; (2) the board should exercise general supervision over the subcommittee and write regulations governing the subcommittee's actions; and (3) any official action of the subcommittee carrying the board's recommendation must be approved by a majority of the board at a properly called meeting. Actions specifically delegated to the board by statute must be viewed as official actions and must be considered by the full board. Ministerial acts may be performed by employees or a subcommittee. 39 A.G. Op. 75 (1982).

### 76-1-306. Staff — service contracts.

**Compiler's Comments**

*2003 Amendment:* Chapter 599 deleted former (1) that read: "(1) The board may appoint and prescribe the duties and fix the compensation of a secretary and such employees as are necessary for the discharge of the duties and responsibilities of the board"; substituted first sentence concerning governing body assigning staff for former text that read: "To effectuate the purpose of this chapter, the board shall have the power and duty to prescribe the qualifications of, appoint, remove, and fix the compensation of the employees of the board"; near middle of second sentence substituted "assigned staff" for "employees"; at beginning of third sentence substituted "governing body" for "board"; and made minor changes in style. Amendment effective May 9, 2003.

**Attorney General's Opinions**

*City-County Planning Board May Contract With City for City-Supervised Professional Services:* A city-county planning board may contract with a city for the professional services of a planning director and staff. The planning board's power to hire and supervise staff pursuant to this section applies only to employees of the planning board; therefore, city employees provided under the contract are subject to the supervision of the city manager rather than the planning board. 50 A.G. Op. 1 (2003).

*Power of and Control Over Subcommittee of Board:* Harmonizing this section and 76-1-304 and 76-1-305 to avoid ambiguity, it appears that: (1) a subcommittee of the planning board may handle administrative functions of the board; (2) the board should exercise general supervision over the subcommittee and write regulations governing the subcommittee's actions; and (3) any official action of the subcommittee carrying the board's recommendation must be approved by a majority of the board at a properly called meeting. Actions specifically delegated to the board by statute must be viewed as official actions and must be considered by the full board. Ministerial acts may be performed by employees or a subcommittee. 39 A.G. Op. 75 (1982).

## Part 4
## Financial Administration

### 76-1-403. Tax levy by county for certain county planning districts authorized.

**Compiler's Comments**

*2001 Amendment:* Chapter 574 in last sentence near middle after "levy" substituted "a tax on the taxable value of all taxable property" for "on all property" and after "district" deleted "a tax not to exceed the maximum levy authorized by 76-1-405"; and made minor changes in style. Amendment effective July 1, 2001.

*1999 Amendment:* Chapter 584 at beginning of second sentence inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

*Severability:* Section 172, Ch. 584, L. 1999, was a severability clause.

*Retroactive Applicability:* Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

**Attorney General's Opinions**

*Mill Levy in Absence of Planning Board and District:* A local government unit cannot levy extra mills for planning purposes unless it has established a planning board and a planning district. 39 A.G. Op. 75 (1982).

### 76-1-404. Tax levy by county for city-county planning board authorized.

**Compiler's Comments**

*2001 Amendment:* Chapter 574 in second sentence near middle after "levy on" substituted "the taxable value of all taxable property" for "all property" and deleted former last sentence that read: "The tax may not exceed the maximum levy authorized in 76-1-405." Amendment effective July 1, 2001.

*1999 Amendment:* Chapter 584 at beginning of second sentence inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

*Severability:* Section 172, Ch. 584, L. 1999, was a severability clause.

*Retroactive Applicability:* Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

**Attorney General's Opinions**

*Mill Levy in Absence of Planning Board and District:* A local government unit cannot levy extra mills for planning purposes unless it has established a planning board and a planning district. 39 A.G. Op. 75 (1982).

### 76-1-406. Tax levy by municipalities authorized.

**Compiler's Comments**

*2001 Amendment:* Chapter 574 near middle after "upon the" substituted "taxable value of all taxable property" for "property" and deleted former last sentence that read: "The tax may not exceed the maximum levy authorized in 76-1-407." Amendment effective July 1, 2001.

*1999 Amendment:* Chapter 584 at beginning inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

*Severability:* Section 172, Ch. 584, L. 1999, was a severability clause.

*Retroactive Applicability:* Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

**Attorney General's Opinions**

*Mill Levy in Absence of Planning Board and District:* A local government unit cannot levy extra mills for planning purposes unless it has established a planning board and a planning district. 39 A.G. Op. 75 (1982).

### 76-1-410. Planning fees — limit.

**Compiler's Comments**

*Effective Date:* Section 9, Ch. 455, L. 2007, provided: "[This act] is effective on passage and approval." Approved May 8, 2007.

## Part 5
## Jurisdictional Area

### 76-1-504. Jurisdictional area of city-county planning board.

**Attorney General's Opinions**

*Growth Policy Required for Entire Jurisdictional Area:* Under 76-1-601 and 76-2-201, adoption of a growth policy is required for the entire jurisdictional area. In the case of a city-county planning board with joint countywide jurisdiction under this section, a growth policy must be adopted for the entire county before zoning may proceed. 49 A.G. Op. 23 (2002).

## Part 6
## Growth Policy

**Part Compiler's Comments**

*Saving Clause:* Section 35, Ch. 582, L. 1999, was a saving clause.

**Part Case Notes**

*Citizen Initiative Expanding Zoning District — Property Owner Challenges Initiative as Reverse Spot Zoning — District Court Ruling That Initiative Complied With County Growth Policy Affirmed.* Egan Slough Community v. Flathead County Bd. of County Comm'rs, 2022 MT 57, 408 Mont. 81, 506 P.3d 996.

*Zoning in Substantial Compliance With Growth Policy Not Illegal Spot Zoning:* Upon receiving a citizens' petition, the Lewis and Clark County Board of Commissioners adopted a special district and zoning regulations that prohibited sand and gravel mining. Helena Sand and Gravel, Inc., (HSG) owned land within the boundaries of the special district that included both active gravel pits and land where mining had not yet occurred. HSG filed suit and argued that it had been subject to illegal spot zoning when the Board adopted the mining prohibition because it was the only landowner affected by the regulations. The Supreme Court disagreed and held that HSG's claim failed all three prongs of the test in Little v. Bd. of County Comm'rs, 193 Mont. 334, 631 P.2d 1282 (1981): the Board lawfully found the prevailing use of land within the special district to be rural residential, and the zoning regulations were in substantial compliance with the growth policy, so the zoning was not in the nature of special legislation. Because HSG could not demonstrate that its property was singled out for a use classification that was totally different from the surrounding area, it was not subject to illegal spot zoning. Helena Sand & Gravel, Inc. v. Lewis & Clark County Planning & Zoning Comm'n, 2012 MT 272, 367 Mont. 130, 290 P.3d 691. See also Hartshorne v. Whitefish, 2021 MT 116, 404 Mont. 150, 486 P.3d 693.

*Requirement to Develop Factual Record of Consideration of Public Comments Prior to Amendment of County Growth Policy:* A Board of County Commissioners adopted an amendment to a county growth plan, expanding a proposed development area. However, the Board relied on a county planning office report that was prepared before more than 4,400 citizens voiced their concern on the amendment. Although the Board was justified in relying on the report to an extent, the Board was obligated to consider the public comments, incorporate those comments into its decision making process, and flesh out the pertinent facts relied upon in approving the amendment. The Supreme Court reversed and required the District Court to evaluate whether the Board considered the public comments. If the District Court determined that the Board failed to satisfy its obligation or if the record was insufficient to determine whether the Board complied, the court was to send the case to the Board for development of the factual record by the Board. N. 93 Neighbors, Inc. v. Flathead County Bd. of County Comm'rs, 2006 MT 132, 332 M 327, 137 P3d 557 (2006). However, see Citizens for a Better Flathead v. Bd. of County Comm'rs of Flathead County, 2016 MT 256, 385 Mont. 156, 381 P.3d 555, in which the Supreme Court upheld a District Court's grant of summary judgment to the Board of County Commissioners for which the factual record demonstrated that the Board had considered and incorporated public comments in the process of revising the county's growth policy.

*Expansion of Anchor Institutions Part of Neighborhood Plan — Approval of Zoning Proposal Affirmed:* Plaintiffs contended that allowing expansion of a grocery store and a hospital did not comport with the goal of a neighborhood plan to maintain a sense of history and protect key landmarks, that the expansion would increase traffic congestion and create a pedestrian unfriendly environment, and that the scale of the big box style store was inconsistent with the character of the neighborhood, which the neighborhood plan sought to preserve. Defendants argued that the expansion stabilized two of the neighborhood's most important anchor institutions, thereby fulfilling a goal of the neighborhood plan to expand and enhance existing businesses. The City Council approved the expansion, and plaintiffs sued. The District Court granted summary judgment to defendants, and plaintiffs appealed, also contending that the zoning proposal constituted illegal spot zoning. The Supreme Court affirmed. Not every zoning proposal will be consistent with every goal and objective expressed in a city's growth plan documents. However, the modified zoning proposal in this case complied with the growth plan by improving existing businesses and enhancing the growth of the anchor institutions, which was considered to be in the public interest. In addition, similar businesses had historically used the area, so the zoning proposal did not constitute illegal spot zoning. Citizen Advocates for a Livable Missoula, Inc. v. City Council, 2006 MT 47, 331 M 269, 130 P3d 1259 (2006), following Little v. Bd. of County Comm'rs, 193 M 334, 631 P2d 1282 (1981).

*Zoning Amendment Considered Illegal Spot Zoning — Little Test:* Duck Creek Properties (Duck Creek), a Florida general partnership, owned 323 acres of undeveloped land in the Hebgen Lake Zoning District. In order to increase development options and the value of the property, Duck Creek sought a zoning change from R-10, which allowed one single-family unit for each 10 acres, to planned unit development (PUD), which permitted more diverse uses at much higher density. The resolution approving the zoning amendment was ultimately approved by the Gallatin County Board of County Commissioners, but was then challenged by two nonprofit corporations. The District Court voided the resolution as illegal spot zoning, and the Board and Duck Creek appealed to the Supreme Court. All parties agreed that Little v. Bd. of County Comm'rs, 193 M 334, 631 P2d 1282 (1981), correctly stated the applicable law, and the Supreme Court examined all three prongs of the Little test, including whether: (1) the requested use is significantly different from the prevailing use in the area; (2) the area in which the requested use is to apply is small, although not solely in physical size, including how many separate landowners will benefit from the zone classifications; and (3) the requested change is more in the nature of special legislation designed to benefit one or a few landowners at the expense of the surrounding landowners or the general public. Under the first prong, prevailing use need not exclude existing use, and the District Court determined that higher density uses under the proposed PUD would have conflicted with the predominately rural and residential character of the surrounding properties. Under the second prong, the size of the area, it was shown that the

Duck Creek parcel was owned by a single entity and that the rezoning would benefit only one landowner. Under the third prong, the District Court found that the Duck Creek parcel was extremely sensitive in its importance to wildlife and wildlife habitat, and the court gave that fact significant weight in evaluating the public welfare, convenience, and necessity. State and national wildlife agencies testified regarding the deleterious effects that a rezone would have on public lands and resources, including the negative impact on habitat for elk, moose, bison, and trout, as well as on grizzly bear habitat and migration. Thus, the District Court properly concluded that the PUD zoning request represented special legislation designed to benefit one landowner at the expense of surrounding landowners and the general public. The court did not err in holding, pursuant to Little, that the proposed Duck Creek parcel was illegal spot zoning. Greater Yellowstone Coalition, Inc. v. Bd. of County Comm'rs of Gallatin County, 2001 MT 99, 305 M 232, 25 P3d 168 (2001). The Little test for spot zoning was applied in N. 93 Neighbors, Inc. v. Flathead County Bd. of County Comm'rs, 2006 MT 132, 332 M 327, 137 P3d 557 (2006), Lake County First v. Polson City Council, 2009 MT 322, 352 M 489, 218 P3d 816 (2009), and Plains Grains L.P. v. Bd. of County Commr's, 2010 MT 155, 357 Mont. 61, 238 P.3d 332.

*Consolidated City-County Government — Holdover Plan — No New Planning Board:* A zoning ordinance enacted after city-county consolidation based upon a comprehensive plan (now growth policy) adopted by the old City-County Planning Board prior to consolidation was proper in that the new consolidated government had not by that time formed a Planning Board having the same jurisdictional area as the consolidated local government. Martz v. Butte-Silver Bow, 196 M 348, 641 P2d 426, 39 St. Rep. 149 (1982).

*Adherence to Master Plan (now Growth Policy):* Local government units, when making zoning decisions, must at least substantially comply with the master plan (now growth policy). Little v. County Comm'rs, 193 M 334, 631 P2d 1282, 38 St. Rep. 1124 (1981).

*Master Plan (now Growth Policy) Required to Exercise Zoning Authority:* Without a master plan (now growth policy) in effect and without a jurisdictional area defined pursuant to the adoption of a master plan (now growth policy), a county may exercise no zoning authority other than on a temporary interim emergency basis as provided in 76-2-206. Little v. County Comm'rs, 193 M 334, 631 P2d 1282, 38 St. Rep. 1124 (1981).

**Part Attorney General's Opinions**

*Extraterritorial Extension of City Zoning Regulations:* In the absence of applicable county zoning regulations, 76-2-310 authorizes a city of the first class that has adopted a master plan (now growth policy) to extend its zoning regulations extraterritorially within a 3-mile radius of its corporate limits without reference to county boundary lines. 43 A.G. Op. 22 (1989).

*Authority of Self-Governing Local Government to Enforce Master Plan (now Growth Policy):* A local government unit with self-governing powers may not refuse to file a certificate of survey because the involved parcel encompasses less than 40, but equal to or more than 20, acres even if its master plan (now growth policy) prohibits divisions of land of such size. A local government that has adopted a master plan (now growth policy) to regulate future land-use planning and zoning may condition issuance of permits for the construction, alteration, or enlargement of structures upon compliance with such plan. 42 A.G. Op. 16 (1987).

**Part Law Review Articles**

North 93 Neighbors, Inc. v. Board of County Commissioners of Flathead County: A Shock to Land Use Planning and Public Comment in Montana, Weldon, 69 Mont. L. Rev. 243 (2008).

**Part Collateral References**

Montana's Growth Policy Resource Book, Montana Department of Commerce (2020).

## 76-1-601. Growth policy — contents.

**Compiler's Comments**

*2013 Amendment:* Chapter 65 inserted (4)(d) concerning establishing coordination or cooperating agency status. Amendment effective October 1, 2013.

*2009 Amendment:* Chapter 446 inserted (3)(b)(viii) relating to sand and gravel resources; in (4)(c)(viii)(F) inserted "sand and gravel resources"; and made minor changes in style. Amendment effective May 5, 2009.

*Applicability:* Section 25(2), Ch. 446, L. 2009, provided: "(2) [Section 2] [76-1-601] applies upon adoption of a new growth policy or upon revision of an existing growth policy."

*2007 Amendments — Composite Section:* Chapter 443 in (2) deleted former first sentence that read: "A growth policy must include the elements listed in subsection (3) by October 1, 2006"; inserted (3)(j) requiring that a growth policy include an evaluation of the potential for fire and wildland fire in the jurisdictional area; and made minor changes in style. Amendment effective May 8, 2007.

Chapter 455 in (2) at end of first sentence deleted "by October 1, 2006" and in second sentence after "elements" deleted "of a growth policy that are"; deleted former (4)(c) through (4)(f) that read: "(c) address the criteria in 76-3-608(3)(a);

(d) evaluate the effect of subdivision on the criteria in 76-3-608(3)(a);

(e) describe zoning regulations that will be implemented to address the criteria in 76-3-608(3)(a); and

(f) identify geographic areas where the governing body intends to authorize an exemption from review of the criteria in 76-3-608(3)(a) for proposed subdivisions pursuant to 76-3-608"; inserted (4)(c) setting out minimum criteria for an infrastructure plan; and made minor changes in style. Amendment effective May 8, 2007.

*Applicability:* Section 8, Ch. 443, L. 2007, provided that this section applies on or after October 1, 2009.

*2003 Amendment:* Chapter 599 in (1) substituted first sentence concerning coverage of growth policy for "The planning board shall prepare and propose a growth policy for the entire jurisdictional area" and deleted former second sentence that read: "The plan may propose ordinances or resolutions for possible adoption by the appropriate governing body"; inserted (2) concerning elements listed in subsection (3); and made minor changes in style. Amendment effective May 9, 2003.

*1999 Amendment:* Chapter 582 in first sentence in (1) substituted "growth policy" for "master plan"; substituted language in (2) through (4) outlining required contents of growth policy for former language that read: "(1) careful and comprehensive surveys and studies of existing conditions and the probable future growth of the city and its environs or of the county;

(2) maps, plats, charts, and descriptive material presenting basic information, locations, extent, and character of any of the following:

(a) history, population, and physical site conditions;

(b) land use, including the height, area, bulk, location, and use of private and public structures and premises;

(c) population densities;

(d) community centers and neighborhood units;

(e) blighted and slum areas;

(f) streets and highways, including bridges, viaducts, subways, parkways, alleys, and other public ways and places;

(g) sewers, sanitation, and drainage, including handling, treatment, and disposal of excess drainage waters, sewage, garbage, refuse, and other wastes;

(h) flood control and prevention;

(i) public and private utilities, including water, light, heat, communication, and other services;

(j) transportation, including rail, bus, truck, air, and water transport and their terminal facilities;

(k) local mass transit, including motor and trolley bus; street, elevated, or underground railways; and taxicabs;

(l) parks and recreation, including parks, playgrounds, reservations, forests, wildlife refuges, and other public grounds, spaces, and facilities of a recreational nature;

(m) public buildings and institutions, including governmental administration and service buildings, hospitals, infirmaries, clinics, penal and correctional institutions, and other civic and social service buildings;

(n) education, including location and extent of schools, colleges, and universities;

(o) land utilization, including areas for manufacturing and industrial uses, concentration of wholesale business, retail business, and other commercial uses, residential uses, and areas for mixed uses;

(p) conservation of water, soil, agricultural, and mineral resources;

(q) any other factors which are a part of the physical, economic, or social situation within the city or county;

(3) reports, maps, charts, and recommendations setting forth plans for the development, redevelopment, improvement, extension, and revision of the subjects and physical situations of the city or county set out in subsection (2) so as to substantially accomplish the object of this chapter as set out in 76-1-101 and 76-1-102;

(4) a long-range development program of public works projects, based on the recommended plans of the planning board, for the purpose of eliminating unplanned, unsightly, untimely, and extravagant projects and with a view to stabilizing industry and employment and the keeping of such program up-to-date for all separate taxing units within the city or county, respectively, for the purpose of assuring efficient and economic use of public funds;

(5) recommendations setting forth the development, improvement, and extension of areas, if any, to be set aside for use as trailer courts and sites for mobile homes"; and made minor changes in style. Amendment effective October 1, 1999.

*Applicability:* Section 36, Ch. 582, L. 1999, provided that the requirements for a growth policy in 76-1-601 apply to the adoption of zoning regulations pursuant to Title 76, chapter 2, part 2 or 3, after October 1, 2001.

**Case Notes**

*Proper Application of Statutory and Regulatory Procedure in Adoption of Zoning Amendment:* A citizens' group challenged the approval of a zoning change in Polson, asserting that the city council failed to properly consider the criteria in Lowe v. Missoula, 165 M 38, 525 P2d 551 (1974), and failed to issue sufficient findings of fact. The District Court found no error and the Supreme Court agreed. The zoning amendment application addressed each Lowe criterion in detail, and the city council properly considered each element, including a report by the city planning department and public comments. Further, there is no requirement that a governing body explain in detail why it has determined whether each criterion has or has not been met. Rather, the proper standard of review is whether the information upon which the decision was based was so lacking in fact and foundation that it was clearly unreasonable and constituted an abuse of discretion. In this case, the city council had sufficient evidence to make an informed decision and followed the proper statutory and regulatory procedure in adopting the zoning amendment. The council's decision that the Lowe criteria were satisfied was not random, unreasonable, arbitrary, or capricious. The District Court was affirmed. Lake County First v. Polson City Council, 2009 MT 322, 352 M 489, 218 P3d 816 (2009). See also N. 93 Neighbors, Inc. v. Flathead County Bd. of County Comm'rs, 2006 MT 132, 332 M 327, 137 P3d 557 (2006).

*Expansion of Anchor Institutions Part of Neighborhood Plan — Approval of Zoning Proposal Affirmed:* Plaintiffs contended that allowing expansion of a grocery store and a hospital did not comport with the goal of a neighborhood plan to maintain a sense of history and protect key landmarks, that the expansion would increase traffic congestion and create a pedestrian unfriendly environment, and that the scale of the big box style store was inconsistent with the character of the neighborhood, which the neighborhood plan sought to preserve. Defendants argued that the expansion stabilized two of the neighborhood's most important anchor institutions, thereby fulfilling a goal of the neighborhood plan to expand and enhance existing businesses. The City Council approved the expansion, and plaintiffs sued. The District Court granted summary judgment to defendants, and plaintiffs appealed, also contending that the zoning proposal constituted illegal spot zoning. The Supreme Court affirmed. Not every zoning proposal will be consistent with every goal and objective expressed in a city's growth plan documents. However, the modified zoning proposal in this case complied with the growth plan by improving existing businesses and enhancing the growth of the anchor institutions, which was considered to be in the public interest. In addition, similar businesses had historically used the area, so the zoning proposal did not constitute illegal spot zoning. Citizen Advocates for a Livable Missoula, Inc. v. City Council, 2006 MT 47, 331 M 269, 130 P3d 1259 (2006), following Little v. Bd. of County Comm'rs, 193 M 334, 631 P2d 1282 (1981).

*Stand-Alone Local Vicinity Plan Violative of Master Plan (now Growth Policy) — Local Vicinity Plan as Amendment to or Partial Repeal of Master Plan (now Growth Policy) Improper:* It was improper for a county to adopt a local vicinity plan (LVP) that regulated development in a specific area of the county when the LVP violated the mandate of the county master plan (now growth policy) authorizing an LVP only to the extent that it was consistent with the master plan (now growth policy). An LVP may not stand alone as the preeminent plan for a particular area when the LVP is inconsistent with the county master plan (now growth policy), nor may an LVP be adopted as an amendment to or revision or repeal of the master plan (now growth policy) in a manner that subordinates the goals and objectives of the master plan (now growth policy) as the preeminent county planning device. Ash Grove Cement Co. v. Jefferson County, 283 M 486, 943 P2d 85, 54 St. Rep. 756 (1997), distinguished in Helena Sand & Gravel, Inc. v. Lewis & Clark County Planning & Zoning Comm'n, 2012 MT 272, 367 Mont. 130, 290 P.3d 691, in which the creation of a special zoning district that included specific zoning requirements within an area already defined by the growth policy and did not amend the growth policy itself was not improper.

*Consistency Between Comprehensive Plan (now Growth Policy), Zoning Ordinances, and Other Planning Documents — Validity of Development Approvals:* Zoning ordinances and other planning documents adopted after adoption of a comprehensive (master) plan (now growth policy) must be consistent with the comprehensive plan (now growth policy) and with each other, and when all three were inconsistent with each other, the zoning commission exceeded its jurisdiction and authority when it approved a planned unit development. It was unsatisfactory to base the decision to approve the development on planning documents that were inherently inconsistent and unreliable. Bridger Canyon Property Owners' Ass'n, Inc. v. Planning & Zoning Comm'n, 270 M 160, 890 P2d 1268, 52 St. Rep. 125 (1995), followed in Ash Grove Cement Co. v. Jefferson County, 283 M 486, 943 P2d 85, 54 St. Rep. 756 (1997), and N. 93 Neighbors, Inc. v. Flathead County Bd. of County Comm'rs, 2006 MT 132, 332 M 327, 137 P3d 557 (2006).

**Attorney General's Opinions**

*Growth Policy Required for Entire Jurisdictional Area:* Under 76-2-201 and this section, adoption of a growth policy is required for the entire jurisdictional area. In the case of a city-county planning board with joint countywide jurisdiction under 76-1-504, a growth policy must be adopted for the entire county before zoning may proceed. 49 A.G. Op. 23 (2002).

*Growth Policy Required Prior to Annexation of New Territory but Not for Continued Subdivision Review:* Under 7-2-4734, a growth policy covering an area proposed for municipal annexation is required before a municipality may extend corporate limits under Title 7, ch. 2, part 47, but the requirement does not apply to annexations conducted under 7-2-4201, 7-2-4301, 7-2-4401, 7-2-4501, or 7-2-4601. A growth policy is also required before certain subdivision review procedures and city powers of annexation are authorized. However, a growth policy is not required to continue subdivision review unless the city or county wishes to qualify for streamlined review processes. 49 A.G. Op. 23 (2002).

*No Legal Effect of Comprehensive Plan Adopted Before October 1, 1999, as Basis for New Zoning Regulations:* Pursuant to the transition and applicability language in Senate Bill No. 97 (1999) (Ch. 582, L. 1999), a comprehensive plan adopted prior to October 1, 1999, has no legal effect as the basis for new local zoning or subdivision regulations unless it meets the requirements of a growth policy under this section. Zoning regulations that were adopted pursuant to master plans, comprehensive plans, and comprehensive development plans prior to October 1, 2001, are enforceable, but county and municipal zoning regulations may not be adopted or substantively revised after October 1, 2001, unless a growth policy is adopted for the entire area of the planning board having jurisdiction. Application of previously adopted zoning regulations does not constitute the adoption of zoning regulations, so rezoning is not precluded, and routine minor revisions that do not have any impact on growth policy may be made. 49 A.G. Op. 23 (2002).

*Plan Mandatory — Adherence to Plan:* This section's provision that "the planning board shall prepare and propose a master plan [now growth policy]" is mandatory. The governmental unit need not strictly adhere to the plan but must substantially adhere to it, amending the plan when the governing unit wishes to change it. 39 A.G. Op. 75 (1982).

**Law Review Articles**

The Role of Fish and Wildlife Evidence in Local Land Use Regulation, Mudd, Dunning, & Hayes, 30 Pub. Land & Resources L. Rev. 107 (2009).

## 76-1-602. Public hearing on proposed growth policy.

**Compiler's Comments**

*1999 Amendment:* Chapter 582 in two places in (1) substituted "growth policy" for "master plan" or "plan". Amendment effective October 1, 1999.

*Transition:* Section 36, Ch. 582, L. 1999, provided: "A governing body that adopts a master plan pursuant to Title 76, chapter 1, before October 1, 1999, may adopt zoning regulations that are consistent with the master plan pursuant to Title 76, chapter 2, part 2 or 3, until October 1, 2001."

**Case Notes**

*Constitutionality:* The former provision in this section "that additional powers be granted legislative bodies of cities and counties" was invalid, insofar as it applied to counties, as an unconstitutional attempt to delegate legislative powers to counties in violation of Art. IV, sec. 1, 1889 Mont. Const. (now Art. III, sec. 1, Mont. Const.). Plath v. Hi-Ball Contractors, Inc., 139 M 263, 362 P2d 1021 (1961).

## 76-1-603. Adoption of growth policy by planning board.

### Compiler's Comments

*2003 Amendment:* Chapter 599 in (1) at end before "board" inserted "planning"; inserted (2) concerning recommending growth policy not be adopted; inserted (3) concerning action related to preparation of growth policy; and made minor changes in style. Amendment effective May 9, 2003.

*1999 Amendment:* Chapter 582 after "proposed" substituted "growth policy" for "master plan". Amendment effective October 1, 1999.

*Transition:* Section 36, Ch. 582, L. 1999, provided: "A governing body that adopts a master plan pursuant to Title 76, chapter 1, before October 1, 1999, may adopt zoning regulations that are consistent with the master plan pursuant to Title 76, chapter 2, part 2 or 3, until October 1, 2001."

### Case Notes

*Requirement to Develop Factual Record of Consideration of Public Comments Prior to Amendment of County Growth Policy:* A Board of County Commissioners adopted an amendment to a county growth plan, expanding a proposed development area. However, the Board relied on a county planning office report that was prepared before more than 4,400 citizens voiced their concern on the amendment. Although the Board was justified in relying on the report to an extent, the Board was obligated to consider the public comments, incorporate those comments into its decision making process, and flesh out the pertinent facts relied upon in approving the amendment. The Supreme Court reversed and required the District Court to evaluate whether the Board considered the public comments. If the District Court determined that the Board failed to satisfy its obligation or if the record was insufficient to determine whether the Board complied, the court was to send the case to the Board for development of the factual record by the Board. N. 93 Neighbors, Inc. v. Flathead County Bd. of County Comm'rs, 2006 MT 132, 332 M 327, 137 P3d 557 (2006). However, see Citizens for a Better Flathead v. Bd. of County Comm'rs of Flathead County, 2016 MT 256, 385 Mont. 156, 381 P.3d 555, in which the Supreme Court upheld a District Court's grant of summary judgment to the Board of County Commissioners for which the factual record demonstrated that the Board had considered and incorporated public comments in the process of revising the county's growth policy.

## 76-1-604. Adoption, revision, or rejection of growth policy.

### Compiler's Comments

*2003 Amendments — Composite Section:* Chapter 87 inserted (5) authorizing repeal of master plan adopted before October 1, 1999; and inserted (6) authorizing revision of master plan adopted before October 1, 1999, to be made until October 1, 2006. Amendment effective March 20, 2003.

Chapter 599 in (1) near middle substituted "adopt with revisions" for "revise" and at end deleted "or any of its parts"; in (2) in first sentence after "adopt" substituted "a growth policy" for "the proposed growth policy or any of its parts" and after "of the" substituted "area covered by the growth policy proposed by the governing body" for "jurisdictional area covered by the proposed growth policy" and deleted former third sentence that read: "Except as provided in this section, the provisions of Title 7, chapter 5, part 1, apply to the referendum election"; substituted (3) concerning revision or repeal of a growth policy for "The governing bodies may adopt, revise, or repeal a growth policy under this section"; in (4) in first sentence near beginning substituted "area covered by the growth policy" for "jurisdictional area included within the growth policy" and after "referendum" deleted "as provided in 7-5-131 through 7-5-137" and inserted second sentence concerning petition signature requirements; inserted (7) concerning application of initiative and referendum laws; and made minor changes in style. Amendment effective May 9, 2003.

*1999 Amendment:* Chapter 582 throughout section substituted "growth policy" for "master plan" or "plan"; and made minor changes in style. Amendment effective October 1, 1999.

*Transition:* Section 36, Ch. 582, L. 1999, provided: "A governing body that adopts a master plan pursuant to Title 76, chapter 1, before October 1, 1999, may adopt zoning regulations that are consistent with the master plan pursuant to Title 76, chapter 2, part 2 or 3, until October 1, 2001."

*1995 Amendment:* Chapter 387 in (2) inserted second sentence requiring a special election to be held in conjunction with a regular or primary election; and made minor changes in style.

*1981 Amendment:* Substituted "The governing bodies shall adopt a resolution of intention to adopt" for "The governing bodies shall adopt" at the beginning of (1); and added (2) through (4) granting governing bodies authority to adopt, revise, or repeal plan and discretion to submit plan to qualified electorate for adoption at primary, general, or special election or for adoption, revision, or repeal by initiative or referendum.

**Case Notes**

*Equitable Tolling and Estoppel Inapplicable to Stay Statutory Deadlines for Collecting Petition Signatures:* The Flathead County Board of County Commissioners adopted a resolution approving a developer's amendment to the county master plan that would allow the building of a regional shopping mall. Plaintiff organization was then formed to put the resolution to a vote of the qualified county electors through the initiative and referendum process, but plaintiff failed to gather enough valid signatures within the statutory deadlines. During the signature-gathering period, the Flathead County Attorney determined that only qualified electors in the area covered by the master plan, rather than all qualified county electors, could sign the petition and vote on any resulting referendum. Plaintiff filed suit, seeking a writ of mandamus requiring the County Commissioners to proceed with the process or an alternative writ seeking relief through a declaratory judgment. The alternative writ was issued and then quashed and dismissed. Plaintiff contended that equitable tolling should have tolled the statute of limitations on gathering signatures because the County Commissioners were urged to file suit to determine which voters were eligible to sign the petition and vote on the resulting referendum. However, the County Commissioners declined to file suit, so the period to collect signatures was not tolled, and plaintiff's equitable tolling argument failed. Plaintiff also argued that the County Commissioners should be equitably estopped from using the statutory deadlines to defeat the qualified electors' exercise of their petition rights. The estoppel argument also failed because plaintiff failed to prove the first element of estoppel—that the County Commissioners misrepresented a material fact. The elements of neither equitable tolling nor estoppel having been proved, the District Court's quashing of plaintiff's writ of mandamus was affirmed. Let the People Vote v. Flathead County Bd. of County Comm'rs, 2005 MT 225, 328 M 361, 120 P3d 385 (2005).

**Attorney General's Opinions**

*Plan Mandatory — Adherence to Plan:* Provision of 76-1-601 that "the planning board shall prepare and propose a master plan [now growth policy]" is mandatory. The governmental unit need not strictly adhere to the plan but must substantially adhere to it, amending the plan when the governing unit wishes to change it. 39 A.G. Op. 75 (1982).

**76-1-605. Use of adopted growth policy.**

**Compiler's Comments**

*2003 Amendment:* Chapter 599 in (1) at beginning inserted "Subject to subsection (2)", before "governing body" deleted "city council, board of county commissioners, or other", and after "within the" substituted "area covered by the growth policy pursuant to 76-1-601" for "territorial jurisdiction of the board"; inserted (2) concerning effect of growth policy and restrictions on governing body; and made minor changes in style. Amendment effective May 9, 2003.

*2001 Amendment:* Chapter 527 deleted former (3) that read: "(3) adoption of subdivision controls"; and made minor changes in style. Amendment effective October 1, 2001.

*Preamble:* The preamble attached to Ch. 527, L. 2001, provided: "WHEREAS, section 76-1-606, MCA, allows local governments to require subdivision plats to conform to the provisions of adopted growth policies; and

WHEREAS, section 76-3-604, MCA, has been interpreted to allow local governments to deny or condition the approval of subdivision plats based on the growth policy; and

WHEREAS, many adopted growth policies contain ambiguous and subjective provisions that cannot be applied to subdivisions in an objective manner; and

WHEREAS, it is inconsistent with accepted precepts of planning to authorize a local government to enforce a growth policy without properly adopted land use controls; and

WHEREAS, the Legislature intends to clarify that growth policies should be implemented through the proper adoption of land use controls; and

WHEREAS, a statutory procedure is in place that allows local governments to implement growth policies through properly adopted land use controls; and

WHEREAS, this land use control adoption procedure incorporates the due process and other constitutional protections that are not included under section 76-1-606, MCA."

*Transition — Applicability:* Section 5, Ch. 527, L. 2001, provided: "[This act] applies to jurisdictions that adopted a growth policy pursuant to Title 76, chapter 1, before October 1, 2001, beginning October 1, 2002."

*1999 Amendment:* Chapter 582 in two places in introduction substituted "growth policy" for "master plan"; and made minor changes in style. Amendment effective October 1, 1999.

*Transition:* Section 36, Ch. 582, L. 1999, provided: "A governing body that adopts a master plan pursuant to Title 76, chapter 1, before October 1, 1999, may adopt zoning regulations that are consistent with the master plan pursuant to Title 76, chapter 2, part 2 or 3, until October 1, 2001."

**Case Notes**

*County Zoning Map Amendment — Board Abused Discretion — Conflict Between County and City Growth Plan Not Addressed — Traffic Concerns Not Addressed:* The District Court did not err by holding that a county's zoning map amendment was invalid for failing to comply with statutory requirements. In view of clear conflict between the Board of County Commissioners of Flathead County's proposed zoning map amendment and the stated growth purposes expressed in the city of Kalispell's growth plan for property that was immediately adjacent to the city, it was incumbent on the Board to more broadly consider this issue and assess the impact of the proposed zoning map amendment on the city's growth plans. The proposed application of the mitigated commercial zone for use on major highways in the county would have permitted banks, retail shops, and other businesses along the highway, clearly impacting traffic, posing a potential for further strip development, and potentially conflicting with planned growth in close proximity to the city. However, the Board's consideration only cursorily addressed commercial growth goals in the growth policy, did not address potential conflicts over disfavored development, only briefly addressed traffic and traffic safety concerns, and failed to assess the possible conflict with planned city growth. Although the Board did not need to address every aspect of the growth policy in detail, it was required to give sufficient consideration to the policies that raise pertinent and significant concerns. For these reasons, the Supreme Court concluded that the Board abused its discretion in implementing a zoning map amendment, and the District Court's ruling invalidating the zoning map amendment was affirmed. Citizens for a Better Flathead v. Flathead County Bd. of County Comm'rs, 2016 MT 325, 385 Mont. 505, 386 P.3d 567.

*Challenge of Revised Growth Policy — Procedures to Revise Policy Followed — Summary Judgment in Favor of County Commission Proper:* The plaintiff, a citizens' group, challenged revisions made to the county's growth policy and sued the defendant, the Board of County Commissioners. The plaintiff alleged that the defendant had not complied with the growth policy's mandatory procedures for adopting policy revisions and that the revisions were amendments to the policy instead of updates. The District Court granted the defendant's motion for summary judgment. On appeal, the Supreme Court affirmed, holding that the revisions were updates under the terms of the policy and that although all of the meetings regarding the revisions occurred in Kalispell instead of throughout the county, that fact alone did not require invalidating the revised growth policy. Citizens for a Better Flathead v. Bd. of County Comm'rs of Flathead County, 2016 MT 256, 385 Mont. 156, 381 P.3d 555.

*Constitutional Challenge of Provision in Growth Policy — Policy Lacking Force of Law — No Violation of Constitution:* The plaintiff, a citizens' group, challenged revisions made to the county's growth policy and sued the defendant, the Board of County Commissioners. The plaintiff contended that a section of the growth policy was unconstitutional. The District Court disagreed and granted the defendant's motion for summary judgment. On appeal, the Supreme Court affirmed, ruling that a growth policy, although a planning tool for a county, cannot be applied in a regulatory fashion, lacks the force of law, and cannot require a county to take any action that conflicts with the Constitution. Citizens for a Better Flathead v. Bd. of County Comm'rs of Flathead County, 2016 MT 256, 385 Mont. 156, 381 P.3d 555.

*Creation of Special District By Petition Consistent With Growth Policy — Zoning Regulations Prohibiting Certain Activities Not Gerrymandering When In Compliance with Growth Policy:* In 2008, Helena Sand and Gravel, Inc., (HSG) obtained a permit from the Montana Department of Environmental Quality (DEQ) to mine 110 acres of a 421-acre parcel. While DEQ was processing the permit, the county received a citizens' petition that proposed the creation of a special zoning district that would prohibit industrial and mining activities and promote the rural residential atmosphere within its proposed boundaries, including the 311 acres owned by HSG that were not covered by the permit. Following statutory procedures, the Board of County Commissioners created the special district and adopted zoning regulations that prohibited mining within the district. HSG filed suit, arguing that the regulations did not substantially comply with the county's growth policy because the prohibition on mining disregarded the actual use of the land, which included HSG's existing gravel mines, in violation of the growth policy. The Supreme Court disagreed and held that the special zoning district created specific zoning requirements within the area already defined by the growth policy, rather than amending the growth policy itself. The court found that the Board reasonably determined that the prevailing use within the district was residential development. Although HSG claimed that the petitioners designed the district specifically to prevent HSG from mining its property, which amounted to gerrymandering, the court determined that the Board's decision was based on compliance with the growth policy and existing uses within the district, without regard to the petitioners' intent. The court upheld the zoning regulations as not clearly unreasonable or an abuse of discretion. Helena Sand & Gravel, Inc. v. Lewis & Clark County Planning & Zoning Comm'n, 2012 MT 272, 367 Mont. 130, 290 P.3d 691.

*Agreement Donating Money to Rural Special Improvement District Held Not to Supersede City Obligation to Follow Growth Policy Adopted Pursuant to Statute:* Defendant developer's predecessor in interest, Sunlight, donated $335,000 to a rural special improvement district and the developer's property was allocated a certain number of "sewer loading units". Many years later, Sunlight's successor argued that this donation and agreement with the city granted the developer certain "vested density rights" to locate more homes on the subject property than the city's growth policy allowed. The Supreme Court held that the city was statutorily required to be guided by and give consideration to the general policy and pattern of development set out in the city's growth policy and that the agreement with Sunlight could not be read as superseding that statutory duty. Heffernan v. Missoula City Council, 2011 MT 91, 360 Mont. 207, 255 P.3d 80.

*"Substantial Compliance" With Growth Policy Standard Not Abrogated by 2003 Amendment — Purpose of Statutory Requirements:* In a dispute over the necessity for the city to substantially comply with its growth policy, the Supreme Court held that the 2003 amendments to this section did not abrogate the "substantial compliance" standard adopted by the Supreme Court in Little v. Bd. of County Comm'rs, 193 Mont. 334, 631 P.2d 1282 (1981), and affirmed in N. 93 Neighbors, Inc. v. Bd. Of County Comm'rs, 2006 MT 132, 332 Mont. 327, 137 P.3d 557. The Supreme Court held that the 2003 amendments simply clarify that strict compliance with the growth policy is not necessary. The court also pointed out that the substantial work that goes into a growth policy pursuant to Title 76, chapters 1 and 2, would be undercut if the courts were not to require that a governing body substantially comply with its own growth policy. Heffernan v. Missoula City Council, 2011 MT 91, 360 Mont. 207, 255 P.3d 80.

*Applicability of Current Growth Policy During Zoning Application Process:* Wal-Mart sought a zoning change from low-density residential to highway commercial in order to construct a large store in Polson. The city council approved the request, but a citizens' group sued the council, contending that the council erroneously failed to apply a new growth policy that was adopted about 10 days prior to approval of the zoning change. The District Court held that it was not necessary to apply the new growth policy, and the citizens' group appealed, but the Supreme Court affirmed. A predecessor master plan was in effect during virtually the entire zoning review process and governed consideration of the review at each stage. The new growth policy was not retroactive, so the council did not err in adopting the zoning change using the master plan criteria. Lake County First v. Polson City Council, 2009 MT 322, 352 M 489, 218 P3d 816 (2009).

*Proper Application of Statutory and Regulatory Procedure in Adoption of Zoning Amendment:* A citizens' group challenged the approval of a zoning change in Polson, asserting that the city council failed to properly consider the criteria in Lowe v. Missoula, 165 M 38, 525 P2d 551 (1974), and failed to issue sufficient findings of fact. The District Court found no error and the Supreme Court agreed. The zoning amendment application addressed each Lowe criterion in detail, and the city council properly considered each element, including a report by the city planning department and public comments. Further, there is no requirement that a governing body explain in detail why it has determined whether each criterion has or has not been met. Rather, the proper standard of review is whether the information upon which the decision was based was so lacking in fact and foundation that it was clearly unreasonable and constituted an abuse of discretion. In this case, the city council had sufficient evidence to make an informed decision and followed the proper statutory and regulatory procedure in adopting the zoning amendment. The council's decision that the Lowe criteria were satisfied was not random, unreasonable, arbitrary, or capricious. The District Court was affirmed. Lake County First v. Polson City Council, 2009 MT 322, 352 M 489, 218 P3d 816 (2009). See also N. 93 Neighbors, Inc. v. Flathead County Bd. of County Comm'rs, 2006 MT 132, 332 M 327, 137 P3d 557 (2006), and Heffernan v. Missoula City Council, 2011 MT 91, 360 Mont. 207, 255 P.3d 80.

*Zoning Arguments Based on Expired County Growth Policy Dismissed as Moot:* Plaintiffs raised issues concerning a 2005 zoning amendment that were dependent upon a 1987 Flathead County growth policy. While the case was pending, the policy was subsequently replaced by a new growth policy in 2007, which provided that land use zoning in existence at the time the 2007 policy was adopted would remain in place. Because the issues were dependent on an expired growth policy, any decision by the Supreme Court on appeal would not grant effective relief or return plaintiffs to their original position, so the appeal was considered moot and was dismissed. Country Highlands Homeowners Ass'n, Inc., v. Flathead Bd. of County Commr's, 2008 MT 286, 345 M 379, 191 P3d 424 (2008), explained in Plains Grains L.P. v. Bd. of County Commr's, 2010 MT 155, 357 Mont. 61, 238 P.3d 332.

*Abuse of Discretion in Issuance of Conditional Use Permit for Gravel Crushing Operation — Remand for Additional Board of Adjustment Findings:* A county board of adjustment granted a conditional use permit for a gravel extracting and crushing operation in a residential area, and some citizens complained, after which the gravel operation owner complained. The board defended its decision based on definitions in the development plan, which disallowed establishment of extractive industries but allowed certain gravel operations associated with agricultural operations. The District Court granted summary judgment for the board, and both the citizens and the gravel operation owner appealed. The Supreme Court reversed. Although the board did not exceed its authority in prohibiting asphalt and concrete batch plants as a condition under the conditional use permit, the board abused its discretion by granting the conditional use permit without issuing findings of fact and conclusions to support its decision. The case was remanded for additional board findings regarding whether: (1) zoning regulations and the development plan permit a gravel extraction operation that was not an accessory to normal farming operations; (2) onsite crushing operations are part of a gravel extraction as that term is used in the regulations or whether onsite crushing operations constitute a prohibited extractive industry pursuant to the regulations; and (3) conditions could be imposed to mitigate traffic impacts from the proposed operation. Flathead Citizens for Quality Growth, Inc. v. Flathead County Bd. of Adjustment, 2008 MT 1, 341 M 1, 175 P3d 282 (2008).

*Requirement to Develop Factual Record of Consideration of Public Comments Prior to Amendment of County Growth Policy:* A Board of County Commissioners adopted an amendment to a county growth plan, expanding a proposed development area. However, the Board relied on a county planning office report that was prepared before more than 4,400 citizens voiced their concern on the amendment. Although the Board was justified in relying on the report to an extent, the Board was obligated to consider the public comments, incorporate those comments into its decision making process, and flesh out the pertinent facts relied upon in approving the amendment. The Supreme Court reversed and required the District Court to evaluate whether the Board considered the public comments. If the District Court determined that the Board failed to satisfy its obligation or if the record was insufficient to determine whether the Board complied, the court was to send the case to the Board for development of the factual record by the Board. N. 93 Neighbors, Inc. v. Flathead County Bd. of County Comm'rs, 2006 MT 132, 332 M 327, 137 P3d 557 (2006). However, see Citizens for a Better Flathead v. Bd. of County Comm'rs of Flathead County, 2016 MT 256, 385 Mont. 156, 381 P.3d 555, in which the Supreme Court upheld a District Court's grant of summary judgment to the Board of County Commissioners for which the factual record demonstrated that the Board had considered and incorporated public comments in the process of revising the county's growth policy.

*Expansion of Anchor Institutions Part of Neighborhood Plan — Approval of Zoning Proposal Affirmed:* Plaintiffs contended that allowing expansion of a grocery store and a hospital did not comport with the goal of a neighborhood plan to maintain a sense of history and protect key landmarks, that the expansion would increase traffic congestion and create a pedestrian unfriendly environment, and that the scale of the big box style store was inconsistent with the character of the neighborhood, which the neighborhood plan sought to preserve. Defendants argued that the expansion stabilized two of the neighborhood's most important anchor institutions, thereby fulfilling a goal of the neighborhood plan to expand and enhance existing businesses. The City Council approved the expansion, and plaintiffs sued. The District Court granted summary judgment to defendants, and plaintiffs appealed, also contending that the zoning proposal constituted illegal spot zoning. The Supreme Court affirmed. Not every zoning proposal will be consistent with every goal and objective expressed in a city's growth plan documents. However, the modified zoning proposal in this case complied with the growth plan by improving existing businesses and enhancing the growth of the anchor institutions, which was considered to be in the public interest. In addition, similar businesses had historically used the area, so the zoning proposal did not constitute illegal spot zoning. Citizen Advocates for a Livable Missoula, Inc. v. City Council, 2006 MT 47, 331 M 269, 130 P3d 1259 (2006), following Little v. Bd. of County Comm'rs, 193 M 334, 631 P2d 1282 (1981).

*Stand-Alone Local Vicinity Plan Violative of Master Plan (now Growth Policy) — Local Vicinity Plan as Amendment to or Partial Repeal of Master Plan (now Growth Policy) Improper:* It was improper for a county to adopt a local vicinity plan (LVP) that regulated development in a specific area of the county when the LVP violated the mandate of the county master plan (now growth policy) authorizing an LVP only to the extent that it was consistent with the master plan (now growth policy). An LVP may not stand alone as the preeminent plan for a particular area when the LVP is inconsistent with the county master plan (now growth policy), nor may an LVP be adopted as an amendment to or revision or repeal of the master plan (now growth policy) in a manner that subordinates the goals and objectives of the master plan (now growth policy) as the preeminent county planning device. Ash Grove Cement Co. v. Jefferson County, 283 M 486, 943 P2d 85, 54 St. Rep. 756 (1997), distinguished in Helena Sand & Gravel, Inc. v. Lewis & Clark County Planning & Zoning Comm'n, 2012 MT 272, 367 Mont. 130, 290 P.3d 691, in which the creation of a special zoning district that included specific zoning requirements within an area already defined by the growth policy and did not amend the growth policy itself was not improper.

*Consistency Between Comprehensive Plan (now Growth Policy), Zoning Ordinances, and Other Planning Documents — Validity of Development Approvals:* Zoning ordinances and other planning documents adopted after adoption of a comprehensive (master) plan (now growth policy) must be consistent with the comprehensive plan (now growth policy) and with each other, and when all three were inconsistent with each other, the zoning commission exceeded its jurisdiction and authority when it approved a planned unit development. It was unsatisfactory to base the decision to approve the development on planning documents that were inherently inconsistent and unreliable. Bridger Canyon Property Owners' Ass'n, Inc. v. Planning & Zoning Comm'n, 270 M 160, 890 P2d 1268, 52 St. Rep. 125 (1995), followed in Ash Grove Cement Co. v. Jefferson County, 283 M 486, 943 P2d 85, 54 St. Rep. 756 (1997), and N. 93 Neighbors, Inc. v. Flathead County Bd. of County Comm'rs, 2006 MT 132, 332 M 327, 137 P3d 557 (2006).

*Adherence to Master Plan (now Growth Policy):* Local government units, when making zoning decisions, must at least substantially comply with the master plan (now growth policy). Little v. County Comm'rs, 193 M 334, 631 P2d 1282, 38 St. Rep. 1124 (1981), followed in Heffernan v. Missoula City Council, 2011 MT 91, 360 Mont. 207, 255 P.3d 80.

*Denial of Building Permit When Use Conflicts With Master Plan (now Growth Policy):* City officials may refuse to process a building permit application when the proposed use is in conflict with the master plan (now growth policy). Little v. County Comm'rs, 193 M 334, 631 P2d 1282, 38 St. Rep. 1124 (1981).

**Law Review Articles**

The Role of Fish and Wildlife Evidence in Local Land Use Regulation, Mudd, Dunning, & Hayes, 30 Pub. Land & Resources L. Rev. 107 (2009).

## 76-1-606. Effect of growth policy on subdivision regulations.

**Compiler's Comments**

*2001 Amendment:* Chapter 527 in first sentence after "approved" substituted "the subdivision regulations adopted pursuant to chapter 3 of this title must be made in accordance with the growth policy" for "the city council may by ordinance or the board of county commissioners may by resolution require subdivision plats to conform to the provisions of the growth policy" and deleted former second sentence in former (1) and deleted former (2) through (6) that read: "Certified copies of the ordinance must be filed with the city or town clerk and with the county clerk and recorder of the county.

(2) When the city council has adopted an ordinance pursuant to subsection (1), a plat involving lands within the corporate limits of the city and covered by the growth policy may not be filed without first presenting it to the planning board, which shall make a report to the city council advising as to compliance or noncompliance of the plat with the growth policy. The city council has the final authority to approve the filing of a plat within the city limits.

(3) When the board of county commissioners has adopted a resolution pursuant to subsection (1), a plat involving lands outside the corporate limits of the city and covered by a growth policy may not be filed without first presenting it to the planning board, which shall make a report to the board of county commissioners advising as to compliance or noncompliance of the plat with the growth policy. The board of county commissioners has the final authority to approve the filing of the plat.

(4) The planning board may delegate to its staff its responsibility to report to the city council or the board of county commissioners under subsection (2) or (3).

(5) This section may not be interpreted to limit the present powers of city or county governments.

(6) The requirements of this section must be met before any plat may be filed of record or entitled to be recorded"; and made minor changes in style. Amendment effective October 1, 2001.

*Preamble:* The preamble attached to Ch. 527, L. 2001, provided: "WHEREAS, section 76-1-606, MCA, allows local governments to require subdivision plats to conform to the provisions of adopted growth policies; and

WHEREAS, section 76-3-604, MCA, has been interpreted to allow local governments to deny or condition the approval of subdivision plats based on the growth policy; and

WHEREAS, many adopted growth policies contain ambiguous and subjective provisions that cannot be applied to subdivisions in an objective manner; and

WHEREAS, it is inconsistent with accepted precepts of planning to authorize a local government to enforce a growth policy without properly adopted land use controls; and

WHEREAS, the Legislature intends to clarify that growth policies should be implemented through the proper adoption of land use controls; and

WHEREAS, a statutory procedure is in place that allows local governments to implement growth policies through properly adopted land use controls; and

WHEREAS, this land use control adoption procedure incorporates the due process and other constitutional protections that are not included under section 76-1-606, MCA."

*Transition — Applicability:* Section 5, Ch. 527, L. 2001, provided: "[This act] applies to jurisdictions that adopted a growth policy pursuant to Title 76, chapter 1, before October 1, 2001, beginning October 1, 2002."

*1999 Amendment:* Chapter 582 throughout section substituted "growth policy" for "master plan"; inserted (4) allowing planning board to delegate reporting responsibility to staff; and made minor changes in style. Amendment effective October 1, 1999.

*Transition:* Section 36, Ch. 582, L. 1999, provided: "A governing body that adopts a master plan pursuant to Title 76, chapter 1, before October 1, 1999, may adopt zoning regulations that are consistent with the master plan pursuant to Title 76, chapter 2, part 2 or 3, until October 1, 2001."

**Case Notes**

*Stand-Alone Local Vicinity Plan Violative of Master Plan (now Growth Policy) — Local Vicinity Plan as Amendment to or Partial Repeal of Master Plan (now Growth Policy) Improper:* It was improper for a county to adopt a local vicinity plan (LVP) that regulated development in a specific area of the county when the LVP violated the mandate of the county master plan (now growth policy) authorizing an LVP only to the extent that it was consistent with the master plan (now growth policy). An LVP may not stand alone as the preeminent plan for a particular area when the LVP is inconsistent with the county master plan (now growth policy), nor may an LVP be adopted as an amendment to or revision or repeal of the master plan (now growth policy) in a manner that subordinates the goals and objectives of the master plan (now growth policy) as the preeminent county planning device. Ash Grove Cement Co. v. Jefferson County, 283 M 486, 943 P2d 85, 54 St. Rep. 756 (1997), distinguished in Helena Sand & Gravel, Inc. v. Lewis & Clark County Planning & Zoning Comm'n, 2012 MT 272, 367 Mont. 130, 290 P.3d 691, in which the creation of a special zoning district that included specific zoning requirements within an area already defined by the growth policy and did not amend the growth policy itself was not improper.

*Consistency Between Comprehensive Plan (now Growth Policy), Zoning Ordinances, and Other Planning Documents — Validity of Development Approvals:* Zoning ordinances and other planning documents adopted after adoption of a comprehensive (master) plan (now growth policy) must be consistent with the comprehensive plan (now growth policy) and with each other, and when all three were inconsistent with each other, the zoning commission exceeded its jurisdiction and authority when it approved a planned unit development. It was unsatisfactory to base the decision to approve the development on planning documents that were inherently inconsistent and unreliable. Bridger Canyon Property Owners' Ass'n, Inc. v. Planning & Zoning Comm'n, 270 M 160, 890 P2d 1268, 52 St. Rep. 125 (1995), followed in Ash Grove Cement Co. v. Jefferson County, 283 M 486, 943 P2d 85, 54 St. Rep. 756 (1997), and N. 93 Neighbors, Inc. v. Flathead County Bd. of County Comm'rs, 2006 MT 132, 332 M 327, 137 P3d 557 (2006).

*Denial of Building Permit When Use Conflicts With Master Plan (now Growth Policy):* City officials may refuse to process a building permit application when the proposed use is in conflict with the master plan (now growth poicy). Little v. County Comm'rs, 193 M 334, 631 P2d 1282, 38 St. Rep. 1124 (1981).

**Attorney General's Opinions**

*Size Parcel Prohibited by Master Plan (now Growth Policy) — Certificate Filing Required — Conditional Issuance of Permit:* A local government unit with self-governing powers may not refuse to file a certificate of survey simply because the parcel encompasses less than 40 but equal to or greater than 20 acres, even if its master plan (now growth policy) prohibits divisions of land of such size. However, the local government may condition issuance of permits for construction, alteration, or enlargement of structures upon compliance with the master plan (now growth policy). 42 A.G. Op. 16 (1987).

**Law Review Articles**

The Role of Fish and Wildlife Evidence in Local Land Use Regulation, Mudd, Dunning, & Hayes, 30 Pub. Land & Resources L. Rev. 107 (2009).

**76-1-607. Growth policy — use and amendment for coordination and cooperation with federal agencies.**

**Compiler's Comments**

*Effective Date:* This section is effective October 1, 2013.

**Law Review Articles**

"Coordinating" with the Federal Government: Assessing County Efforts to Control Decisionmaking on Public Lands, Blumm & Fraser, 38 Pub. Land & Resources L. Rev. 1 (2017).

## CHAPTER 2
## PLANNING AND ZONING

**Chapter Compiler's Comments**

*Severability Clause:* Section 21, Ch. 273, L. 1971, was a severability clause.

**Chapter Case Notes**

*Citizen Initiative Expanding Zoning District — Property Owner Challenges Initiative as Reverse Spot Zoning — District Court Ruling That Initiative Complied With County Growth Policy Affirmed.* Egan Slough Community v. Flathead County Bd. of County Comm'rs, 2022 MT 57, 408 Mont. 81, 506 P.3d 996.

*Zoning in Substantial Compliance With Growth Policy Not Illegal Spot Zoning:* Upon receiving a citizens' petition, the Lewis and Clark County Board of Commissioners adopted a special district and zoning regulations that prohibited sand and gravel mining. Helena Sand and Gravel, Inc., (HSG) owned land within the boundaries of the special district that included both active gravel pits and land where mining had not yet occurred. HSG filed suit and argued that it had been subject to illegal spot zoning when the Board adopted the mining prohibition because it was the only landowner affected by the regulations. The Supreme Court disagreed and held that HSG's claim failed all three prongs of the test in Little v. Bd. of County Comm'rs, 193 Mont. 334, 631 P.2d 1282 (1981): the Board lawfully found the prevailing use of land within the special district to be rural residential, and the zoning regulations were in substantial compliance with the growth policy, so the zoning was not in the nature of special legislation. Because HSG could not demonstrate that its property was singled out for a use classification that was totally different from the surrounding area, it was not subject to illegal spot zoning. Helena Sand & Gravel, Inc. v. Lewis & Clark County Planning & Zoning Comm'n, 2012 MT 272, 367 Mont. 130, 290 P.3d 691. See also Hartshorne v. Whitefish, 2021 MT 116, 404 Mont. 150, 486 P.3d 693.

*"Substantial Compliance" With Growth Policy Standard Not Abrogated by 2003 Amendment — Purpose of Statutory Requirements:* In a dispute over the necessity for the city to substantially comply with its growth policy, the Supreme Court held that the 2003 amendments to this section did not abrogate the "substantial compliance" standard adopted by the Supreme Court in Little v. Bd. of County Comm'rs, 193 Mont. 334, 631 P.2d 1282 (1981), and affirmed in N. 93 Neighbors, Inc. v. Bd. Of County Comm'rs, 2006 MT 132, 332 Mont. 327, 137 P.3d 557. The Supreme Court held that the 2003 amendments simply clarify that strict compliance with the growth policy is not necessary. The court also pointed out that the substantial work that goes into a growth policy pursuant to Title 76, chapters 1 and 2, would be undercut if the courts were not to require that a governing body substantially comply with its own growth policy. Heffernan v. Missoula City Council, 2011 MT 91, 360 Mont. 207, 255 P.3d 80.

*Impermissible Spot Zoning — Little Test Applied:* The Supreme Court found illegal spot zoning by applying three prongs of the Little test and determined: (1) a proposed power plant constituted a heavy industrial use and differed significantly from agricultural uses that dominated the surrounding area; (2) the area to be rezoned was relatively small both in absolute size and in terms of landowners affected; and (3) the proposed rezone smacked of special legislation that would accrue to a single landowner to the detriment of surrounding farmers and ranchers. Moreover, the fact that the power plant could have pursued a special use permit from the board of adjustment did not undermine the spot zoning claim. Plains Grains L.P. v. Bd. of County Commr's, 2010 MT 155, 357 Mont. 61, 238 P.3d 332, following Little v. Bd. of County Comm'rs, 193 M 334, 631 P2d 1282 (1981).

*Expansion of Anchor Institutions Part of Neighborhood Plan — Approval of Zoning Proposal Affirmed:* Plaintiffs contended that allowing expansion of a grocery store and a hospital did not comport with the goal of a neighborhood plan to maintain a sense of history and protect key landmarks, that the expansion would increase traffic congestion and create a pedestrian unfriendly environment, and that the scale of the big box style store was inconsistent with the character of the neighborhood, which the neighborhood plan sought to preserve. Defendants argued that the expansion stabilized two of the neighborhood's most important anchor institutions, thereby fulfilling a goal of the neighborhood plan to expand and enhance existing businesses. The City Council approved the expansion, and plaintiffs sued. The District Court granted summary judgment to defendants, and plaintiffs appealed, also contending that the zoning proposal constituted illegal spot zoning. The Supreme Court affirmed. Not every zoning proposal will be consistent with every goal and objective expressed in a city's growth plan documents. However, the modified zoning proposal in this case complied with the growth plan by improving existing businesses and enhancing the growth of the anchor institutions, which was considered to be in the public interest. In addition, similar businesses had historically used the area, so the zoning proposal did not constitute illegal spot zoning. Citizen Advocates for a Livable Missoula, Inc. v. City Council, 2006 MT 47, 331 M 269, 130 P3d 1259 (2006), following Little v. Bd. of County Comm'rs, 193 M 334, 631 P2d 1282 (1981).

*Onsite Construction Zoning Regulation Violative of Substantive Due Process:* The Yellowstone Board of County Commissioners created a zoning district wherein dwellings had to be single-family units with not less than 1,500 square feet of floor area, with a requirement for onsite construction with new materials and for completion within 1 year. Plaintiffs moved a new modular home onto their lot, and although the home conformed to required building standards, plaintiffs were informed that the modular home did not meet the onsite construction provision. The District Court held that plaintiffs' substantive due process rights were violated because the onsite construction provision did not have a substantial bearing on the public health, safety, morals, or general welfare and was not based on a legitimate government objective. The county appealed on grounds that the regulation did have a bearing on community welfare by preserving property values. The Supreme Court disagreed. Neither the city-county planner nor a County Commissioner was able to identify any health and only minimal safety concerns. Although a resident's ability to control the environment and the preservation of property values may implicate legitimate government concerns in some zoning situations, nothing in the record indicated that those concerns actually drove the formulation of these regulations. Absent a rational relationship to a legitimate governmental interest, the onsite construction requirement violated plaintiffs' substantive due process rights. Yurczyk v. Yellowstone County, 2004 MT 3, 319 M 169, 83 P3d 266 (2004), following Boland v. Great Falls, 275 M 128, 910 P2d 890 (1996).

*Onsite Construction Zoning Regulation Void for Vagueness:* A county zoning regulation required that residences be built onsite. Plaintiffs who wished to place a modular home on a lot contended that the regulation was void for vagueness because the term "onsite construction" was not defined in the regulation, there was no indication of what percentage of the structure had to be built onsite, and members of the Board of County Commissioners and the zoning commission were unable to determine whether a modular home satisfied the restriction. The Supreme Court agreed that the regulation was vague, finding it difficult to imagine how the general public could be any more informed as to what the term meant when the very officials who adopted the regulation and who were to enforce it could not agree on the term's meaning. Yurczyk v. Yellowstone County, 2004 MT 3, 319 M 169, 83 P3d 266 (2004), following St. v. Martel, 273 M 143, 902 P2d 14 (1995).

*Existing Telecommunications Tower Not Inclusive of Tower Not Yet Built:* Mesa Communications Group (Mesa) sought a permit from Yellowstone County to construct a telecommunications tower within the county's zoning jurisdiction. County regulations required that all commercial telecommunications towers over 50 feet high be located at least 1 mile from any other communications tower. Mesa's application was denied because a 100-foot tower had been built and a 300-foot tower had been approved but not yet built within 1 mile of the tower proposed by Mesa. The regulations provided for waiver of the 1-mile restriction by the Board of County Commissioners upon special review if an applicant established that an existing tower could not accommodate the applicant's proposed antenna. Mesa requested special review and presented evidence that the proposed antenna could not be accommodated on the existing 100-foot tower, but the application was nevertheless denied because Mesa's proposed tower was still within 1 mile of the approved but as yet unconstructed 300-foot tower. Mesa sought relief from application of the 1-mile restriction in District Court. The court granted summary judgment for Mesa, concluding that the restriction applied only to towers that had been constructed, but not to unconstructed towers approved for construction. The county appealed, but the Supreme Court affirmed. The term "existing tower" as used in the regulation was neither ambiguous nor imprecise and did not include a tower that was not yet built or even begun. Mesa Communications Group, LLC v. Yellowstone County, 2002 MT 73, 309 M 233, 45 P3d 37 (2002).

*Zoning Amendment Considered Illegal Spot Zoning — Little Test:* Duck Creek Properties (Duck Creek), a Florida general partnership, owned 323 acres of undeveloped land in the Hebgen Lake Zoning District. In order to increase development options and the value of the property, Duck Creek sought a zoning change from R-10, which allowed one single-family unit for each 10 acres, to planned unit development (PUD), which permitted more diverse uses at much higher density. The resolution approving the zoning amendment was ultimately approved by the Gallatin County Board of County Commissioners, but was then challenged by two nonprofit corporations. The District Court voided the resolution as illegal spot zoning, and the Board and Duck Creek appealed to the Supreme Court. All parties agreed that Little v. Bd. of County Comm'rs, 193 M 334, 631 P2d 1282 (1981), correctly stated the applicable law, and the Supreme Court examined all three prongs of the Little test, including whether: (1) the requested use is significantly different from the prevailing use in the area; (2) the area in which the requested use is to apply is small, although not solely in physical size, including how many separate landowners will benefit from the zone classifications; and (3) the requested change is more in the nature of special legislation designed to benefit one or a few landowners at the expense of the surrounding landowners or the general public. Under the first prong, prevailing use need not exclude existing use, and the District Court determined that higher density uses under the proposed PUD would have conflicted with the predominately rural and residential character of the surrounding properties. Under the second prong, the size of the area, it was shown that the Duck Creek parcel was owned by a single entity and that the rezoning would benefit only one landowner. Under the third prong, the District Court found that the Duck Creek parcel was extremely sensitive in its importance to wildlife and wildlife habitat, and the court gave that fact significant weight in evaluating the public welfare, convenience, and necessity. State and national wildlife agencies testified regarding the deleterious effects that a rezone would have on public lands and resources, including the negative impact on habitat for elk, moose, bison, and trout, as well as on grizzly bear habitat and migration. Thus, the District Court properly concluded that the PUD zoning request represented special legislation designed to benefit one landowner at the expense of surrounding landowners and the general public. The court did not err in holding, pursuant to Little, that the proposed Duck Creek parcel was illegal spot zoning. Greater Yellowstone Coalition, Inc. v. Bd. of County Comm'rs of Gallatin County, 2001 MT 99, 305 M 232, 25 P3d 168 (2001). The Little test for spot zoning was applied in N. 93 Neighbors, Inc. v. Flathead County Bd. of County Comm'rs, 2006 MT 132, 332 M 327, 137 P3d 557 (2006), Lake County First v. Polson City Council, 2009 MT 322, 352 M 489, 218 P3d 816 (2009), and Plains Grains L.P. v. Bd. of County Commr's, 2010 MT 155, 357 Mont. 61, 238 P.3d 332.

*Fuel Storage Tank as Part of Pipeline — Construction in Agricultural-Open Zone Permitted:* After careful and conscientious review by the zoning coordinator and planning department, a building permit for a 35,000-barrel diesel fuel tank on property zoned agricultural-open space was properly granted. The tank could be considered part of a pipeline, which is a permitted use within such a zone. The Supreme Court found that contentions of error in interpreting the county zoning plan, which disallowed liquid fuel storage in a tank no matter how temporary or in what context in any agricultural-open zone, to be too narrow and rigid. The court held that since zoning laws and ordinances are in derogation of the common-law right to free use of private property, such ordinances must be strictly construed and must be given a fair and reasonable interpretation, by the officials assigned to interpret and apply the zoning laws, with some regard to the proposed use. Whistler v. Burlington N. RR Co., 228 M 150, 741 P2d 422, 44 St. Rep. 1415 (1987). The presumption of reasonableness of adopted regulations was applied in McElwain v. Flathead County, 248 M 231, 811 P2d 1267, 48 St. Rep. 410 (1991).

*Spot Zoning Defined:* There is no single, comprehensive definition of spot zoning applicable to all fact situations. Generally, however, three factors enter into determining whether spot zoning exists in any given instance: (1) the requested use is significantly different from the prevailing use in the area; (2) the area in which the requested use is to apply is rather small; and (3) the requested change is more in the nature of special legislation. Little v. County Comm'rs, 193 M 334, 631 P2d 1282, 38 St. Rep. 1124 (1981), followed in Boland v. Great Falls, 275 M 128, 910 P2d 890, 53 St. Rep. 69 (1996), Greater Yellowstone Coalition, Inc. v. Bd. of County Comm'rs of Gallatin County, 2001 MT 99, 305 M 232, 25 P3d 168 (2001), and Helena Sand & Gravel, Inc. v. Lewis & Clark County Planning & Zoning Comm'n, 2012 MT 272, 367 Mont. 130, 290 P.3d 691.

*Constitutionality:* Zoning ordinances and statutes authorizing them are constitutional under both the Due Process Clause and the Equal Protection Clause, in that they constitute a valid exercise of the police power; i.e., they have a substantial bearing upon the public health, safety, morals, and general welfare of a community. Freeman v. Bd. of Adjustment, 97 M 342, 34 P2d 534 (1934).

**Chapter Attorney General's Opinions**

*Revenue Department Not Zoning Authority — Designation of Property for Assessment Purposes Only:* The Department of Revenue is not a bona fide zoning authority that may designate an area as commercial for outdoor advertising purposes. A property designation made by the Department applies to tax assessment classifications only and may not be extended to zoning restrictions. 42 A.G. Op. 43 (1987).

**Chapter Law Review Articles**

Koontz v. St. Johns River Water Management District: The Constitutionality of Monetary Exactions in Land Use Planning, Newman, 76 Mont. L. Rev. 359 (2015).

Learning Both Directions: How Better Federal-Local Land Use Collaboration Can Quiet the Call for Federal Lands Transfers, Bryan, 76 Mont. L. Rev. 147 (2015).

**Chapter Collateral References**

Community Technical Assistance Program, Montana Department of Commerce, Community Development Division, https://comdev.mt.gov/Programs-and-Boards/Community-Technical-Assistance-Program/.

## Part 1
## County Planning and Zoning Commission

**Part Administrative Rules**

ARM 36.15.204 Local flood plain regulations — requirements.

**Part Case Notes**

*County Commissioners' Waiver of Zoning Petition Requirements Arbitrarily Set Forth in Resolution — Proper Dismissal of Complaint Without Prejudice:* The appellants submitted a petition to the Board of Carbon County Commissioners to create a zoning district pursuant to 76-2-101 et seq. The Board held a public meeting and voted to adopt a resolution of intent to grant the petition and establish a zoning district. One month later, the Board held another public meeting, this time noting that none of the interested parties had complied with Resolution 2009-16, the specific county resolution providing substantive and procedural requirements for the citizen-driven zoning petition certification process. The Board noted that all of the parties had failed to take notice of the governing resolution but that no parties were prejudiced by the oversight because they were all held to the same standards and all benefited from the Board's application of easier standards to the process. The Board then rescinded its previously adopted resolution of intent and voted to deny creation of the zoning district as proposed. The appellants filed suit in the District Court, asking in part for a declaration that the Board's decision to withdraw the resolution of intent and to deny the zoning petition was arbitrary and capricious. The appellees then moved to dismiss the complaint pursuant to Rule 12(b)(6), M.R.Civ.P. (Title 25, ch. 20). The District Court concluded that the Board had waived compliance with Resolution 2009-16 and in doing so had acted arbitrarily, leading the District Court to grant the motion to dismiss and dismissing the complaint without prejudice. On appeal, the appellants argued that none of the parties had been prejudiced by the Board's waiver of the requirements in Resolution 2009-16. The Supreme Court disagreed, noting that waiving standards for one petition would result in uncertainty for future petitioners, protesters, and members of the public. The Supreme Court held that the District Court was correct to conclude that the Board had acted arbitrarily and for reasons of convenience and affirmed the dismissal of the complaint without prejudice, noting that the appellants were free to file another zoning petition that complied with Resolution

2009-16 before the Board. Martinell v. Carbon County Bd. of Comm'rs, 2016 MT 136, 383 Mont. 486, 373 P.3d 34.

*Zoning Districts May Be Established by Property Owners or County Commissioners:* The plaintiff argued that the creation of a zoning district by the county commissioners was invalid because zoning districts could be created only by petition by affected landowners. The Supreme Court held that under Title 76, chapter 2, part 1, zoning districts had to be created by landowner petition but under Title 76, chapter 2, part 2, the county commission could create zoning districts, and therefore the zoning district was properly formed. Motta v. Granite County Comm'rs, 2013 MT 172, 370 Mont. 469, 304 P.3d 720.

*Commission Order to Remove Partially Constructed Barn Not Unreasonable — Negative Easement Analysis Inapplicable:* A planning and zoning commission determined that a partially constructed barn that was outside the designated building site violated applicable zoning regulations and covenants and must be removed. On appeal, the Supreme Court held that the commission's decision did not constitute an abuse of discretion since it was not so lacking in fact and foundation as to be clearly unreasonable. Moreover, the Supreme Court declined to apply the negative easement analysis in Conway v. Miller, 2010 MT 103, 356 Mont. 231, 232 P.3d 390, reasoning that the express language of the sales documents, the zoning regulations, and the covenants was sufficient justification for the commission's action. Botz v. Bridger Canyon Planning & Zoning Comm'n, 2012 MT 262, 367 Mont. 47, 289 P.3d 180.

*County Adoption of Local Vicinity Plan Not Creation of Zoning District:* The Jefferson County Board of Commissioners adopted a comprehensive master plan (now growth policy) regarding development in the county, and over a period of years following the adoption, a group of residents developed a local vicinity plan (LVP) that included proposed zoning regulations for a specific area of the county. The LVP also set goals for air and water quality, location standards for the placement of facilities dealing with hazardous waste, and guides for future development in the local vicinity consistent with the master plan (now growth policy). Although the County Commissioners stated that they adopted the LVP as an amendment to the master plan (now growth policy), the LVP was given precedence over the master plan (now growth policy) in cases of conflict between provisions in the plans. When a cement company in the local vicinity challenged the validity of the LVP, the District Court granted summary judgment for the county. On appeal, the Supreme Court reversed, holding that the LVP did not meet the statutory criteria for a zoning district and thus could not form the foundation for adoption of zoning regulations. Because the LVP related to planning, not to zoning, the county did not unlawfully establish the boundaries of a zoning district through adoption of the LVP. Ash Grove Cement Co. v. Jefferson County, 283 M 486, 943 P2d 85, 54 St. Rep. 756 (1997).

*Substantial Compliance as Standard of Whether Procedural Requirements Met:* The proper issue facing a District Court's interpretation of zoning district statutes is whether a Board of County Commissioners substantially complied with the procedural steps for creating zoning districts. Petty v. Flathead County Bd. of County Comm'rs, 231 M 428, 754 P2d 496, 45 St. Rep. 737 (1988).

*Constitutionality of Planning and Zoning Districts — Interrelationship of Provisions:* In 1978, a group of landowners in the Gallatin Valley initiated meetings to propose a general planning and zoning district for the approval of the County Commissioners. They hired a planner to create a master plan (now growth policy) and a lawyer to do the preliminary legal work. In the meantime, owners of two parcels of land, one of 120 acres and one of 80 acres, located within the area proposed for general planning, filed petitions for creation of separate planning and zoning districts for their own land. The petitions were filed with the express purpose of escaping the application of the proposed large zoning district. A comprehensive plan (now growth policy) was never prepared for either parcel, and the County Commissioners adopted the planning and zoning districts over the objections of the county subdivision staff. Appellants challenged the creation and implementation of the two zoning districts on the ground that they were inconsistent with governing statutory standards. Appellants further claimed that the districts were defective on constitutional grounds because the zoning decisions had not been based on rational criteria and were arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare. The Supreme Court held the statutes constitutional, ruling that when the provisions of 76-2-101 and 76-2-104 are read together, as they must be, the law provides sufficient substantive and procedural guidelines. Mont. Wildlife Fed'n v. Sager, 190 M 247, 620 P2d 1189, 37 St. Rep. 1897 (1980).

*Planning and Zoning Districts Not Spot Zoning:* Plaintiffs contended the county engaged in spot zoning when it established planning and zoning districts under this part. The Supreme

Court said that in accepting the legality of procedures under this part, they were bound to accept the reasonable consequences of that decision. One consequence is that parcels of 40 acres or more are entitled to be designated as planning and zoning districts under 76-2-101 without being considered spot zoning. Mont. Wildlife Fed'n v. Sager, 190 M 247, 620 P2d 1189, 37 St. Rep. 1897 (1980).

*When Comprehensive Plan (now Growth Policy) Not Necessary:* A countywide comprehensive plan (now growth policy) is not necessary prior to adoption of a county planning and zoning district, and further, in making and adopting a development district it is not necessary that there be created a countywide development pattern. Doull v. Wohlschlager, 141 M 354, 377 P2d 758 (1963), explained in Mont. Wildlife Fed'n v. Sager, 190 M 247, 620 P2d 1189, 37 St. Rep. 1897 (1980).

*Constitutionality:* This part does not contravene Art. IV, sec. 1, 1889 Mont. Const. (now Art. III, sec. 1, Mont. Const.), as an unlawful delegation of power, since sufficient guidelines are set out. Missoula v. Missoula County, 139 M 256, 362 P2d 539 (1961), explained in Plath v. Hi-Ball Contractors, Inc., 139 M 263, 362 P2d 1021 (1961), followed in Doull v. Wohlschlager, 139 M 274, 363 P2d 542 (1961), followed in Mont. Wildlife Fed'n v. Sager, 190 M 247, 620 P2d 1189, 37 St. Rep. 1897 (1980).

**Part Attorney General's Opinions**

*Addition or Withdrawal of Freeholder's Name Following Certification of Petition to Board of County Commissioners for Review:* In determining how long a freeholder may add or withdraw the freeholder's name from a zoning petition under this part, "final action" occurs when the County Clerk certifies the petition to the Board of County Commissioners for review. The practice of extending until a date certain the time in which signatures may be added or withdrawn, although not to be encouraged, is harmless as long as the date certain is public knowledge and precedes the Commission's decision to create the district, assuming that the boundaries remain the same and that, as of the date certain, the signatures of 60% of freeholders within the proposed district remain on the petition. 48 A.G. Op. 5 (1999).

*Advisory Role of County Planning Board in Development Process:* When a planning and zoning district is created in a county that has adopted a comprehensive master plan (now growth policy), the district's development pattern, which must substantially adhere to the master plan (now growth policy), is determined by the planning and zoning commission, subject to approval by the Board of County Commissioners. A county planning board has no statutory authority over a planning and zoning district created within the planning board's jurisdictional area. However, nothing precludes the planning and zoning commission or the Board of County Commissioners from requesting input from the county planning board during the process of determining and approving the development pattern. 48 A.G. Op. 5 (1999).

*Law Applicable to County Adoption of Planning and Zoning District:* A county that has adopted a comprehensive master plan (now growth policy) is not limited to zoning pursuant to Title 76, ch. 2, part 2, but may also create planning and zoning districts under this part. The planning and zoning vehicles in part 2 and this part are separate and distinct; however, this part constitutes the mechanism by which freeholders may initiate zoning changes and is a process that is available to freeholders whether or not their county has adopted a comprehensive master plan (now growth policy). 48 A.G. Op. 5 (1999).

*No Power of Planning and Zoning Commission to Alter District Boundaries:* A planning and zoning commission is empowered to create a development pattern for a planning and zoning district. However, a planning and zoning commission may not unilaterally alter planning and zoning district boundaries to include land not referenced in the petition. The boundaries are proposed by the petitioners and set by the Board of County Commissioners when it accepts the petition creating the district. 48 A.G. Op. 5 (1999).

*Function of Planning and Zoning Commission:* A petition for a county planning and zoning district need not include zoning regulations that the petitioners desire for the district. The county planning and zoning commission has the exclusive duty to make and adopt a development pattern for the district. 28 A.G. Op. 1 (1959).

### 76-2-101. Planning and zoning commission and district.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 1, Ch. 401, L. 2023. Amendment effective May 3, 2023.

*Applicability:* Section 5, Ch. 401, L. 2023, provided: "[This act] applies to zoning districts created pursuant to Title 76, chapter 2, part 1, on or after January 1, 2023."

*2021 Amendment:* Chapter 533 in (1) near beginning inserted reference to subsection (6), after "planning and zoning district" inserted "may", and near end after "planning and zoning commission consisting of" inserted "up to"; in (5) after "establishment of the district within" substituted "90 days" for "30 days"; inserted (6) concerning requirement to provide draft documents before the board of county commissioners determines whether the number of affected real property owners necessary to meet the petition requirement of subsection (1) has been met, the contents of the draft documents, and the requirement that the final adopted development plan be similar to the draft documents; and made minor changes in style. Amendment effective May 14, 2021.

*2009 Amendment:* Chapter 446 in (1) after "affected" substituted "real property owners in the proposed district" for "freeholders"; in (4) reduced time for bringing challenge from 5 years to 6 months; and in (5) near beginning substituted "real property owners" for "freeholders". Amendment effective May 5, 2009.

*2001 Amendment:* Chapter 288 in (1) near end increased membership of a planning and zoning commission from five to seven members; and made minor changes in style. Amendment effective October 1, 2001.

*Transition:* Section 5, Ch. 288, L. 2001, provided: "On or before October 1, 2002, the county board of commissioners shall appoint new members to the planning and zoning commission, as provided in [sections 1 and 2] [76-2-101 and 76-2-102], for each planning and zoning district that exists as of [the effective date of this act]." Effective October 1, 2001.

*1995 Amendment:* Chapter 591 in (1), at beginning, inserted "Subject to the provisions of subsection (5)"; in (4), at beginning, inserted exception clause, near middle, after "commenced", deleted "by October 1, 1994, or", and at end deleted "if the district was created after October 1, 1989"; and inserted (5) concerning protest by freeholders.

**Case Notes**

*County Commissioners' Waiver of Zoning Petition Requirements Arbitrarily Set Forth in Resolution — Proper Dismissal of Complaint Without Prejudice:* The appellants submitted a petition to the Board of Carbon County Commissioners to create a zoning district pursuant to 76-2-101 et seq. The Board held a public meeting and voted to adopt a resolution of intent to grant the petition and establish a zoning district. One month later, the Board held another public meeting, this time noting that none of the interested parties had complied with Resolution 2009-16, the specific county resolution providing substantive and procedural requirements for the citizen-driven zoning petition certification process. The Board noted that all of the parties had failed to take notice of the governing resolution but that no parties were prejudiced by the oversight because they were all held to the same standards and all benefited from the Board's application of easier standards to the process. The Board then rescinded its previously adopted resolution of intent and voted to deny creation of the zoning district as proposed. The appellants filed suit in the District Court, asking in part for a declaration that the Board's decision to withdraw the resolution of intent and to deny the zoning petition was arbitrary and capricious. The appellees then moved to dismiss the complaint pursuant to Rule 12(b)(6), M.R.Civ.P. (Title 25, ch. 20). The District Court concluded that the Board had waived compliance with Resolution 2009-16 and in doing so had acted arbitrarily, leading the District Court to grant the motion to dismiss and dismissing the complaint without prejudice. On appeal, the appellants argued that none of the parties had been prejudiced by the Board's waiver of the requirements in Resolution 2009-16. The Supreme Court disagreed, noting that waiving standards for one petition would result in uncertainty for future petitioners, protesters, and members of the public. The Supreme Court held that the District Court was correct to conclude that the Board had acted arbitrarily and for reasons of convenience and affirmed the dismissal of the complaint without prejudice, noting that the appellants were free to file another zoning petition that complied with Resolution 2009-16 before the Board. Martinell v. Carbon County Bd. of Comm'rs, 2016 MT 136, 383 Mont. 486, 373 P.3d 34.

*Creation of Special District By Petition Consistent With Growth Policy — Zoning Regulations Prohibiting Certain Activities Not Gerrymandering When In Compliance with Growth Policy:* In 2008, Helena Sand and Gravel, Inc., (HSG) obtained a permit from the Montana Department of Environmental Quality (DEQ) to mine 110 acres of a 421-acre parcel. While DEQ was processing the permit, the county received a citizens' petition that proposed the creation of a special zoning district that would prohibit industrial and mining activities and promote the rural residential atmosphere within its proposed boundaries, including the 311 acres owned by HSG that were not covered by the permit. Following statutory procedures, the Board of County Commissioners created the special district and adopted zoning regulations that prohibited mining within the district. HSG filed suit, arguing that the regulations did not substantially comply with the county's growth policy because the prohibition on mining disregarded the actual use of the land, which included HSG's existing gravel mines, in violation of the growth policy. The Supreme Court disagreed and held that the special zoning district created specific zoning requirements within the area already defined by the growth policy, rather than amending the growth policy itself. The court found that the Board reasonably determined that the prevailing use within the district was residential development. Although HSG claimed that the petitioners designed the district specifically to prevent HSG from mining its property, which amounted to gerrymandering, the court determined that the Board's decision was based on compliance with the growth policy and existing uses within the district, without regard to the petitioners' intent. The court upheld the zoning regulations as not clearly unreasonable or an abuse of discretion. Helena Sand & Gravel, Inc. v. Lewis & Clark County Planning & Zoning Comm'n, 2012 MT 272, 367 Mont. 130, 290 P.3d 691.

*Zoning in Substantial Compliance With Growth Policy Not Illegal Spot Zoning:* Upon receiving a citizens' petition, the Lewis and Clark County Board of Commissioners adopted a special district and zoning regulations that prohibited sand and gravel mining. Helena Sand and Gravel, Inc., (HSG) owned land within the boundaries of the special district that included both active gravel pits and land where mining had not yet occurred. HSG filed suit and argued that it had been subject to illegal spot zoning when the Board adopted the mining prohibition because it was the only landowner affected by the regulations. The Supreme Court disagreed and held that HSG's claim failed all three prongs of the test in Little v. Bd. of County Comm'rs, 193 Mont. 334, 631 P.2d 1282 (1981): the Board lawfully found the prevailing use of land within the special district to be rural residential, and the zoning regulations were in substantial compliance with the growth policy, so the zoning was not in the nature of special legislation. Because HSG could not demonstrate that its property was singled out for a use classification that was totally different from the surrounding area, it was not subject to illegal spot zoning. Helena Sand & Gravel, Inc. v. Lewis & Clark County Planning & Zoning Comm'n, 2012 MT 272, 367 Mont. 130, 290 P.3d 691. See also Hartshorne v. Whitefish, 2021 MT 116, 404 Mont. 150, 486 P.3d 693.

*Countywide Zoning Statutes Inapplicable to Rural Zoning District Statutes:* Appellant contended that 76-2-201 required establishment of an actual jurisdictional area prior to adoption of a zoning district pursuant to this section. The Supreme Court held that procedural requirements for zoning jurisdictional areas under the countywide zoning statutes had no application to the requirements for the creation of zoning districts under the rural zoning laws. Petty v. Flathead County Bd. of County Comm'rs, 231 M 428, 754 P2d 496, 45 St. Rep. 737 (1988).

*Motion to Create District Sufficient to Satisfy Requirement That Zoning Commission Be Appointed:* A motion by the Board of County Commissioners creating a zoning district and stating that a "meeting of the Zoning Commission will be called to determine a development pattern for this area" was sufficient to satisfy the requirement that the Board appoint a zoning commission at the time the district is created. Petty v. Flathead County Bd. of County Comm'rs, 231 M 428, 754 P2d 496, 45 St. Rep. 737 (1988).

*Constitutionality of Planning and Zoning Districts — Interrelationship of Provisions:* In 1978, a group of landowners in the Gallatin Valley initiated meetings to propose a general planning and zoning district for the approval of the County Commissioners. They hired a planner to create a master plan (now growth policy) and a lawyer to do the preliminary legal work. In the meantime, owners of two parcels of land, one of 120 acres and one of 80 acres, located within the area proposed for general planning, filed petitions for creation of separate planning and zoning districts for their own land. The petitions were filed with the express purpose of escaping the application of the proposed large zoning district. A comprehensive plan (now growth policy) was never prepared for either parcel, and the County Commissioners adopted the planning and zoning districts over the objections of the county subdivision staff. Appellants challenged the creation and implementation of the two zoning districts on the ground that they were inconsistent with governing statutory standards. Appellants further claimed that the districts were defective on constitutional grounds because the zoning decisions had not been based on rational criteria and were arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare. The Supreme Court held the statutes constitutional, ruling that when the provisions of 76-2-101 and 76-2-104 are read together, as they must be, the law provides sufficient substantive and procedural guidelines. Mont. Wildlife Fed'n v. Sager, 190 M 247, 620 P2d 1189, 37 St. Rep. 1897 (1980).

*Planning and Zoning Districts Not Spot Zoning:* Plaintiffs contended the county engaged in spot zoning when it established planning and zoning districts under this part. The Supreme Court said that in accepting the legality of procedures under this part, they were bound to accept the reasonable consequences of that decision. One consequence is that parcels of 40 acres or more are entitled to be designated as planning and zoning districts under this section without being considered spot zoning. Mont. Wildlife Fed'n v. Sager, 190 M 247, 620 P2d 1189, 37 St. Rep. 1897 (1980).

*Adoption of Comprehensive Development Plan (now Growth Policy) as Prerequisite to Zoning Authority:* The clear and unambiguous language of 76-2-201 requires that a county adopt a comprehensive development plan (now growth policy) for an entire jurisdictional area. Only after the adoption of such a plan may a county adopt zoning regulations. Allen v. Flathead County, 184 M 58, 601 P2d 399, 36 St. Rep. 1839 (1979).

*Petition for Establishment:* A Board of County Commissioners does not have the power to create a planning and zoning district and to make a survey in portions of the county in the absence of a petition by 60% of the freeholders (now real property owners). Doull v. Wohlschlager, 141 M 354, 377 P2d 758 (1963). (Dissenting opinion, 141 M 354, 377 P2d 758 (1963).)

*Size of District:*

A district under this section need not comprise an area of 40 acres, none of which are used for grazing, horticulture, agriculture, or the growing of timber. Doull v. Wohlschlager, 141 M 354, 377 P2d 758 (1963). (Dissenting opinion, 141 M 354, 377 P2d 758 (1963).)

This section contemplated districts which would be less than an entire county. Doull v. Wohlschlager, 141 M 354, 377 P2d 758 (1963). (Dissenting opinion, 141 M 354, 377 P2d 758 (1963).)

*Survey:* A countywide survey is unnecessary for the establishment of a planning and zoning district unless authorized by the requisite petition under this section. Doull v. Wohlschlager, 141 M 354, 377 P2d 758 (1963). (Dissenting opinion, 141 M 354, 377 P2d 758 (1963).) See also Mont. Wildlife Fed'n v. Sager, 190 M 247, 620 P2d 1189, 37 St. Rep. 1897 (1980).

*Constitutionality:* Title 76, ch. 2, part 1 does not contravene Art. IV, sec. 1, 1889 Mont. Const. (now Art. III, sec. 1, 1972 Mont. Const.), as an unlawful delegation of power, since sufficient guidelines are set out. Missoula v. Missoula County, 139 M 256, 362 P2d 539 (1961), explained in Plath v. Hi-Ball Contractors, Inc., 139 M 263, 362 P2d 1021 (1961), followed in Doull v. Wohlschlager, 139 M 274, 362 P2d 542 (1961), followed in Mont. Wildlife Fed'n v. Sager, 190 M 247, 620 P2d 1189, 37 St. Rep. 1897 (1980).

**Attorney General's Opinions**

*Addition or Withdrawal of Freeholder's Name Following Certification of Petition to Board of County Commissioners for Review:* In determining how long a freeholder may add or withdraw the freeholder's name from a zoning petition under Title 76, ch. 2, part 1, "final action" occurs when the County Clerk certifies the petition to the Board of County Commissioners for review. The practice of extending until a date certain the time in which signatures may be added or withdrawn, although not to be encouraged, is harmless as long as the date certain is public knowledge and precedes the Commission's decision to create the district, assuming that the boundaries remain the same and that, as of the date certain, the signatures of 60% of freeholders within the proposed district remain on the petition. 48 A.G. Op. 5 (1999).

*Acreage Requirements:* This section requires that acreage in a zoning district be one contiguous 40-acre parcel. 42 A.G. Op. 43 (1987).

*Zoning Study Proper Function of Planning and Zoning Commission:* Studies necessary to the establishment of zoning districts may be undertaken by a planning and zoning commission established under 76-2-101, but not by the Board of County Commissioners. 26 A.G. Op. 65 (1956).

## 76-2-102. Organization and operation of commission.

**Compiler's Comments**

*2009 Amendment:* Chapter 446 in (1) in first sentence substituted "either the county surveyor or the county clerk and recorder" for "the county surveyor" and after "zoning district" inserted "or, if only one district exists in a county or is proposed, both from that district"; and made minor changes in style. Amendment effective May 5, 2009.

*2001 Amendments — Composite Section:* Chapter 288 in (1) near middle of first sentence after "surveyor" inserted "two citizen members, each of whom resides in a different planning and zoning district" and inserted second sentence regarding appointment and terms of citizen members; in (3) near middle after "expenses of the" substituted "commission's members" for "members of the board"; and made minor changes in style. Amendment effective October 1, 2001.

Chapter 574 in (3) near end after "levy" substituted "on the taxable value of all taxable property" for "of not to exceed 1 mill on the taxable valuation of the real property". Amendment effective July 1, 2001.

*Transition:* Section 5, Ch. 288, L. 2001, provided: "On or before October 1, 2002, the county board of commissioners shall appoint new members to the planning and zoning commission, as provided in [sections 1 and 2] [76-2-101 and 76-2-102], for each planning and zoning district that exists as of [the effective date of this act]." Effective October 1, 2001.

*1999 Amendment:* Chapter 584 at beginning of (3) inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

*Severability:* Section 172, Ch. 584, L. 1999, was a severability clause.

*Retroactive Applicability:* Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

*1993 Special Session Amendment:* Chapter 27 in (1), in first sentence, substituted "a county official appointed by the county commissioners" for "the county assessor"; and made minor changes in style. Amendment effective January 1, 1994.

*Applicability:* Section 171(2), Ch. 27, Sp. L. November 1993, provided that the amendments to this section apply to tax years after December 31, 1993.

### Attorney General's Opinions

*Proper Use of One-Mill Levy:* A city-county zoning district may not receive funding from the 1-mill levy provision of subsection (3) of this section. 33 A.G. Op. 34 (1970).

## 76-2-103. Powers of commission and employees.

### Attorney General's Opinions

*Zoning Rules Not Enforceable by Criminal Proceeding:* The county planning and zoning commission does not have the authority to enforce its rules and regulations by criminal proceedings. 30 A.G. Op. 19 (1963).

## 76-2-104. Development pattern.

### Case Notes

*Creation of Special District By Petition Consistent With Growth Policy — Zoning Regulations Prohibiting Certain Activities Not Gerrymandering When In Compliance with Growth Policy:* In 2008, Helena Sand and Gravel, Inc., (HSG) obtained a permit from the Montana Department of Environmental Quality (DEQ) to mine 110 acres of a 421-acre parcel. While DEQ was processing the permit, the county received a citizens' petition that proposed the creation of a special zoning district that would prohibit industrial and mining activities and promote the rural residential atmosphere within its proposed boundaries, including the 311 acres owned by HSG that were not covered by the permit. Following statutory procedures, the Board of County Commissioners created the special district and adopted zoning regulations that prohibited mining within the district. HSG filed suit, arguing that the regulations did not substantially comply with the county's growth policy because the prohibition on mining disregarded the actual use of the land, which included HSG's existing gravel mines, in violation of the growth policy. The Supreme Court disagreed and held that the special zoning district created specific zoning requirements within the area already defined by the growth policy, rather than amending the growth policy itself. The court found that the Board reasonably determined that the prevailing use within the district was residential development. Although HSG claimed that the petitioners designed the district specifically to prevent HSG from mining its property, which amounted to gerrymandering, the court determined that the Board's decision was based on compliance with the growth policy and existing uses within the district, without regard to the petitioners' intent. The court upheld the zoning regulations as not clearly unreasonable or an abuse of discretion. Helena Sand & Gravel, Inc. v. Lewis & Clark County Planning & Zoning Comm'n, 2012 MT 272, 367 Mont. 130, 290 P.3d 691.

*Members of County Commission Also Members of Zoning Commission — Zoning Regulations Properly Adopted:* Plaintiffs contended that: (1) zoning regulations were not properly adopted because the Yellowstone Board of County Commissioners did not create a development pattern and the regulations themselves did not create a development pattern; (2) it was inappropriate for a development pattern and regulations to be promulgated together; (3) the zoning commission did not submit draft regulations to the Board; and (4) the Board itself did not vote to adopt the regulations. The District Court held that the Board substantially complied with statute in adopting the regulations, and the Supreme Court concurred. The zoning commission, not the Board, is charged with creating and adopting a development pattern, and nothing in law proscribes the creation of a development plan and zoning regulations simultaneously. The proposed regulations were properly submitted to the Board for consideration and public hearing. In this case, the County Commissioners were also members of the zoning commission, and although the members did not clearly state in what capacity they were voting when they adopted the regulations, the court found it difficult to imagine that the members would not have voted similarly in either capacity. To avoid confusion, the court recommended that members in similar positions make clear in what capacity they are voting and sign appropriately. Yurczyk v. Yellowstone County, 2004 MT 3, 319 M 169, 83 P3d 266 (2004).

*Stand-Alone Local Vicinity Plan Violative of Master Plan (now Growth Policy) — Local Vicinity Plan as Amendment to or Partial Repeal of Master Plan (now Growth Policy) Improper:* It was improper for a county to adopt a local vicinity plan (LVP) that regulated development in a specific area of the county when the LVP violated the mandate of the county master plan (now growth policy) authorizing an LVP only to the extent that it was consistent with the master plan (now growth policy). An LVP may not stand alone as the preeminent plan for a particular area when the LVP is inconsistent with the county master plan (now growth policy), nor may an LVP be adopted as an amendment to or revision or repeal of the master plan (now growth policy) in a manner that subordinates the goals and objectives of the master plan (now growth policy) as the preeminent county planning device. Ash Grove Cement Co. v. Jefferson County, 283 M 486, 943 P2d 85, 54 St. Rep. 756 (1997), distinguished in Helena Sand & Gravel, Inc. v. Lewis & Clark County Planning & Zoning Comm'n, 2012 MT 272, 367 Mont. 130, 290 P.3d 691, in which the creation of a special zoning district that included specific zoning requirements within an area already defined by the growth policy and did not amend the growth policy itself was not improper.

*Consistency Between Comprehensive Plan (now Growth Policy), Zoning Ordinances, and Other Planning Documents — Validity of Development Approvals:* Zoning ordinances and other planning documents adopted after adoption of a comprehensive (master) plan (now growth policy) must be consistent with the comprehensive plan (now growth policy) and with each other, and when all three were inconsistent with each other, the zoning commission exceeded its jurisdiction and authority when it approved a planned unit development. It was unsatisfactory to base the decision to approve the development on planning documents that were inherently inconsistent and unreliable. Bridger Canyon Property Owners' Ass'n, Inc. v. Planning & Zoning Comm'n, 270 M 160, 890 P2d 1268, 52 St. Rep. 125 (1995), followed in Ash Grove Cement Co. v. Jefferson County, 283 M 486, 943 P2d 85, 54 St. Rep. 756 (1997), and N. 93 Neighbors, Inc. v. Flathead County Bd. of County Comm'rs, 2006 MT 132, 332 M 327, 137 P3d 557 (2006).

*Multiple Uses Not Required:* The reference in the plural to a development pattern for "districts" in subsection (2) of this section does not mandate that each district, which may be as small as 40 acres, be fractionalized into several smaller districts with different regulations for each fraction. Petty v. Flathead County Bd. of County Comm'rs, 231 M 428, 754 P2d 496, 45 St. Rep. 737 (1988).

*Single Land Use Classification and Notice of Legal Description — Statutory Requirement for Descriptive Matter Substantially Met:* A development pattern recommended a single land use classification, and the notice of the public hearing held prior to the zoning commission's recommendation on the development pattern contained a legal description of the district. Under these circumstances, the statutory requirement for reference to maps, charts, and descriptive matters was substantially met. Petty v. Flathead County Bd. of County Comm'rs, 231 M 428, 754 P2d 496, 45 St. Rep. 737 (1988).

*Constitutionality of Planning and Zoning Districts — Interrelationship of Provisions:* In 1978, a group of landowners in the Gallatin Valley initiated meetings to propose a general planning and zoning district for the approval of the County Commissioners. They hired a planner to create a master plan (now growth policy) and a lawyer to do the preliminary legal work. In the meantime, owners of two parcels of land, one of 120 acres and one of 80 acres, located within the area proposed for general planning, filed petitions for creation of separate planning and zoning districts for their own land. The petitions were filed with the express purpose of escaping the application of the proposed large zoning district. A comprehensive plan (now growth policy) was never prepared for either parcel, and the County Commissioners adopted the planning and zoning districts over the objections of the county subdivision staff. Appellants challenged the creation and implementation of the two zoning districts on the ground that they had not been based on rational criteria and were defective on constitutional grounds because the zoning decisions were either inconsistent with governing statutory standards or were clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare. The Supreme Court held the statutes constitutional, ruling that when the provisions of 76-2-101 and 76-2-104 are read together, as they must be, the law provides sufficient substantive and procedural guidelines. Mont. Wildlife Fed'n v. Sager, 190 M 247, 620 P2d 1189, 37 St. Rep. 1897 (1980).

*Unreasonable and Discriminatory:* Zoning of plaintiff's vacant lot and commercial building as part of a residential zone was unreasonable and discriminatory since the residential zone was contiguous with a commercial zone, contained only one residence surrounded by commercial properties, and the Board of County Commissioners gave no reason for failing to include the property in the commercial zone. Alden v. Bd. of Zoning Comm'rs, 165 M 364, 528 P2d 1320 (1974).

*Construction:* Since the Legislature used the word "district" in the plural in the second sentence of this section and in the singular in the first sentence, it must be assumed that the Legislature knew the difference and intended the use of the singular when so used. Doull v. Wohlschlager, 141 M 354, 377 P2d 758 (1963). (Dissenting opinion, 141 M 354, 377 P2d 758 (1963). See also 1-2-105.)

*Countywide Survey:* It is unnecessary to make a countywide survey unless so authorized by the requisite petition under 76-2-101. Doull v. Wohlschlager, 141 M 354, 377 P2d 758 (1963). (Dissenting opinion, 141 M 354, 377 P2d 758 (1963).)

*Maps and Plats:* The need for maps and plats under this section would only seem to exist when the Planning and Zoning Commission has divided the district into separate areas within which it is permissible and other areas within which it is not permissible to erect and maintain certain types of "industries, trades, or callings". Such a provision is intended to provide notice where the regulations may vary from block to block and lot to lot. Doull v. Wohlschlager, 141 M 354, 377 P2d 758 (1963). (Dissenting opinion, 141 M 354, 377 P2d 758 (1963).)

*Residential Units:* The Planning and Zoning Commission has complied with the provisions of this section requiring it "to make and adopt a development pattern for the physical and economic development of the planning and zoning district" when it provides for residential expansion and the protection of economic values by restricting the development to residential units. Doull v. Wohlschlager, 141 M 354, 377 P2d 758 (1963). (Dissenting opinion, 141 M 354, 377 P2d 758 (1963).)

**Attorney General's Opinions**

*No Power of Planning and Zoning Commission to Alter District Boundaries:* A planning and zoning commission is empowered to create a development pattern for a planning and zoning district. However, a planning and zoning commission may not unilaterally alter planning and zoning district boundaries to include land not referenced in the petition. The boundaries are proposed by the petitioners and set by the Board of County Commissioners when it accepts the petition creating the district. 48 A.G. Op. 5 (1999).

*Function of Planning and Zoning Commission:* A petition for a county planning and zoning district need not include zoning regulations that the petitioners desire for the district. The county planning and zoning commission has the exclusive duty to make and adopt a development pattern for the district. 28 A.G. Op. 1 (1959).

## 76-2-105. Continuation of prior nonconforming uses.

**Case Notes**

*Water Bottling Facility on Agricultural Land — Valid Nonconforming Use as of Date Citizen-Initiative Zoning District Regulations Passed — District Court's Decision Affirmed on Appeal.* Egan Slough Community v. Flathead County Bd. of County Comm'rs, 2022 MT 57, 408 Mont. 81, 506 P.3d 996.

*Commission's Denial of Conditional Use Permit for Barn Justified — Proposed Use Considered Detrimental to Conditions in Zoning District:* After receiving considerable public comment, the planning and zoning commission denied an application to modify a conditional use permit that would have allowed the petitioners to finalize construction of a barn outside the designated building site, reasoning that the application did not meet the purposes of a planned unit development as established under the zoning regulations. Moreover, the commission determined that it was unable to find that the proposed modification would not, under the circumstances of the particular case, be detrimental to the health, safety, peace, morals, comfort, and general welfare of the zoning district. On appeal, the Supreme Court held that the commission's decision did not constitute an abuse of discretion since the modification may have been detrimental to the regulatory scheme as a whole. Botz v. Bridger Canyon Planning & Zoning Comm'n, 2012 MT 262, 367 Mont. 47, 289 P.3d 180.

*Unreasonable and Discriminatory Zoning:* Zoning of plaintiff's vacant lot and commercial building as part of a residential zone was unreasonable and discriminatory under zoning plan that did not permit the continuance of nonconforming uses. Alden v. Bd. of Zoning Comm'rs, 165 M 364, 528 P2d 1320 (1974).

### 76-2-106. Adoption of development district.

**Case Notes**

*Application of Other Statutes:* Section 76-2-203, requiring adherence to a comprehensive development plan (now growth policy) in adopting zoning regulations, does not apply to action taken by Planning and Zoning Commission under this section. Mont. Wildlife Fed'n v. Sager, 190 M 247, 620 P2d 1189, 37 St. Rep. 1897 (1980).

*Variance and Nonconforming Use Distinguished:* District Court decision limiting nonconforming use for mobile homes to six trailers and court order to remove trailers exceeding that number did not make the question of a variance res judicata, and landowners were entitled to a hearing on the merits on their petition for variance. Wheeler v. Armstrong, 159 M 392, 498 P2d 300 (1972).

**Attorney General's Opinions**

*No Power of Planning and Zoning Commission to Alter District Boundaries:* A planning and zoning commission is empowered to create a development pattern for a planning and zoning district. However, a planning and zoning commission may not unilaterally alter planning and zoning district boundaries to include land not referenced in the petition. The boundaries are proposed by the petitioners and set by the Board of County Commissioners when it accepts the petition creating the district. 48 A.G. Op. 5 (1999).

*When Map or Narrative Legal Description Defines District Boundaries:* When presented with the question of whether a narrative legal description contained in a zoning petition or an accompanying map that is inconsistent with the legal description defines the boundaries of a proposed planning and zoning district, the Attorney General applied 70-20-201, which contains the rules for construing the description of real property being conveyed when construction is doubtful and no other sufficient method exists by which to determine the description. In this case, if signatures were obtained on the petition as a result of reference to the map, the map defines the district boundaries; however, if the map was created from the narrative legal description contained in the zoning petition, the narrative controls. The planning and zoning commission shall ascertain the exact facts through the public hearing process provided for in 76-2-101. 48 A.G. Op. 5 (1999).

### 76-2-107. Preparation of resolutions and other materials.

**Compiler's Comments**

*2009 Amendment:* Chapter 446 inserted (2) authorizing board of county commissioners to void planning and zoning district by resolution under certain conditions; and made minor changes in style. Amendment effective May 5, 2009.

**Case Notes**

*Members of County Commission Also Members of Zoning Commission — Zoning Regulations Properly Adopted:* Plaintiffs contended that: (1) zoning regulations were not properly adopted because the Yellowstone Board of County Commissioners did not create a development pattern and the regulations themselves did not create a development pattern; (2) it was inappropriate for a development pattern and regulations to be promulgated together; (3) the zoning commission did not submit draft regulations to the Board; and (4) the Board itself did not vote to adopt the regulations. The District Court held that the Board substantially complied with statute in adopting the regulations, and the Supreme Court concurred. The zoning commission, not the Board, is charged with creating and adopting a development pattern, and nothing in law proscribes the creation of a development plan and zoning regulations simultaneously. The proposed regulations were properly submitted to the Board for consideration and public hearing. In this case, the County Commissioners were also members of the zoning commission, and although the members did not clearly state in what capacity they were voting when they adopted the regulations, the court found it difficult to imagine that the members would not have voted similarly in either capacity. To avoid confusion, the court recommended that members in similar positions make clear in what capacity they are voting and sign appropriately. Yurczyk v. Yellowstone County, 2004 MT 3, 319 M 169, 83 P3d 266 (2004).

## 76-2-108. Permits authorized.

### Case Notes

*Commission's Denial of Conditional Use Permit for Barn Justified — Proposed Use Considered Detrimental to Conditions in Zoning District:* After receiving considerable public comment, the planning and zoning commission denied an application to modify a conditional use permit that would have allowed the petitioners to finalize construction of a barn outside the designated building site, reasoning that the application did not meet the purposes of a planned unit development as established under the zoning regulations. Moreover, the commission determined that it was unable to find that the proposed modification would not, under the circumstances of the particular case, be detrimental to the health, safety, peace, morals, comfort, and general welfare of the zoning district. On appeal, the Supreme Court held that the commission's decision did not constitute an abuse of discretion since the modification may have been detrimental to the regulatory scheme as a whole. Botz v. Bridger Canyon Planning & Zoning Comm'n, 2012 MT 262, 367 Mont. 47, 289 P.3d 180.

*Vested Interest Not Gained by Mere Submission of Beer and Wine Application — Retroactive Application of General Rule on Denial of Building Permit:* Town Pump, Inc. (Town Pump), was required to obtain subdivision approval in order to complete a property conveyance for the building of a convenience store, gas station, and casino wherein beer and wine would be sold. After Town Pump had submitted an application for a beer and wine license, the property was rezoned as a commercial highway, and the city subsequently adopted a development code requiring a conditional use permit for the property in order for beer and wine to be sold on premises. Town Pump's application was denied based on the provisions of the new development code. Applying the rationale in Femling v. Mont. St. Univ., 220 M 133, 713 P2d 996 (1986), and Wallace v. Dept. of Fish, Wildlife, and Parks, 269 M 364, 889 P2d 817 (1995), the Supreme Court held that Town Pump did not gain a vested interest in the beer and wine application merely because the application was submitted before the adoption of the development plan. The general rule is that the denial of an application for a building permit may be based on a zoning regulation enacted or becoming effective after the application was made; therefore, a zoning regulation may be retroactively applied to deny an application for a building permit, even though the permit could have been lawfully issued at the time of application. The court concluded that the development code was neither arbitrary nor unreasonable in its effects, that it did not impair or burden any vested interest or passed transaction held by Town Pump, and that retroactive application of the development code did not deny Town Pump's constitutional right to due process. Town Pump, Inc. v. Bd. of Adjustment of Red Lodge, 1998 MT 294, 292 M 6, 971 P2d 349, 55 St. Rep. 1205 (1998).

*Fuel Storage Tank as Part of Pipeline — Construction in Agricultural-Open Zone Permitted:* After careful and conscientious review by the zoning coordinator and planning department, a building permit for a 35,000-barrel diesel fuel tank on property zoned agricultural-open space was properly granted. The tank could be considered part of a pipeline, which is a permitted use within such a zone. The Supreme Court found that contentions of error in interpreting the county zoning plan, which disallowed liquid fuel storage in a tank no matter how temporary or in what context in any agricultural-open zone, to be too narrow and rigid. The court held that since zoning laws and ordinances are in derogation of the common-law right to free use of private property, such ordinances must be strictly construed and must be given a fair and reasonable interpretation, by the officials assigned to interpret and apply the zoning laws, with some regard to the proposed use. Whistler v. Burlington N. RR Co., 228 M 150, 741 P2d 422, 44 St. Rep. 1415 (1987). The presumption of reasonableness of adopted regulations was applied in McElwain v. Flathead County, 248 M 231, 811 P2d 1267, 48 St. Rep. 410 (1991).

## 76-2-109. Effect on natural resources.

### Compiler's Comments

*2021 Amendments — Composite Section:* Chapter 526 in (1) at beginning substituted "Regulations adopted under this part may not regulate" for "No planning district or recommendations adopted under this part shall regulate" and at end inserted "or the complete use, development, or recovery of any mineral"; and inserted (2) concerning limitations on the construction of this part and regulations adopted under this part. Amendment effective May 14, 2021.

Chapter 533 in (1) substituted "Regulations adopted under this part may not regulate" for "No planning district or recommendations adopted under this part shall regulate" and at end inserted "or the complete use, development, or recovery of any mineral"; inserted (2) concerning the construction of this section and limitations on a resolution or rule adopted pursuant to the provisions of this part; and made minor changes in style. Amendment effective May 14, 2021.

Style changes were slightly different in the chapters. In each case, the codifier chose appropriate text.

**Case Notes**

*Composition of District:*

District Court was in error in holding that a planning and zoning district must comprise an area of 40 acres, none of which are used for grazing, horticulture, agriculture, or the growing of timber, since 76-2-101, defining a district, makes no such distinction. Doull v. Wohlschlager, 141 M 354, 377 P2d 758 (1963). (Dissenting opinion, 141 M 354, 377 P2d 758 (1963).)

The word "used" in this section is a verb used in a noun phrase as a participial adjective rather than in the past tense of the verb form. When a verb is so used it indicates a present rather than a past meaning. Doull v. Wohlschlager, 141 M 354, 377 P2d 758 (1963). (Dissenting opinion, 141 M 354, 377 P2d 758 (1963).)

*Farmlands:*

Lands used for grazing, horticulture, agriculture, or the growing of timber at the time of survey are not thereafter exempt from regulation. Doull v. Wohlschlager, 141 M 354, 377 P2d 758 (1963). (Dissenting opinion, 141 M 354, 377 P2d 758 (1963).)

The Legislature intended under this section to preserve the identity of farmlands from the encroachment of expanding towns and cities but only so long as such lands are so employed. Doull v. Wohlschlager, 141 M 354, 377 P2d 758 (1963). (Dissenting opinion, 141 M 354, 377 P2d 758 (1963).)

**Attorney General's Opinions**

*Zoning of Patented Mining Claims:* County Commissioners have the authority to zone land areas which include patented mining claims subject to the mandate that natural resources thereon be allowed to be used, developed, or recovered. 36 A.G. Op. 33 (1975).

### 76-2-110. Appeal procedure.

**Case Notes**

*Planned Unit Development — Certiorari Inappropriate:* Writ of certiorari was an inappropriate remedy for review of a zoning commission's approval of planned unit development because petitioner had an adequate appeal remedy under this section. Bridger Canyon Property Owners' Ass'n, Inc. v. Planning & Zoning Comm'n, 270 M 160, 890 P2d 1268, 52 St. Rep. 125 (1995).

*Approval of Preliminary Plat Not Appealable:* Kalispell argued that the issuing of a preliminary plat approval by the city-county planning board was illegal because it did not conform with the master zoning plan adopted by the city and county. The Supreme Court followed the precedent of its decision in Sourdough v. Bd. of County Comm'rs, 253 M 325, 833 P2d 207 (1992), holding that there is no statutory appeal process from the approval of a preliminary plat. Kalispell v. Flathead County, 260 M 258, 859 P2d 458, 50 St. Rep. 1033 (1993).

*Dismissal of Appeal of Preliminary Subdivision Plat Approval Upheld:* The Sourdough Protective Association petitioned the District Court for a writ of mandamus and moved to stay the Board of County Commissioners from further proceedings concerning a subdivision project for which it had granted preliminary approval. The Supreme Court held that the association had no basis to support its petition because the Board was not subject to the Montana Administrative Procedure Act and the Legislature had not created an appeal process for cases involving conditional approval of preliminary plats. Sourdough Protective Ass'n, Inc. v. Bd. of County Comm'rs of Gallatin County, 253 M 325, 833 P2d 207, 49 St. Rep. 563 (1992).

*Timeliness of Appeal of Planning and Zoning District — When Properly Raised:* County Commissioners adopted a planning and zoning district, and a complaint was filed in response seeking declaratory judgment, but filing was not made within the 30-day time limit of this section. This section was not raised as an affirmative defense by the landowner, intervenors, or the county officers. Some time later, at the "total hearing", the defendants filed a motion to dismiss the appeal based on the 30-day time limitations in this section. The District Court denied this motion and was upheld on appeal. The Supreme Court said the proper method of raising the question of a timely appeal is by an affirmative defense pleaded in an answer to a complaint. Mont. Wildlife Fed'n v. Sager, 190 M 247, 620 P2d 1189, 37 St. Rep. 1897 (1980).

### 76-2-113. Enforcement of zoning provisions.

**Compiler's Comments**

*Effective Date:* This section is effective October 1, 2001.

**Case Notes**

*Commission Order to Remove Partially Constructed Barn Not Unreasonable — Negative Easement Analysis Inapplicable:* A planning and zoning commission determined that a partially constructed barn that was outside the designated building site violated applicable zoning regulations and covenants and must be removed. On appeal, the Supreme Court held that the commission's decision did not constitute an abuse of discretion since it was not so lacking in fact and foundation as to be clearly unreasonable. Moreover, the Supreme Court declined to apply the negative easement analysis in Conway v. Miller, 2010 MT 103, 356 Mont. 231, 232 P.3d 390, reasoning that the express language of the sales documents, the zoning regulations, and the covenants was sufficient justification for the commission's action. Botz v. Bridger Canyon Planning & Zoning Comm'n, 2012 MT 262, 367 Mont. 47, 289 P.3d 180.

### 76-2-114. Housing fees and dedication of real property prohibited.

**Compiler's Comments**

*Effective Date:* Section 7, Ch. 249, L. 2021, provided: "[This act] is effective on passage and approval." Approved April 19, 2021.

### 76-2-117. Addition of territory adjacent to existing planning and zoning district.

**Compiler's Comments**

*Effective Date:* This section is effective October 1, 2003.

### 76-2-118. Referendum to terminate zoning district.

**Compiler's Comments**

*Effective Date:* Section 4, Ch. 401, L. 2023, provided: "[This act] is effective on passage and approval." Approved May 3, 2023.

*Applicability:* Section 5, Ch. 401, L. 2023, provided: "[This act] applies to zoning districts created pursuant to Title 76, chapter 2, part 1, on or after January 1, 2023."

## Part 2
## County Zoning

**Part Case Notes**

*Zoning Districts May Be Established by Property Owners or County Commissioners:* The plaintiff argued that the creation of a zoning district by the county commissioners was invalid because zoning districts could be created only by petition by affected landowners. The Supreme Court held that under Title 76, chapter 2, part 1, zoning districts had to be created by landowner petition but under Title 76, chapter 2, part 2, the county commission could create zoning districts, and therefore the zoning district was properly formed. Motta v. Granite County Comm'rs, 2013 MT 172, 370 Mont. 469, 304 P.3d 720.

*Mootness Not Established When Plaintiff Alleging Spot Zoning Could Be Restored to Original Position:* The transfer of property to a third party for the purpose of constructing a power plant did not render moot a plaintiff's spot zoning claim because the original parcel remained intact and the completion and operation of the power plant had not materialized. Mootness revolves around a court's ability to restore the parties to their original position. Plains Grains L.P. v. Bd. of County Commr's, 2010 MT 155, 357 Mont. 61, 238 P.3d 332.

*County Adoption of Local Vicinity Plan Not Creation of Zoning District:* The Jefferson County Board of Commissioners adopted a comprehensive master plan (now growth policy) regarding development in the county, and over a period of years following the adoption, a group of residents developed a local vicinity plan (LVP) that included proposed zoning regulations for a specific area of the county. The LVP also set goals for air and water quality, location standards for the placement of facilities dealing with hazardous waste, and guides for future development in the local vicinity consistent with the master plan (now growth policy). Although the County Commissioners stated that they adopted the LVP as an amendment to the master plan (now growth policy), the LVP was given precedence over the master plan (now growth policy) in cases of conflict between provisions in the plans. When a cement company in the local vicinity challenged the validity of the LVP, the District Court granted summary judgment for the county. On appeal, the Supreme Court reversed, holding that the LVP did not meet the statutory criteria for a zoning district and thus could not form the foundation for adoption of zoning regulations. Because the LVP related to planning, not to zoning, the county did not unlawfully establish the boundaries of a zoning district through adoption of the LVP. Ash Grove Cement Co. v. Jefferson County, 283 M 486, 943 P2d 85, 54 St. Rep. 756 (1997).

*Constitutionality of Planning and Zoning Districts — Interrelationship of Provisions:* In 1978, a group of landowners in the Gallatin Valley initiated meetings to propose a general planning and zoning district for the approval of the County Commissioners. They hired a planner to create a master plan (now growth policy) and a lawyer to do the preliminary legal work. In the meantime, owners of two parcels of land, one of 120 acres and one of 80 acres, located within the area proposed for general planning, filed petitions for creation of separate planning and zoning districts for their own land. The petitions were filed with the express purpose of escaping the application of the proposed large zoning district. A comprehensive plan (now growth policy) was never prepared for either parcel, and the County Commissioners adopted the planning and zoning districts over the objections of the county subdivision staff. Appellants challenged the creation and implementation of the two zoning districts on the ground that they were inconsistent with governing statutory standards. Appellants further claimed that the districts were defective on constitutional grounds because the zoning decisions had not been based on rational criteria and were arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare. The Supreme Court held the statutes constitutional, ruling that when the provisions of 76-2-101 and 76-2-104 are read together, as they must be, the law provides sufficient substantive and procedural guidelines. Mont. Wildlife Fed'n v. Sager, 190 M 247, 620 P2d 1189, 37 St. Rep. 1897 (1980).

**Part Attorney General's Opinions**

*Law Applicable to County Adoption of Planning and Zoning District:* A county that has adopted a comprehensive master plan (now growth policy) is not limited to zoning pursuant to this part, but may also create planning and zoning districts under Title 76, ch. 2, part 1. The planning and zoning vehicles in part 1 and this part are separate and distinct; however, part 1 constitutes the mechanism by which freeholders may initiate zoning changes and is a process that is available to freeholders whether or not their county has adopted a comprehensive master plan (now growth policy). 48 A.G. Op. 5 (1999).

**Part Law Review Articles**

North 93 Neighbors, Inc. v. Board of County Commissioners of Flathead County: A Shock to Land Use Planning and Public Comment in Montana, Weldon, 69 Mont. L. Rev. 243 (2008).

## 76-2-201. County zoning authorized.

**Compiler's Comments**

*2003 Amendments — Composite Section:* Chapter 87 inserted (2) authorizing governing body, until October 1, 2006, to adopt or revise zoning regulations consistent with a master plan adopted before October 1, 1999; and made minor changes in style. Amendment effective March 20, 2003.

Chapter 599 in (1) near middle after "growth policy" deleted "for the entire jurisdictional area". Amendment effective May 9, 2003.

*1999 Amendment:* Chapter 582 near beginning after "welfare" deleted "of the people in cities and towns and counties whose governing bodies have adopted a comprehensive development plan for jurisdictional areas pursuant to chapter 1" and after "commissioners" substituted "that has adopted a growth policy for the entire jurisdictional area pursuant to chapter 1" for "in such counties"; and made minor changes in style. Amendment effective October 1, 1999.

*Saving Clause:* Section 35, Ch. 582, L. 1999, was a saving clause.

*Transition:* Section 36, Ch. 582, L. 1999, provided: "A governing body that adopts a master plan pursuant to Title 76, chapter 1, before October 1, 1999, may adopt zoning regulations that are consistent with the master plan pursuant to Title 76, chapter 2, part 2 or 3, until October 1, 2001."

**Case Notes**

*Zoning in Substantial Compliance With Growth Policy Not Illegal Spot Zoning:* Upon receiving a citizens' petition, the Lewis and Clark County Board of Commissioners adopted a special district and zoning regulations that prohibited sand and gravel mining. Helena Sand and Gravel, Inc., (HSG) owned land within the boundaries of the special district that included both active gravel pits and land where mining had not yet occurred. HSG filed suit and argued that it had been subject to illegal spot zoning when the Board adopted the mining prohibition because it was the only landowner affected by the regulations. The Supreme Court disagreed and held that HSG's claim failed all three prongs of the test in Little v. Bd. of County Comm'rs, 193 Mont. 334, 631 P.2d 1282 (1981): the Board lawfully found the prevailing use of land within the special district to be rural residential, and the zoning regulations were in substantial compliance with the growth policy, so the zoning was not in the nature of special legislation. Because HSG could not demonstrate that its property was singled out for a use classification that was totally different from the surrounding area, it was not subject to illegal spot zoning. Helena Sand & Gravel, Inc. v. Lewis & Clark County Planning & Zoning Comm'n, 2012 MT 272, 367 Mont. 130, 290 P.3d 691. See also Hartshorne v. Whitefish, 2021 MT 116, 404 Mont. 150, 486 P.3d 693.

*Commission's Denial of Conditional Use Permit for Barn Justified — Proposed Use Considered Detrimental to Conditions in Zoning District:* After receiving considerable public comment, the planning and zoning commission denied an application to modify a conditional use permit that would have allowed the petitioners to finalize construction of a barn outside the designated building site, reasoning that the application did not meet the purposes of a planned unit development as established under the zoning regulations. Moreover, the commission determined that it was unable to find that the proposed modification would not, under the circumstances of the particular case, be detrimental to the health, safety, peace, morals, comfort, and general welfare of the zoning district. On appeal, the Supreme Court held that the commission's decision did not constitute an abuse of discretion since the modification may have been detrimental to the regulatory scheme as a whole. Botz v. Bridger Canyon Planning & Zoning Comm'n, 2012 MT 262, 367 Mont. 47, 289 P.3d 180.

*Impermissible Spot Zoning — Little Test Applied:* The Supreme Court found illegal spot zoning by applying three prongs of the Little test and determined: (1) a proposed power plant constituted a heavy industrial use and differed significantly from agricultural uses that dominated the surrounding area; (2) the area to be rezoned was relatively small both in absolute size and in terms of landowners affected; and (3) the proposed rezone smacked of special legislation that would accrue to a single landowner to the detriment of surrounding farmers and ranchers. Moreover, the fact that the power plant could have pursued a special use permit from the board of adjustment did not undermine the spot zoning claim. Plains Grains L.P. v. Bd. of County Commr's, 2010 MT 155, 357 Mont. 61, 238 P.3d 332, following Little v. Bd. of County Comm'rs, 193 M 334, 631 P2d 1282 (1981).

*County Planning Board Jurisdiction of Conditional Use Permit — Restraining Order Regarding Artificial Lighted Palm Trees Properly Granted:* Defendant applied for a conditional use permit in 2007 to allow four logo signs, including an LCD display sign, and 50 lighted artificial palm trees to be installed at defendant's casino near Deer Lodge. The Powell County planning board approved the casino and three logo signs but denied approval for the LCD sign and the palm trees. Defendant believed that the planning board did not have jurisdiction over the geographical area where the casino was located, and he installed 25 palm trees in violation of the planning board's decision. The county then sought and was granted an injunction prohibiting any more palm trees and requiring removal of the 25 trees previously installed. The District Court granted the injunction and denied a motion to amend the judgment, and defendant appealed. Although the area outside the Deer Lodge city limits was located in a planning area donut jointly administered by the city and the county, that interlocal agreement was terminated in September 2006 and the area was thereafter administered by the county planning board, so the planning board did in fact have jurisdiction over defendant's conditional use permit. The District Court correctly determined that the permit was based on the change in use from primarily a convenience store to a casino, not on the erection of lighted palm trees. Zoning regulations allowed the planning board to review signage for conformity with surrounding property use when a change in use was contemplated. The county growth policy focused on maintenance of open spaces and historic heritage that reasonably promoted the general welfare of the community. The defendant had no vested right to erect artificial palm trees without county approval, and defendant's private property rights were not infringed by denial of portions of the conditional use permit. Powell County v. Country Village, LLC, 2009 MT 294, 352 M 291, 217 P3d 508 (2009).

*Zoning Decision Not Arbitrary or Capricious in Light of Legitimate Governmental Objective:* Plaintiffs petitioned the Board of County Commissioners for a zoning change from residential to commercial. The request was denied, and plaintiffs filed an action in District Court alleging that the Board's action was arbitrary and capricious and constituted a taking by inverse condemnation. The District Court summarily dismissed the claim, and the Supreme Court affirmed as to the takings claim, but remanded on the due process claim because the Board had not issued specific findings in support of the denial of the zone change request. The Board subsequently provided the findings, and the District Court dismissed the due process claim. Plaintiffs appealed again. The Supreme Court noted its holding in Mack T. Anderson Ins. Agency, Inc. v. Belgrade, 246 M 112, 803 P2d 648 (1990), that the purpose of zoning is not to provide for the highest and best use of each lot or parcel within the zone, but rather to benefit the community generally by the sensible planning of land uses, taking into consideration the peculiar suitabilities and most appropriate use of land throughout the community. The court also pointed out that it will not sit as a super-Legislature or superzoning board. After reviewing the record, the court concluded that substantial evidence supported the finding that the zoning change would not be compatible with the majority of surrounding land uses or be in accord with the county comprehensive plan. The Board adequately considered and based its decision on the statutory factors. The decision was reasonably related to the legitimate governmental objective of promoting the public health, safety, and welfare. Thus, denial of the zoning change was not arbitrary or capricious. Further, the District Court did not err in declining to consider evidence of a subsequent 2000 zone change application because it was not relevant to the 1997 application in question. Englin v. Yellowstone County Bd. of County Comm'rs., 2002 MT 115, 310 M 1, 48 P3d 39 (2002).

*Zoning Amendment Considered Illegal Spot Zoning — Little Test:* Duck Creek Properties (Duck Creek), a Florida general partnership, owned 323 acres of undeveloped land in the Hebgen Lake Zoning District. In order to increase development options and the value of the property, Duck Creek sought a zoning change from R-10, which allowed one single-family unit for each 10 acres, to planned unit development (PUD), which permitted more diverse uses at much higher density. The resolution approving the zoning amendment was ultimately approved by the Gallatin County Board of County Commissioners, but was then challenged by two nonprofit corporations. The District Court voided the resolution as illegal spot zoning, and the Board and Duck Creek appealed to the Supreme Court. All parties agreed that Little v. Bd. of County Comm'rs, 193 M 334, 631 P2d 1282 (1981), correctly stated the applicable law, and the Supreme Court examined all three prongs of the Little test, including whether: (1) the requested use is significantly different from the prevailing use in the area; (2) the area in which the requested use is to apply is small, although not solely in physical size, including how many separate landowners will benefit from the zone classifications; and (3) the requested change is more in the nature of special legislation designed to benefit one or a few landowners at the expense of the surrounding landowners or the general public. Under the first prong, prevailing use need not exclude existing use, and the District Court determined that higher density uses under the proposed PUD would have conflicted with the predominately rural and residential character of the surrounding properties. Under the second prong, the size of the area, it was shown that the Duck Creek parcel was owned by a single entity and that the rezoning would benefit only one landowner. Under the third prong, the District Court found that the Duck Creek parcel was extremely sensitive in its importance to wildlife and wildlife habitat, and the court gave that fact significant weight in evaluating the public welfare, convenience, and necessity. State and national wildlife agencies testified regarding the deleterious effects that a rezone would have on public lands and resources, including the negative impact on habitat for elk, moose, bison, and trout, as well as on grizzly bear habitat and migration. Thus, the District Court properly concluded that the PUD zoning request represented special legislation designed to benefit one landowner at the expense of surrounding landowners and the general public. The court did not err in holding, pursuant to Little, that the proposed Duck Creek parcel was illegal spot zoning. Greater Yellowstone Coalition, Inc. v. Bd. of County Comm'rs of Gallatin County, 2001 MT 99, 305 M 232, 25 P3d 168 (2001). The Little test for spot zoning was applied in N. 93 Neighbors, Inc. v. Flathead County Bd. of County Comm'rs, 2006 MT 132, 332 M 327, 137 P3d 557 (2006), Lake County First v. Polson City Council, 2009 MT 322, 352 M 489, 218 P3d 816 (2009), and Plains Grains L.P. v. Bd. of County Commr's, 2010 MT 155, 357 Mont. 61, 238 P.3d 332.

*Stand-Alone Local Vicinity Plan Violative of Master Plan (now Growth Policy) — Local Vicinity Plan as Amendment to or Partial Repeal of Master Plan (now Growth Policy) Improper:* It was improper for a county to adopt a local vicinity plan (LVP) that regulated development in a specific area of the county when the LVP violated the mandate of the county master plan (now growth policy) authorizing an LVP only to the extent that it was consistent with the master plan (now growth policy). An LVP may not stand alone as the preeminent plan for a particular area when the LVP is inconsistent with the county master plan (now growth policy), nor may an LVP be adopted as an amendment to or revision or repeal of the master plan (now growth policy) in a manner that subordinates the goals and objectives of the master plan (now growth policy) as the preeminent county planning device. Ash Grove Cement Co. v. Jefferson County, 283 M 486, 943 P2d 85, 54 St. Rep. 756 (1997), distinguished in Helena Sand & Gravel, Inc. v. Lewis & Clark County Planning & Zoning Comm'n, 2012 MT 272, 367 Mont. 130, 290 P.3d 691, in which the creation of a special zoning district that included specific zoning requirements within an area already defined by the growth policy and did not amend the growth policy itself was not improper.

*Consistency Between Comprehensive Plan (now Growth Policy), Zoning Ordinances and Other Planning Documents — Validity of Development Approvals:* Zoning ordinances and other planning documents adopted after adoption of a comprehensive (master) plan (now growth policy) must be consistent with the comprehensive plan (now growth policy) and with each other, and when all three were inconsistent with each other, the zoning commission exceeded its jurisdiction and authority when it approved a planned unit development. It was unsatisfactory to base the decision to approve the development on planning documents that were inherently inconsistent and unreliable. Bridger Canyon Property Owners' Ass'n, Inc. v. Planning & Zoning Comm'n, 270 M 160, 890 P2d 1268, 52 St. Rep. 125 (1995), followed in Ash Grove Cement Co. v. Jefferson County, 283 M 486, 943 P2d 85, 54 St. Rep. 756 (1997), and N. 93 Neighbors, Inc. v. Flathead County Bd. of County Comm'rs, 2006 MT 132, 332 M 327, 137 P3d 557 (2006).

*Countywide Zoning Statutes Inapplicable to Rural Zoning District Statutes:* Appellant contended that this section required establishment of an actual jurisdictional area prior to adoption of a zoning district pursuant to 76-2-101. The Supreme Court held that procedural requirements for zoning jurisdictional areas under the countywide zoning statutes had no application to the requirements for the creation of zoning districts under the rural zoning laws. Petty v. Flathead County Bd. of County Comm'rs, 231 M 428, 754 P2d 496, 45 St. Rep. 737 (1988).

*Jurisdictional Area:* The jurisdictional area referred to in the introductory sentence of this section is the jurisdictional area of the planning board, not of the local government. Martz v. Butte-Silver Bow, 196 M 348, 641 P2d 426, 39 St. Rep. 149 (1982).

*"Comprehensive Development Plan" (now Growth Policy) as Master Plan (now Growth Policy):* The term "comprehensive development plan [now growth policy]" contained in this section refers to the planning and organizational statutes (76-1-101 through 76-2-112) by which a master plan (now growth policy) is derived. Little v. County Comm'rs, 193 M 334, 631 P2d 1282, 38 St. Rep. 1124 (1981).

*Master Plan (now Growth Policy) Required to Exercise Zoning Authority:*

Without a master plan (now growth policy) in effect and without a jurisdictional area defined pursuant to the adoption of a master plan (now growth policy), a county may exercise no zoning authority other than on a temporary interim emergency basis as provided in 76-2-206. Little v. County Comm'rs, 193 M 334, 631 P2d 1282, 38 St. Rep. 1124 (1981).

The clear and unambiguous language of this section requires that a county adopt a comprehensive development plan (now growth policy) for an entire jurisdictional area. Only after the adoption of such a plan may a county adopt zoning regulations. Allen v. Flathead County, 184 M 58, 601 P2d 399, 36 St. Rep. 1839 (1979).

**Attorney General's Opinions**

*Growth Policy Required for Entire Jurisdictional Area:* Under 76-1-601 and this section, adoption of a growth policy is required for the entire jurisdictional area. In the case of a city-county planning board with joint countywide jurisdiction under 76-1-504, a growth policy must be adopted for the entire county before zoning may proceed. 49 A.G. Op. 23 (2002).

*Municipality's Duty in Absence of Board or Commission:* Neither the creation of a planning board nor creation of a zoning commission is mandated; and if neither is created, the local governing unit must resolve zoning issues under the general authority granted by this section, subject to the requirement that a comprehensive plan (now growth policy) has been adopted. 39 A.G. Op. 75 (1982).

*Zoning of Patented Mining Claims:* County Commissioners have the authority to zone land areas which include patented mining claims subject to the mandate that natural resources thereon be allowed to be used, developed, or recovered. 36 A.G. Op. 33 (1975).

## 76-2-202. Establishment of zoning districts — regulations.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 1, Ch. 178, L. 2023. Amendment effective October 1, 2023.

*2009 Amendment:* Chapter 446 in (1)(a) in first sentence inserted reference to 76-2-201 and at end substituted "establish zoning regulations for a part or all of the jurisdictional area or divide the county into zoning districts with zoning regulations that are considered best suited to carry out the purposes of this part" for "establish zoning districts and zoning regulations for all or part of the jurisdictional area", and inserted second sentence allowing board to regulate buildings or structures or use of land through zoning regulations; in (1)(b) in two places inserted reference to adoption of zoning regulations, and reduced time for bringing challenge from 5 years to 6 months; deleted former (2) that read: "(2) Within some zoning districts, it is lawful and within others it is unlawful to erect, construct, alter, or maintain certain buildings or to carry on certain trades, industries, or callings"; deleted former (4) that read: "(4) Within each district the height and bulk of future buildings and the area of the yards, courts, and other open spaces and the future uses of the land or buildings must be limited and future building setback lines must be established"; in (3) at beginning deleted "All regulations must be uniform for each class or kind of buildings throughout a district, but"; and made minor changes in style. Amendment effective May 5, 2009.

*2005 Amendments — Composite Section — Code Commissioner Correction:* Chapter 542 in (6) at end of second sentence substituted "61-1-101" for "61-1-501". Amendment effective January 1, 2006.

Chapter 596 in (6) at end substituted "15-1-101" for "61-1-501". Amendment effective January 1, 2006.

The code commissioner codified the Ch. 596 amendment to provide consistency in style in the definitions in 61-1-101.

*1997 Amendment:* Chapter 42 in (1)(b), near middle after "commenced", deleted "by October 1, 1994, or" and at end deleted "if the district was created after October 1, 1989"; in (6), near end, substituted "mobile home or housetrailer, as defined in 61-1-501" for "mobile home, as defined in 61-4-309, or a housetrailer, as defined in 61-1-501"; and made minor changes in style. Amendment effective March 12, 1997.

*1993 Amendment:* Chapter 505 inserted (3) relating to rebuttable presumption concerning manufactured housing within residential zoning district; inserted (6) defining manufactured housing; inserted (7) prohibiting section being construed to limit conditions imposed in historic districts, local design review standards, existing covenants, or ability to enter into covenants; and made minor changes in style.

*Preamble:* The preamble attached to Ch. 505, L. 1993, provided: "WHEREAS, certain zoning codes in Montana prohibit the placement of manufactured housing within districts where the construction of comparable site-built housing is permitted; and

WHEREAS, the reasons for treating manufactured housing differently from site-built housing have, because of significant improvements in the quality and regulation of manufactured housing, lost whatever historical justification they may once have had.

THEREFORE, the Legislature of the State of Montana finds it desirable and appropriate to discourage discrimination within zoning districts between manufactured and site-built housing."

**Case Notes**

*Statute of Limitations — Trigger:* A county zoning resolution provided that a zoning area would revert to the original zoning classification if a developer failed to submit a subdivision application within a certain period of time. This automatic reversion, rather than a termination letter from the county, triggered the 6-month statute of limitations. Grant Creek Heights, Inc. v. Missoula County, 2012 MT 177, 366 Mont. 44, 285 P.3d 1046.

*Amendment to County Zoning Regulations Not Subject to Statute of Limitations Defense:* The 6-month statute of limitations under this section to challenge the creation of a zoning district or adoption of zoning regulations was not applicable to an amendment of county zoning regulations that did not relate to the parcel rezone that was challenged. Plains Grains L.P. v. Bd. of County Commr's, 2010 MT 155, 357 Mont. 61, 238 P.3d 332.

*Manufactured Home Not Violative of Covenant That Prohibited Mobile Homes Unless Considered Prebuilt Home on Permanent Foundation:* Gagnon purchased a manufactured home and placed it on a permanent foundation in plaintiff's subdivision. One part of a subdivision covenant defined a mobile home in a manner that included a manufactured home, while a second part of the covenant generally prohibited placement of mobile homes in the subdivision but did not prevent prebuilt homes on permanent foundations if the structure met federal housing specifications as nonmobile, permanent, residential homes. Gagnon conceded that the manufactured home was a mobile home pursuant to Fox Farm Estates Landowners Ass'n v. Kreisch, 285 M 264, 947 P2d 79 (1997). However, in this case, it was not the type of home that was at issue but rather the language of the covenant. To prohibit Gagnon's home by applying only the first part of the covenant would have rendered the second part meaningless. The Supreme Court interpreted the covenant in its entirety and held that Gagnon's manufactured home was allowed in the subdivision. Grassy Mtn. Ranch Owners' Ass'n v. Gagnon, 2004 MT 245, 323 M 19, 98 P3d 307 (2004).

*Use of Property Substantially Different From Preexisting Nonconforming Use — Conditions Placed on Use of Property Not Erroneous:* When the property at issue was zoned in 1991, it was a dairy farm with a shop that was used to repair farm equipment that was classified as suburban agricultural. Russell later purchased part of the property and used it to operate an equipment repair business, which included the general storage of heavy equipment. The county zoning administrator received complaints of Russell's use of the property for industrial purposes and issued a determination that Russell's use was nonconforming under the zoning regulations. The

District Court limited Russell's use with respect to the type of equipment repaired, the number of pieces of equipment stored on the property, and the number of hours operated each week to the manner and extent of the prior use and also imposed a screening requirement to shield vehicles from public view. Russell appealed, but the Supreme Court affirmed. The court initially noted that Russell's complaint was time-barred because it was filed more than 5 years after creation of the zoning district. (See 2009 amendment.) The court then went on to find that the property was included in the district when it was created and that by Russell's own admission, use of the property was substantially different in both manner and extent from the preexisting nonconforming use, so a continuation of a nonconforming use was not warranted pursuant to 76-2-208. In imposing conditions on the use of the property, the District Court was not legislating limitations on the property, but rather enforcing the zoning ordinance's requirement that nonconforming uses be continued in the same manner as at the time that the zoning occurred. Russell v. Flathead County, 2003 MT 8, 314 M 26, 67 P3d 183 (2003), distinguishing Kensmoe v. Missoula, 156 M 401, 480 P2d 835 (1971).

*Existing Telecommunications Tower Not Inclusive of Tower Not Yet Built:* Mesa Communications Group (Mesa) sought a permit from Yellowstone County to construct a telecommunications tower within the county's zoning jurisdiction. County regulations required that all commercial telecommunications towers over 50 feet high be located at least 1 mile from any other communications tower. Mesa's application was denied because a 100-foot tower had been built and a 300-foot tower had been approved but not yet built within 1 mile of the tower proposed by Mesa. The regulations provided for waiver of the 1-mile restriction by the Board of County Commissioners upon special review if an applicant established that an existing tower could not accommodate the applicant's proposed antenna. Mesa requested special review and presented evidence that the proposed antenna could not be accommodated on the existing 100-foot tower, but the application was nevertheless denied because Mesa's proposed tower was still within 1 mile of the approved but as yet unconstructed 300-foot tower. Mesa sought relief from application of the 1-mile restriction in District Court. The court granted summary judgment for Mesa, concluding that the restriction applied only to towers that had been constructed, but not to unconstructed towers approved for construction. The county appealed, but the Supreme Court affirmed. The term "existing tower" as used in the regulation was neither ambiguous nor imprecise and did not include a tower that was not yet built or even begun. Mesa Communications Group, LLC v. Yellowstone County, 2002 MT 73, 309 M 233, 45 P3d 37 (2002).

*Mobile Homes Prohibited by Restrictive Covenant — Manufactured Home Towed to Site Construed to Be "Mobile Home":* The Kreisches purchased a manufactured home and had it towed to the Fox Farm subdivision outside Great Falls. Restrictive covenants of the subdivision provided that "no structure of a temporary character, mobile home, [or] trailer" could be used on the property in the subdivision. The Supreme Court, citing Newman v. Wittmer, 277 M 1, 917 P2d 926 (1996), and Toavs v. Sayre, 281 M 243, 934 P2d 165 (1997), held that the Kreisches' home was a "mobile home", as that term is used in its ordinary sense, because the home: (1) was manufactured away from the lot that it was intended to be placed on; (2) was built with features allowing it to be towed; and (3) would be issued a certificate of ownership by the Department of Justice. The Supreme Court noted that the District Court relied on this section, which had not been cited in either Newman or Toavs, and that, considering this section and the fact that the home would be placed on a permanent foundation, the District Court determined that the home had been changed in character and was therefore not a "mobile home". This section was not determinative of the issue, the Supreme Court held, and should be just one of the statutes considered in determining whether the Kreisches' home was a "mobile home". The Supreme Court relied upon the reasoning in Timmerman v. Gabriel, 155 M 294, 470 P2d 528 (1970), and held that it is the nature of the construction of a movable home and not its subsequent mobility after placement on its site that is determinative. Because the home was designed and built offsite, to be transported to and installed on a different site, the Supreme Court determined the home to be a "mobile home" within the meaning of the restrictive covenant. Fox Farm Estates Landowners Ass'n v. Kreisch, 285 M 264, 947 P2d 79, 54 St. Rep. 1142 (1997).

**Attorney General's Opinions**

*What Electors Considered Qualified Voters for County Zoning Initiatives:* A zoning regulation is subject to citizen initiative, and nothing in county zoning law limits qualified electors to only voters living in the area affected by the zoning regulations. Thus, in the case of county zoning regulation initiatives effective in all unincorporated areas of a county, all county residents are considered qualified voters, including those residing within incorporated areas of the county. 52 A.G. Op. 6 (2008).

*Funding for City-County Zoning Districts:* A city-county zoning district may not receive funding from the 1-mill levy provision of 76-2-102(3), nor may it receive money from other county funds. 33 A.G. Op. 34 (1970).

**76-2-203. Criteria and guidelines for zoning regulations.**

**Compiler's Comments**

*2021 Amendment:* Chapter 249 inserted (4) concerning prohibition on zoning regulations requiring a fee or dedication of real property for the purpose of providing housing; and inserted (5) concerning the meaning of a dedication of real property. Amendment effective April 19, 2021.

*2009 Amendment:* Chapter 446 in (1)(a) after "policy" deleted "or a master plan, as provided for in 76-2-201(2)"; deleted former (1)(b)(i) that read: "(i) lessen congestion in the streets"; in (1)(b)(i) after "fire" deleted "panic"; in (1)(b)(ii) inserted "public safety"; deleted former (1)(b)(iv) through (1)(b)(vi) that read: "(iv) provide adequate light and air;

(v) prevent the overcrowding of land;

(vi) avoid undue concentration of population"; in (2) at beginning deleted "Zoning regulations must be made with reasonable consideration, among other things, to", inserted introductory clause, and inserted (2)(a) through (2)(c) related to light and air, transportation systems, and urban growth; in (3) at end substituted "nearby municipalities" for "the municipality within the jurisdictional area"; and made minor changes in style. Amendment effective May 5, 2009.

*2003 Amendment:* Chapter 87 at end of (1)(a) inserted "or a master plan, as provided for in 76-2-201(2)"; and made minor changes in style. Amendment effective March 20, 2003.

*1999 Amendment:* Chapter 582 in (1) substituted "the growth policy" for "a comprehensive development plan"; and made minor changes in style. Amendment effective October 1, 1999.

*Saving Clause:* Section 35, Ch. 582, L. 1999, was a saving clause.

*Transition:* Section 36, Ch. 582, L. 1999, provided: "A governing body that adopts a master plan pursuant to Title 76, chapter 1, before October 1, 1999, may adopt zoning regulations that are consistent with the master plan pursuant to Title 76, chapter 2, part 2 or 3, until October 1, 2001."

**Case Notes**

*County Zoning Map Amendment — Board Abused Discretion — Conflict Between County and City Growth Plan Not Addressed — Traffic Concerns Not Addressed:* The District Court did not err by holding that a county's zoning map amendment was invalid for failing to comply with statutory requirements. In view of clear conflict between the Board of County Commissioners of Flathead County's proposed zoning map amendment and the stated growth purposes expressed in the city of Kalispell's growth plan for property that was immediately adjacent to the city, it was incumbent on the Board to more broadly consider this issue and assess the impact of the proposed zoning map amendment on the city's growth plans. The proposed application of the mitigated commercial zone for use on major highways in the county would have permitted banks, retail shops, and other businesses along the highway, clearly impacting traffic, posing a potential for further strip development, and potentially conflicting with planned growth in close proximity to the city. However, the Board's consideration only cursorily addressed commercial growth goals in the growth policy, did not address potential conflicts over disfavored development, only briefly addressed traffic and traffic safety concerns, and failed to assess the possible conflict with planned city growth. Although the Board did not need to address every aspect of the growth policy in detail, it was required to give sufficient consideration to the policies that raise pertinent and significant concerns. For these reasons, the Supreme Court concluded that the Board abused its discretion in implementing a zoning map amendment, and the District Court's ruling invalidating the zoning map amendment was affirmed. Citizens for a Better Flathead v. Flathead County Bd. of County Comm'rs, 2016 MT 325, 385 Mont. 505, 386 P.3d 567.

*Text Amendments and Floating Zones Allowed — Legal Test for Floating Zones — Public Allowed to Be Heard:* The District Court did not err by failing to invalidate a text amendment based on an alleged violation of statutory obligations and state and county public participation requirements. The Board of County Commissioners of Flathead County enacted a zoning regulation that created a commercial zoning classification within the county zoning regulations, containing certain specifics regarding location, lot size, use, setback, building height, and others. The text amendment made no actual changes on the ground to any property, or to the zoning map, and created a classic floating zone. Section 76-2-203 provides the substantive requirements for all zoning regulations enacted by a county without distinguishing between text and map amendments. These provisions do not prohibit float zoning or otherwise require all zoning ordinances to apply to a particular property or location when enacted. Rather, the statutes require that certain considerations and analyses be undertaken and that zoning regulations be in accordance with the county's growth policy. In a legal challenge to a county text amendment or floating zone that makes no on-the-ground changes, the question is whether the new zoning category could satisfy statutory requirements anywhere in the county. The Supreme Court held that because locations existed in the county where the zoning regulation would satisfy those requirements, the zoning regulation was not invalid on its face. As applied, the Supreme Court also determined that the Board satisfied the statutory obligation to permit the public to be heard and, further, satisfied the obligations of the county public participation ordinance by summarizing the concerns raised and explaining its position in light of those concerns, and thus the text amendment was not invalid. Citizens for a Better Flathead v. Flathead County Bd. of County Comm'rs, 2016 MT 325, 385 Mont. 505, 386 P.3d 567.

*Proper Consideration of Statutory Criteria in Adopting Zoning Amendments:* A Board of County Commissioners must make zoning amendments in accordance with the criteria in this section and follow statutory procedures, including allowing a protest period, consideration of public comments, and holding a public hearing. In reviewing a zoning amendment, the Supreme Court decides whether the information upon which a Board based its decision is so lacking in fact and foundation that it is clearly unreasonable and constitutes an abuse of discretion. In this case, the Board followed the proper statutory and regulatory procedure for adopting zoning amendments and had sufficient evidence before it to make an informed decision. Absent an abuse of discretion, the zoning amendment was affirmed. N. 93 Neighbors, Inc. v. Flathead County Bd. of County Comm'rs, 2006 MT 132, 332 M 327, 137 P3d 557 (2006), following Lowe v. Missoula, 165 M 38, 525 P2d 551 (1974), and Schanz v. Billings, 182 M 328, 597 P2d 67 (1979).

*Zoning Decision Not Arbitrary or Capricious in Light of Legitimate Governmental Objective:* Plaintiffs petitioned the Board of County Commissioners for a zoning change from residential to commercial. The request was denied, and plaintiffs filed an action in District Court alleging that the Board's action was arbitrary and capricious and constituted a taking by inverse condemnation. The District Court summarily dismissed the claim, and the Supreme Court affirmed as to the takings claim, but remanded on the due process claim because the Board had not issued specific findings in support of the denial of the zone change request. The Board subsequently provided the findings, and the District Court dismissed the due process claim. Plaintiffs appealed again. The Supreme Court noted its holding in Mack T. Anderson Ins. Agency, Inc. v. Belgrade, 246 M 112, 803 P2d 648 (1990), that the purpose of zoning is not to provide for the highest and best use of each lot or parcel within the zone, but rather to benefit the community generally by the sensible planning of land uses, taking into consideration the peculiar suitabilities and most appropriate use of land throughout the community. The court also pointed out that it will not sit as a super-Legislature or superzoning board. After reviewing the record, the court concluded that substantial evidence supported the finding that the zoning change would not be compatible with the majority of surrounding land uses or be in accord with the county comprehensive plan. The Board adequately considered and based its decision on the statutory factors. The decision was reasonably related to the legitimate governmental objective of promoting the public health, safety, and welfare. Thus, denial of the zoning change was not arbitrary or capricious. Further, the District Court did not err in declining to consider evidence of a subsequent 2000 zone change application because it was not relevant to the 1997 application in question. Englin v. Yellowstone County Bd. of County Comm'rs., 2002 MT 115, 310 M 1, 48 P3d 39 (2002).

*Stand-Alone Local Vicinity Plan Violative of Master Plan (now Growth Policy) — Local Vicinity Plan as Amendment to or Partial Repeal of Master Plan (now Growth Policy) Improper:* It was improper for a county to adopt a local vicinity plan (LVP) that regulated development in a specific area of the county when the LVP violated the mandate of the county master plan (now growth policy) authorizing an LVP only to the extent that it was consistent with the master plan (now growth policy). An LVP may not stand alone as the preeminent plan for a particular area when the LVP is inconsistent with the county master plan (now growth policy), nor may an LVP be adopted as an amendment to or revision or repeal of the master plan (now growth policy) in a manner that subordinates the goals and objectives of the master plan (now growth policy) as the preeminent county planning device. Ash Grove Cement Co. v. Jefferson County, 283 M 486, 943 P2d 85, 54 St. Rep. 756 (1997), distinguished in Helena Sand & Gravel, Inc. v. Lewis & Clark County Planning & Zoning Comm'n, 2012 MT 272, 367 Mont. 130, 290 P.3d 691, in which the creation of a special zoning district that included specific zoning requirements within an area already defined by the growth policy and did not amend the growth policy itself was not improper.

*Consistency Between Comprehensive Plan (now Growth Policy), Zoning Ordinances, and Other Planning Documents — Validity of Development Approvals:* Zoning ordinances and other planning documents adopted after adoption of a comprehensive (master) plan (now growth policy) must be consistent with the comprehensive plan (now growth policy) and with each other, and when all three were inconsistent with each other, the zoning commission exceeded its jurisdiction and authority when it approved a planned unit development. It was unsatisfactory to base the decision to approve the development on planning documents that were inherently inconsistent and unreliable. Bridger Canyon Property Owners' Ass'n, Inc. v. Planning & Zoning Comm'n, 270 M 160, 890 P2d 1268, 52 St. Rep. 125 (1995), followed in Ash Grove Cement Co. v. Jefferson County, 283 M 486, 943 P2d 85, 54 St. Rep. 756 (1997), and N. 93 Neighbors, Inc. v. Flathead County Bd. of County Comm'rs, 2006 MT 132, 332 M 327, 137 P3d 557 (2006).

*Application:* This section, requiring adherence to a comprehensive development plan (now growth policy) in adopting zoning regulations, does not apply to action taken by Planning and Zoning Commission under Title 76, ch. 2, part 1, in adopting development pattern for the planning and zoning district. Mont. Wildlife Fed'n v. Sager, 190 M 247, 620 P2d 1189, 37 St. Rep. 1897 (1980).

*When Comprehensive Plan (now Growth Policy) Not Necessary:* A countywide comprehensive plan (now growth policy) is not necessary prior to adoption of a county planning and zoning district, and, further, in making and adopting a development district it is not necessary that there be created a countywide development pattern. Doull v. Wohlschlager, 141 M 354, 377 P2d 758 (1963), explained in Mont. Wildlife Fed'n v. Sager, 190 M 247, 620 P2d 1189, 37 St. Rep. 1897 (1980).

**Attorney General's Opinions**

*No Legal Effect of Comprehensive Plan Adopted Before October 1, 1999, as Basis for New Zoning Regulations:* Pursuant to the transition and applicability language in Senate Bill No. 97 (1999) (Ch. 582, L. 1999), a comprehensive plan adopted prior to October 1, 1999, has no legal effect as the basis for new local zoning or subdivision regulations unless it meets the requirements of a growth policy under 76-1-601. Zoning regulations that were adopted pursuant to master plans, comprehensive plans, and comprehensive development plans prior to October 1, 2001, are enforceable, but county and municipal zoning regulations may not be adopted or substantively revised after October 1, 2001, unless a growth policy is adopted for the entire area of the planning board having jurisdiction. Application of previously adopted zoning regulations does not constitute the adoption of zoning regulations, so rezoning is not precluded, and routine minor revisions that do not have any impact on growth policy may be made. 49 A.G. Op. 23 (2002).

## 76-2-204. Role of planning boards.

**Case Notes**

*Zoning Decision Not Arbitrary or Capricious in Light of Legitimate Governmental Objective:* Plaintiffs petitioned the Board of County Commissioners for a zoning change from residential to commercial. The request was denied, and plaintiffs filed an action in District Court alleging that the Board's action was arbitrary and capricious and constituted a taking by inverse condemnation. The District Court summarily dismissed the claim, and the Supreme Court affirmed as to the takings claim, but remanded on the due process claim because the Board had not issued specific findings in support of the denial of the zone change request. The Board subsequently provided the findings, and the District Court dismissed the due process claim. Plaintiffs appealed again. The Supreme Court noted its holding in Mack T. Anderson Ins. Agency, Inc. v. Belgrade, 246 M 112, 803 P2d 648 (1990), that the purpose of zoning is not to provide for the highest and best use of each lot or parcel within the zone, but rather to benefit the community generally by the sensible planning of land uses, taking into consideration the peculiar suitabilities and most appropriate use of land throughout the community. The court also pointed out that it will not sit as a super-Legislature or superzoning board. After reviewing the record, the court concluded that substantial evidence supported the finding that the zoning change would not be compatible with the majority of surrounding land uses or be in accord with the county comprehensive plan. The Board adequately considered and based its decision on the statutory factors. The decision was reasonably related to the legitimate governmental objective of promoting the public health, safety, and welfare. Thus, denial of the zoning change was not arbitrary or capricious. Further, the District Court did not err in declining to consider evidence of a subsequent 2000 zone change application because it was not relevant to the 1997 application in question. Englin v. Yellowstone County Bd. of County Comm'rs., 2002 MT 115, 310 M 1, 48 P3d 39 (2002).

*Failure to Involve Planning Board — Action Invalid:* The Flathead County Commissioners adopted a resolution of intent to zone a tract of land as commercial without demanding, requesting, or reviewing written recommendations from the City-County Planning Board. Even though the statute provides that the recommendations are "advisory only", the statute clearly mandates that the Planning Board's recommendation be considered. Failure of the Commissioners to involve the Planning Board renders the Commissioners' action invalid. Little v. County Comm'rs, 193 M 334, 631 P2d 1282, 38 St. Rep. 1124 (1981).

### 76-2-205. Procedure for adoption of regulations and boundaries.

**Compiler's Comments**

*2021 Amendment:* Chapter 380 in (5)(d) near middle substituted "written comments on" for "written protests to"; in (6) in first sentence substituted "comment period" for "protest period" and deleted former last sentence (see 2021 Session Law for former text); and made minor changes in style. Amendment effective May 3, 2021.

*Applicability:* Section 6, Ch. 380, L. 2021, provided: "[Sections 1 and 2] apply to zoning districts created pursuant to Title 76, chapter 2, part 2, on or after January 1, 2021."

*2009 Amendment:* Chapter 446 in (1) in introductory clause after "district" deleted "must be published once a week for 2 weeks in a newspaper of general circulation within the county. The notice"; inserted (1)(b) requiring posting of notice for 45 days; inserted (1)(c) requiring publication for 2 weeks; in (6) in two places substituted "real property owners" for "freeholders"; and made minor changes in style. Amendment effective May 5, 2009.

*1995 Amendment:* Chapter 591 in (6), in second sentence after "roll", inserted "or if the freeholders representing 50% of the titled property ownership whose property is taxed for agricultural purposes under 15-7-202 or whose property is taxed as forest land under Title 15, chapter 44, part 1"; and made minor changes in style.

**Case Notes**

*Text Amendments and Floating Zones Allowed — Legal Test for Floating Zones — Public Allowed to Be Heard:* The District Court did not err by failing to invalidate a text amendment based on an alleged violation of statutory obligations and state and county public participation requirements. The Board of County Commissioners of Flathead County enacted a zoning regulation that created a commercial zoning classification within the county zoning regulations, containing certain specifics regarding location, lot size, use, setback, building height, and others. The text amendment made no actual changes on the ground to any property, or to the zoning map, and created a classic floating zone. Section 76-2-203 provides the substantive requirements for all zoning regulations enacted by a county without distinguishing between text and map amendments. These provisions do not prohibit float zoning or otherwise require all zoning ordinances to apply to a particular property or location when enacted. Rather, the statutes require that certain considerations and analyses be undertaken and that zoning regulations be in accordance with the county's growth policy. In a legal challenge to a county text amendment or floating zone that makes no on-the-ground changes, the question is whether the new zoning category could satisfy statutory requirements anywhere in the county. The Supreme Court held that because locations existed in the county where the zoning regulation would satisfy those requirements, the zoning regulation was not invalid on its face. As applied, the Supreme Court also determined that the Board satisfied the statutory obligation to permit the public to be heard and, further, satisfied the obligations of the county public participation ordinance by summarizing the concerns raised and explaining its position in light of those concerns, and thus the text amendment was not invalid. Citizens for a Better Flathead v. Flathead County Bd. of County Comm'rs, 2016 MT 325, 385 Mont. 505, 386 P.3d 567.

*Protest Provision for Agricultural and Forest Property Owners Unconstitutional Delegation of Legislative Authority:* Following notice of Missoula County's intent to establish a special zoning district that would have prohibited sand and gravel operations in the area, five landowners who owned more than 50% of the agricultural and forest land within the proposed district filed a written protest against the district. The plaintiff initiated an action against Missoula County and the District Court granted summary judgment in favor of the plaintiff on the basis that the protest provision violated fundamental voting and equal protection rights and constituted an unlawful delegation of legislative power. The Supreme Court affirmed on the basis that the protest provision for agricultural and forest land unconstitutionally provided no standards or guidelines to inform the exercise of the delegated power and because it contained no mechanism for the county to override the protest for reasons of public health or safety. Additionally, the District Court did not err when it ruled that the protest provision at issue was severable from the remainder of the statute. Williams v. Missoula County, 2013 MT 243, 371 Mont. 356, 308 P.3d 88.

*Challenge to Protest Provision Mooted by County Inaction:* Individuals residing within the boundary of a proposed zoning district sought an injunction against Gallatin County, claiming the protest provision of 76-2-205 was unconstitutional. While the parties awaited the injunction hearing, the 30-day postprotest deadline passed without the county taking action. An intervening party moved for summary judgment, which the District Court granted on the basis of mootness because the county had not acted within the statutory deadlines. The Supreme Court affirmed and declined to consider the constitutional challenge under the "capable of repetition" exception. The challenge never ripened because the zoning district did not fail due to the protest provision, but failed because of county inaction. Gateway Opencut Min. Action Group v. Bd. of County Comm'rs, 2011 MT 198, 361 Mont. 398, 260 P.3d 133.

*Sufficient Notice of Interim Zoning Hearing:* Plaintiff contended that because the public notice requirements applicable to standard zoning were not applied to a hearing on interim zoning, the interim zoning measures were void. The Supreme Court noted that the hearing was widely publicized and that plaintiff in fact attended the meeting and offered comments. Because plaintiff received actual notice and had the opportunity to be heard, constitutional public notice requirements were essentially satisfied. The court also noted that the law has long recognized that actual attendance and participation may constitute a waiver of alleged deficiencies of notice. Therefore, any error in the public notice of the interim zoning hearing was harmless. Liberty Cove, Inc. v. Missoula County, 2009 MT 377, 353 M 286, 220 P3d 617 (2009). See also Knode v. Williamson, 84 US 586 (1873).

*Failure to Substantially Comply With Notice Requirements — Permanent Zoning Regulations Properly Voided:* Plaintiff asserted that a Board of County Commissioners substantially complied with statutory notice requirements by publishing only one notice of intent to adopt permanent zoning regulations. The District Court disagreed and voided the regulations, which were subsequently adopted as interim zoning regulations. Plaintiff appealed, but the Supreme Court affirmed. Section 76-2-205 requires published notice not once but twice during 2 consecutive weeks. Newspaper articles and opinion pieces published during the period in question pertained to the proposed regulations but did not meet the statutory requirements for publication of notice by the Board. Fasbender v. Lewis & Clark Bd. of County Commr's, 2009 MT 323, 352 M 505, 218 P3d 69 (2009).

*Statutory Notice and Hearing Procedures Satisfied — Interim Zoning Regulations Properly Adopted:* A Board of County Commissioners twice published separate notices of proposed interim zoning regulations and then held a public hearing on the regulations. Due process required nothing more. Therefore, the Board complied with affected landowners' fundamental right to notice and the opportunity to be heard in adopting interim zoning regulations. Fasbender v. Lewis & Clark Bd. of County Commr's, 2009 MT 323, 352 M 505, 218 P3d 69 (2009), distinguishing Bryant Dev. Ass'n v. Dagel, 166 M 252, 531 P2d 1320 (1975), and State ex rel. Christian, Spring, Sielbach & Assoc. v. Miller, 169 M 242, 545 P2d 660 (1976).

*Proper Consideration of Statutory Criteria in Adopting Zoning Amendments:* A Board of County Commissioners must make zoning amendments in accordance with the criteria in 76-2-203 and follow statutory procedures, including allowing a protest period, consideration of public comments, and holding a public hearing. In reviewing a zoning amendment, the Supreme Court decides whether the information upon which a Board based its decision is so lacking in fact and foundation that it is clearly unreasonable and constitutes an abuse of discretion. In this case, the Board followed the proper statutory and regulatory procedure for adopting zoning amendments and had sufficient evidence before it to make an informed decision. Absent an abuse of discretion, the zoning amendment was affirmed. N. 93 Neighbors, Inc. v. Flathead County Bd. of County Comm'rs, 2006 MT 132, 332 M 327, 137 P3d 557 (2006), following Lowe v. Missoula, 165 M 38, 525 P2d 551 (1974), and Schanz v. Billings, 182 M 328, 597 P2d 67 (1979).

*Failure to Involve Planning Board — Action Invalid:* The Flathead County Commissioners adopted a resolution of intent to zone a tract of land as commercial without demanding, requesting, or reviewing written recommendations from the City-County Planning Board. Even though the statute provides that the recommendations are "advisory only", the statute clearly mandates that the Planning Board's recommendation be considered. Failure of the Commissioners to involve the Planning Board renders the Commissioners' action invalid. Little v. County Comm'rs, 193 M 334, 631 P2d 1282, 38 St. Rep. 1124 (1981).

*Amendments to Zoning Regulations:* Subsection (4) applies not only to applications to create zoning districts but also to amendments of zoning regulations. Dover Ranch v. Yellowstone County, 187 M 276, 609 P2d 711, 37 St. Rep. 727 (1980).

*"May" Construed:* The District Court set aside an amended resolution of the Board of Yellowstone County Commissioners which granted an application for a zoning change on the grounds that the county did not comply with subsections (4), (5), and (6) of this section. The county

argues that the use of the word "may" in subsection (4) makes the requirements of subsections (4), (5), and (6) discretionary. The Supreme Court found that "may" as used in subsection (4) means that the Commissioners may deny the application or they may pass a resolution if they intend to grant the application. The Commissioners cannot grant the application and ignore the statutory procedures of this section. Dover Ranch v. Yellowstone County, 187 M 276, 609 P2d 711, 37 St. Rep. 727 (1980).

*Interim Zoning Notice and Hearing Requirements:* The provision of this section for notice and hearing is applicable to 76-2-206 authorizing interim emergency zoning, and a zoning ordinance adopted without such notice and hearing is void. State ex rel. Christian, Spring, Sielbach & Assoc. v. Miller, 169 M 242, 545 P2d 660 (1976).

**Attorney General's Opinions**

*Enlargement of Protest Rights for Agricultural and Forest Land Freeholders — Proportionate Share of Freehold Interest to Be Included in Calculation of Protest Area:* Resolving an ambiguous interpretation of subsection (6) of this section, the Attorney General opined that the 1995 amendment to that subsection enlarged protest rights for freeholders (now real property owners) whose property is classified for real property tax purposes as agricultural or forest land when their combined title ownership represents 50% of the total property ownership within the proposed or revised zoning district. Those protest rights supplement the protest rights provided to 40% of the freeholders within the district whose names appear on the last-completed assessment roll. The phrase "freeholders representing 50% of the titled property ownership" requires all owners of property held in joint or common ownership to join in the protest for the area of the parcel to be included in the calculation of the protest area. Condominium owners or purchasers may have their proportionate share of the freehold interest in the land area of the particular development included in the calculation of the protest area. 46 A.G. Op. 22 (1996).

*Protests to Creation of Zoning Districts:* For purposes of counting protests pursuant to this section, all freeholders within a zoning district whose names appear on the last completed assessment roll of the county are entitled to one vote without regard to the number of parcels they own within the district. 37 A.G. Op. 47 (1977).

## 76-2-206. Interim zoning district or regulation.

**Compiler's Comments**

*2013 Amendments — Composite Section:* Chapter 56 in (1) at beginning inserted exception clause; and made minor changes in style. Amendment effective February 28, 2013.

Chapter 416 in (1) substituted "to address an emergency that involves" for "as an emergency measure in order to promote" and substituted "or general" for "and general"; in (1)(a) after "classify" deleted "and regulate" and after "that" substituted "must be regulated to mitigate" for "constitute"; in (1)(b) substituted current language regarding study or investigation by county for "the county"; deleted former (1)(b)(i) and (1)(b)(ii) that read: "(i) is conducting or in good faith intends to conduct studies within a reasonable time; or

(ii) has held or is holding a hearing for the purpose of considering any of the following:

(A) a growth policy;

(B) zoning regulations; or

(C) a revision to a growth policy, to a master plan, as provided for in 76-1-604(6) and 76-2-201(2), or to zoning regulations pursuant to this part"; in (2) substituted "subsections (4) and (5)" for "subsection (3)"; in (3)(a) in first sentence after "published" substituted "as provided in 7-1-2121" for "once a week for 2 weeks in a newspaper of general circulation within the county" and at beginning of second sentence inserted "In addition to the requirements of 7-1-2121"; in (3)(a)(ii) after "emergency" deleted "or exigent circumstance"; in (3)(a)(iii) after "regulation" inserted language regarding how uses will be classified and regulated; deleted former (3)(a)(iv) that read: "(iv) the time and place of the public hearing"; inserted (4) and (5) providing procedures for extension of resolution; and made minor changes in style. Amendment effective October 1, 2013.

*2009 Amendment:* Chapter 446 in (1) in introductory clause at beginning inserted "Subject to subsection (3)", and substituted "may establish an interim zoning district or interim regulation" for "may adopt an interim zoning map or regulation"; in (1)(a) substituted "interim zoning district or interim regulation" for "interim zoning map or regulation"; in (2) in first sentence at beginning substituted "A resolution for an interim zoning district or interim regulation" for "An interim resolution", and in second sentence at beginning inserted "Subject to subsection (3)" and before "resolution" deleted "interim"; inserted (3) requiring certain procedures for establishment of interim zoning district or interim regulation; and made minor changes in style. Amendment effective May 5, 2009.

*2003 Amendment:* Chapter 87 at beginning of (1)(b)(ii)(C) substituted "a revision" for "an amendment, extension, or addition" and after "policy" inserted "to a master plan, as provided for in 76-1-604(6) and 76-2-201(2)". Amendment effective March 20, 2003.

*1999 Amendment:* Chapter 582 inserted (1) and (1)(a) authorizing county commissioners to adopt interim zoning map or regulation as emergency measure to classify and regulate uses that constitute emergency; in (1)(b)(ii)(A) substituted "growth policy" for "master plan"; in (1)(b)(ii)(C) after "part" deleted "the board of county commissioners in order to promote the public health, safety, morals, and general welfare may adopt as an emergency measure a temporary interim zoning map or temporary interim zoning regulation, the purpose of which shall be to classify and regulate uses and related matters as constitutes the emergency"; and made minor changes in style. Amendment effective October 1, 1999.

*Saving Clause:* Section 35, Ch. 582, L. 1999, was a saving clause.

*Transition:* Section 36, Ch. 582, L. 1999, provided: "A governing body that adopts a master plan pursuant to Title 76, chapter 1, before October 1, 1999, may adopt zoning regulations that are consistent with the master plan pursuant to Title 76, chapter 2, part 2 or 3, until October 1, 2001."

**Case Notes**

*Interim Zoning Based on Reasonable Emergency — Limited Applicability — Spot Zoning Test Inapplicable:* The Missoula County Board of County Commissioners enacted an interim zoning provision for an area that was previously unzoned, prohibiting plaintiff from digging a gravel pit for 1 year. The interim zoning provision placed various residential designations on the area where plaintiff's property was located. Plaintiff challenged the interim zoning, but the District Court affirmed the Board's decision, so plaintiff appealed. The Supreme Court affirmed the District Court's holding that a reasonable emergency existed that justified interim zoning based on issues of public health, safety, and welfare because of regulatory deficiencies. Interim zoning allows a local government to enact temporary zoning to avoid suffering serious detriment while pursuing the necessary planning efforts to adopt a growth policy as a condition precedent to enacting standard zoning. Therefore, the Board acted within its discretion in finding that an emergency existed justifying interim zoning. Plaintiff also contended that interim zoning constituted illegal reverse spot zoning. Applying the test in Little v. Bd. of County Comm'rs, 193 M 334, 631 P2d 1282 (1981), the Supreme Court held that the spot zoning test did not apply because the interim zoning was effective for only 1 or 2 years and could be implemented without a growth policy in place, so spot zoning challenges are not applicable to interim zoning measures adopted under 76-2-206. Liberty Cove, Inc. v. Missoula County, 2009 MT 377, 353 M 286, 220 P3d 617 (2009).

*Sufficient Notice of Interim Zoning Hearing:* Plaintiff contended that because the public notice requirements applicable to standard zoning were not applied to a hearing on interim zoning, the interim zoning measures were void. The Supreme Court noted that the hearing was widely publicized and that plaintiff in fact attended the meeting and offered comments. Because plaintiff received actual notice and had the opportunity to be heard, constitutional public notice requirements were essentially satisfied. The court also noted that the law has long recognized that actual attendance and participation may constitute a waiver of alleged deficiencies of notice. Therefore, any error in the public notice of the interim zoning hearing was harmless. Liberty Cove, Inc. v. Missoula County, 2009 MT 377, 353 M 286, 220 P3d 617 (2009). See also Knode v. Williamson, 84 US 586 (1873).

*Master Plan (now Growth Policy) Required to Exercise Zoning Authority:* Without a master plan (now growth policy) in effect and without a jurisdictional area defined pursuant to the adoption of a master plan (now growth policy), a county may exercise no zoning authority other than on a temporary interim emergency basis as provided in this section. Little v. County Comm'rs, 193 M 334, 631 P2d 1282, 38 St. Rep. 1124 (1981).

*Interim Zoning Regulations Suggested:* The Supreme Court suggested that the defendants take note of this section for interim zoning regulations in emergency situations to alleviate the potentially serious consequences of the decision in the instant case. Allen v. Flathead County, 184 M 58, 601 P2d 399, 36 St. Rep. 1839 (1979).

**Attorney General's Opinions**

*What Electors Considered Qualified Voters for County Zoning Initiatives:* A zoning regulation is subject to citizen initiative, and nothing in county zoning law limits qualified electors to only voters living in the area affected by the zoning regulations. Thus, in the case of county zoning regulation initiatives effective in all unincorporated areas of a county, all county residents are considered qualified voters, including those residing within incorporated areas of the county. 52 A.G. Op. 6 (2008).

*When Interim Zoning May Be Implemented — Failure to Adopt Growth Policy Not Considered Exigency That Permits Emergency Interim Zoning:* In the case of both counties and municipalities, interim zoning measures may be adopted: (1) when proper zoning procedures have not been satisfied; (2) when some matter of urgency requires zoning to protect public health, safety, and welfare; (3) if the interim measure addresses the urgent matter; and (4) as long as more formal planning processes have been initiated or will be initiated within a reasonable time. The absence of a growth policy satisfies the first provision, but interim zoning cannot be implemented unless all four requirements are satisfied. Failure to adopt a growth policy does not in itself constitute an exigency that allows implementation of emergency zoning. 49 A.G. Op. 23 (2002).

## 76-2-208. Continuation of nonconforming uses.

### Case Notes

*Use of Property Substantially Different From Preexisting Nonconforming Use — Conditions Placed on Use of Property Not Erroneous:* When the property at issue was zoned in 1991, it was a dairy farm with a shop that was used to repair farm equipment that was classified as suburban agricultural. Russell later purchased part of the property and used it to operate an equipment repair business, which included the general storage of heavy equipment. The county zoning administrator received complaints of Russell's use of the property for industrial purposes and issued a determination that Russell's use was nonconforming under the zoning regulations. The District Court limited Russell's use with respect to the type of equipment repaired, the number of pieces of equipment stored on the property, and the number of hours operated each week to the manner and extent of the prior use and also imposed a screening requirement to shield vehicles from public view. Russell appealed, but the Supreme Court affirmed. The court initially noted that Russell's complaint was time-barred because it was filed more than 5 years after creation of the zoning district. The court then went on to find that the property was included in the district when it was created and that by Russell's own admission, use of the property was substantially different in both manner and extent from the preexisting nonconforming use, so a continuation of a nonconforming use was not warranted pursuant to this section. In imposing conditions on the use of the property, the District Court was not legislating limitations on the property, but rather enforcing the zoning ordinance's requirement that nonconforming uses be continued in the same manner as at the time that the zoning occurred. Russell v. Flathead County, 2003 MT 8, 314 M 26, 67 P3d 183 (2003), distinguishing Kensmoe v. Missoula, 156 M 401, 480 P2d 835 (1971).

*Unreasonable and Discriminatory:* Zoning of plaintiff's vacant lot and commercial building as part of a residential zone was unreasonable and discriminatory under zoning plan that did not permit the continuance of nonconforming uses. Alden v. Bd. of Zoning Comm'rs, 165 M 364, 528 P2d 1320 (1974).

## 76-2-209. Effect on natural resources.

### Compiler's Comments

*2021 Amendment:* Chapter 545 in (2) at end after "the board of county commissioners" and in (3) near beginning after "under this chapter" inserted "and in effect prior to the filing of a permit application or at the time a written request is received for a preapplication meeting pursuant to 82-4-432". Amendment effective May 14, 2021.

*2005 Amendment:* Chapter 340 near beginning of (1) in exception clause inserted reference to subsection (2); in (2) after "asphalt" substituted language allowing use, development, or recovery of mineral in residential zone as defined by county commissioners for "on a site that is located within a geographic area zoned as residential are subject to the zoning regulations adopted under this chapter"; inserted (3) relating to zoning regulations in all zones other than residential; and made minor changes in style. Amendment effective April 21, 2005.

*1991 Amendment:* At beginning of (1) inserted exception clause; inserted (2) making use, development, or recovery of a mineral by a sand and gravel operation and a concrete mixing or asphalt batching operation subject to local zoning regulations; and made minor changes in style. Amendment effective April 9, 1991.

*Applicability:* Section 5, Ch. 408, L. 1991, provided: "(1) [This act] [76-1-113, 76-2-209, 82-4-431, and 82-4-432] does not apply to:

(a) an area for which a contract was issued prior to [the effective date of this act] [effective April 9, 1991] or for which an application for contract or contract amendment was filed with the department of state lands [functions now transferred to department of natural resources and conservation] prior to February 23, 1991; or

(b) an area:

(i) that is contiguous to an area described in subsection (1)(a);

(ii) for which the holder of the contract has the legal right to mine on [the effective date of this act] [effective April 9, 1991]; and

(iii) for which the contract holder files with the department on or before January 1, 1992, on a form provided by the department, a legal description of the area, evidence of the legal right to mine, and certification that the contract holder holds the property for the purpose of future sand or gravel mining.

(2) Before June 1, 1991, the department shall mail notice of the provisions and passage of [this act] [76-1-113, 76-2-209, 82-4-431, and 82-4-432] and the form described in subsection (1)(b)(iii) to each person who holds a current contract on [the effective date of this act] [effective April 9, 1991] or who had, prior to February 23, 1991, submitted an application for contract or contract amendment that the department had not approved or denied as of February 23, 1991.

(3) The department shall maintain a list of areas for which certifications have been filed pursuant to subsection (1)(b) and shall provide a copy of the list to any person who requests the list."

**Case Notes**

*Abuse of Discretion in Issuance of Conditional Use Permit for Gravel Crushing Operation — Remand for Additional Board of Adjustment Findings:* A county board of adjustment granted a conditional use permit for a gravel extracting and crushing operation in a residential area, and some citizens complained, after which the gravel operation owner complained. The board defended its decision based on definitions in the development plan, which disallowed establishment of extractive industries but allowed certain gravel operations associated with agricultural operations. The District Court granted summary judgment for the board, and both the citizens and the gravel operation owner appealed. The Supreme Court reversed. Although the board did not exceed its authority in prohibiting asphalt and concrete batch plants as a condition under the conditional use permit, the board abused its discretion by granting the conditional use permit without issuing findings of fact and conclusions to support its decision. The case was remanded for additional board findings regarding whether: (1) zoning regulations and the development plan permit a gravel extraction operation that was not an accessory to normal farming operations; (2) onsite crushing operations are part of a gravel extraction as that term is used in the regulations or whether onsite crushing operations constitute a prohibited extractive industry pursuant to the regulations; and (3) conditions could be imposed to mitigate traffic impacts from the proposed operation. Flathead Citizens for Quality Growth, Inc. v. Flathead County Bd. of Adjustment, 2008 MT 1, 341 M 1, 175 P3d 282 (2008).

*Determination of Residential Use in Multiuse Geographical Zoning Districts:* In cases when nontraditional, uniquely zoned, multiuse geographical districts are considered, a determination of whether the geographical area is zoned as residential for purposes of this section must be based on facts and circumstances. In this case, zoning regulations and the development plan demonstrated that the district was specifically zoned to promote and regulate residential use, even though other uses were recognized and permitted, so the district was considered residential for purposes of this section. Flathead Citizens for Quality Growth, Inc. v. Flathead County Bd. of Adjustment, 2008 MT 1, 341 M 1, 175 P3d 282 (2008).

*Board of County Commissioners Compelled to Follow Clear Statutory Language and Allow Gravel Pit in Nonresidential Area:* Plaintiff owned agricultural property adjacent to a school and sought to develop a gravel pit on the property. Plaintiff applied for the appropriate special review with the Board of County Commissioners. The Board determined that a gravel pit would interfere with surrounding property uses and would violate the rights of people who lived and attended school nearby to a clean and healthful environment, citing 82-4-431 and 82-4-432 as authority for the Board's right to deny the special review. Plaintiff argued that under 76-1-113 and this section, local planning boards may not prevent the operation of a gravel pit in a nonresidential area. The District Court concluded that plaintiff accurately construed the statutes and that the Board could not deny a gravel pit in a nonresidential area. The Supreme Court affirmed. The Board ruled as if either this section did not exist or the statute unconstitutionally deprived residents of a clean and healthful environment, but as an Executive Branch agency, the Board violated the separation of powers doctrine by ruling on the constitutionality of the statute. The statutory language was clear and unambiguous, and the Board was compelled to follow the legal mandate and allow the gravel pit. Further, because the statutes were clear, the District Court was not required to reach the constitutional question and did not err in failing to address the constitutionality of the statute. Merlin Myers Revocable Trust v. Yellowstone County, 2002 MT 201, 311 M 194, 53 P3d 1268 (2002). See also St. v. Still, 273 M 261, 902 P2d 546 (1995), and Goldman Sachs v. District Court, 2002 MT 83, 309 M 289, 46 P3d 606 (2002).

*Excavation and Processing of Gravel — County Zoning and Planning Inapplicable:* Part of the legislative purpose of this section is clear and unambiguous. It demonstrates the Legislature's awareness that a range of activities must occur on-site in order for the owner of mineral, timber, or agricultural resources to benefit, and that the Legislature did not intend counties to have the power to prevent the owner from having that benefit. However, the range of activities that cannot be prevented is by no means clear and unambiguous. There is ambiguity in the interpretation and construction of the phrase "complete use, development, or recovery of any mineral . . . resources" and in its application to defendant's gravel extraction and processing. A reasonable construction depends, to some extent, on the circumstances to which this section is applied. Therefore, the court must look to industry practices to discern the extent to which the Legislature intended the owner of the resource to benefit. A county must at least allow the activities necessary to develop the resource to a point at which it can be effectively utilized. In the case at bar, the District Court found that processing occurs at the site of gravel extraction because the cost of transporting the material elsewhere for processing would render the mining economically unfeasible. The District Court also found that gravel processing on-site included washing, crushing, screening, and concrete and asphalt batching and that these activities were part of the recovery of gravel resources. The record supported the District Court's findings. The District Court properly held that 76-1-113 and 76-2-209 exempt the defendant from county zoning and planning. The record concerned gravel mining in a particular geographic location. The Supreme Court declined to announce a broad, sweeping interpretation on such a narrow record and restricted the holding of this opinion accordingly. (See 1991 amendment.) Missoula County v. Am. Asphalt, Inc., 216 M 423, 701 P2d 990, 42 St. Rep. 920 (1985).

**Attorney General's Opinions**

*Zoning of Patented Mining Claims:* County Commissioners have the authority to zone land areas which include patented mining claims subject to the mandate that natural resources thereon be allowed to be used, developed, or recovered. 36 A.G. Op. 33 (1975).

## 76-2-210. Enforcement of zoning provisions.

**Compiler's Comments**

*2009 Amendment:* Chapter 446 inserted (2) requiring attempt to obtain voluntary compliance before filing complaint; and made minor changes in style. Amendment effective May 5, 2009.

**Case Notes**

*Existing Telecommunications Tower Not Inclusive of Tower Not Yet Built:* Mesa Communications Group (Mesa) sought a permit from Yellowstone County to construct a telecommunications tower within the county's zoning jurisdiction. County regulations required that all commercial telecommunications towers over 50 feet high be located at least 1 mile from any other communications tower. Mesa's application was denied because a 100-foot tower had been built and a 300-foot tower had been approved but not yet built within 1 mile of the tower proposed by Mesa. The regulations provided for waiver of the 1-mile restriction by the Board of County Commissioners upon special review if an applicant established that an existing tower could not accommodate the applicant's proposed antenna. Mesa requested special review and presented evidence that the proposed antenna could not be accommodated on the existing 100-foot tower, but the application was nevertheless denied because Mesa's proposed tower was still within 1 mile of the approved but as yet unconstructed 300-foot tower. Mesa sought relief from application of the 1-mile restriction in District Court. The court granted summary judgment for Mesa, concluding that the restriction applied only to towers that had been constructed, but not to unconstructed towers approved for construction. The county appealed, but the Supreme Court affirmed. The term "existing tower" as used in the regulation was neither ambiguous nor imprecise and did not include a tower that was not yet built or even begun. Mesa Communications Group, LLC v. Yellowstone County, 2002 MT 73, 309 M 233, 45 P3d 37 (2002).

## 76-2-212. Minimum lot size restrictions.

**Compiler's Comments**

*Effective Date:* Section 5, Ch. 380, L. 2021, provided: "[This act] is effective on passage and approval." Approved May 3, 2021.

*Applicability:* Section 6, Ch. 380, L. 2021, provided: "[Sections 1 and 2] apply to zoning districts created pursuant to Title 76, chapter 2, part 2, on or after January 1, 2021."

### 76-2-216. Wholly surrounded county property — change of use — hearing.

**Compiler's Comments**

*Effective Date:* This section is effective October 1, 2013.

### 76-2-220. Zoning commission — appointment — duties.

**Attorney General's Opinions**

*County Planning Board Not to Serve as County Zoning Commission:* Because of differences in membership requirements and jurisdictional areas, a County Planning Board may not be designated to serve as the County Zoning Commission. However, members of one board may serve as members of the other if they meet the requirements for membership of each board. 43 A.G. Op. 18 (1989).

### 76-2-221. Board of adjustment.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

**Case Notes**

*Impermissible Spot Zoning — Little Test Applied:* The Supreme Court found illegal spot zoning by applying three prongs of the Little test and determined: (1) a proposed power plant constituted a heavy industrial use and differed significantly from agricultural uses that dominated the surrounding area; (2) the area to be rezoned was relatively small both in absolute size and in terms of landowners affected; and (3) the proposed rezone smacked of special legislation that would accrue to a single landowner to the detriment of surrounding farmers and ranchers. Moreover, the fact that the power plant could have pursued a special use permit from the board of adjustment did not undermine the spot zoning claim. Plains Grains L.P. v. Bd. of County Commr's, 2010 MT 155, 357 Mont. 61, 238 P.3d 332, following Little v. Bd. of County Comm'rs, 193 M 334, 631 P2d 1282 (1981).

### 76-2-222. Membership and term of board members — vacancies.

**Compiler's Comments**

*1997 Amendment:* Chapter 42 in (1), at beginning, deleted "Except as provided in subsection (3)"; deleted (3) that read: "(3) Within 30 days after January 1, 1988, the board of county commissioners shall designate two members of the board of adjustment whose terms must end in 1988 and three members whose terms must end in 1989. Subsequent appointments must be made for a term of 2 years"; and made minor changes in style. Amendment effective March 12, 1997.

*1987 Amendment:* At beginning of (1) inserted exception clause; and inserted (3) requiring County Commissioners to designate two Board of Adjustment members whose terms end in 1988 and three those terms end in 1989.

### 76-2-223. Powers of board of adjustment.

**Case Notes**

*Impermissible Spot Zoning — Little Test Applied:* The Supreme Court found illegal spot zoning by applying three prongs of the Little test and determined: (1) a proposed power plant constituted a heavy industrial use and differed significantly from agricultural uses that dominated the surrounding area; (2) the area to be rezoned was relatively small both in absolute size and in terms of landowners affected; and (3) the proposed rezone smacked of special legislation that would accrue to a single landowner to the detriment of surrounding farmers and ranchers. Moreover, the fact that the power plant could have pursued a special use permit from the board of adjustment did not undermine the spot zoning claim. Plains Grains L.P. v. Bd. of County Commr's, 2010 MT 155, 357 Mont. 61, 238 P.3d 332, following Little v. Bd. of County Comm'rs, 193 M 334, 631 P2d 1282 (1981).

*Abuse of Discretion in Issuance of Conditional Use Permit for Gravel Crushing Operation — Remand for Additional Board of Adjustment Findings:* A county board of adjustment granted a conditional use permit for a gravel extracting and crushing operation in a residential area, and some citizens complained, after which the gravel operation owner complained. The board defended its decision based on definitions in the development plan, which disallowed establishment of extractive industries but allowed certain gravel operations associated with agricultural operations. The District Court granted summary judgment for the board, and both the citizens and the gravel operation owner appealed. The Supreme Court reversed. Although the board did not exceed its authority in prohibiting asphalt and concrete batch plants as a condition under the conditional use permit, the board abused its discretion by granting the conditional use permit without issuing findings of fact and conclusions to support its decision. The case was remanded for additional board findings regarding whether: (1) zoning regulations and the development plan permit a gravel extraction operation that was not an accessory to normal farming operations; (2) onsite crushing operations are part of a gravel extraction as that term is used in the regulations or whether onsite crushing operations constitute a prohibited extractive industry pursuant to the regulations; and (3) conditions could be imposed to mitigate traffic impacts from the proposed operation. Flathead Citizens for Quality Growth, Inc. v. Flathead County Bd. of Adjustment, 2008 MT 1, 341 M 1, 175 P3d 282 (2008).

## 76-2-224. Vote needed for board action.

### Case Notes

*Conditions Met for Residential Zoning Variance:* After plaintiffs built an addition on their house, they applied for a zoning variance because the addition violated the subdivision setback requirement. The variance was denied by the defendant board of adjustment, and plaintiffs appealed to District Court for a writ of certiorari. The court appointed a referee, who concluded that the variance should have been granted because: (1) the addition was not injurious to the public health or dangerous to the traveling public; (2) the addition did not impair the intent of the zoning regulation because it did not significantly alter the density of the property and actually improved the look of the property; (3) the house had suffered extensive fire damage prior to the building of the addition; (4) the configuration of the house was unusual because the main living area was on the second floor; (5) the only direction to expand the house was toward the street; and (6) plaintiffs' claim that the need to add the addition to avoid hardship was legitimate in order to accommodate plaintiffs' relative who lived in the house but was unable to negotiate the stairs to the second floor because of postpolio syndrome. The District Court adopted the referee's findings and granted the variance, and the board of adjustment appealed. The Supreme Court affirmed. Evidence was substantial and sufficient to support the referee's findings. Expansion in any direction but toward the street was not a reasonable option, and without the variance, plaintiffs would have suffered a unique and unnecessary hardship. Thus, the District Court did not abuse its discretion by overturning the board's denial and granting the variance. Arkell v. Middle Cottonwood Bd. of Zoning Adjustment, 2007 MT 160, 338 M 77, 162 P3d 856 (2007).

## 76-2-226. Appeals to board of adjustment.

### Compiler's Comments

*2015 Amendment:* Chapter 171 in (1) substituted "any person or persons, jointly or severally, aggrieved by a decision of the administrative officer" for "a person aggrieved". Amendment effective October 1, 2015.

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### Case Notes

*County Planning Board Jurisdiction of Conditional Use Permit — Restraining Order Regarding Artificial Lighted Palm Trees Properly Granted:* Defendant applied for a conditional use permit in 2007 to allow four logo signs, including an LCD display sign, and 50 lighted artificial palm trees to be installed at defendant's casino near Deer Lodge. The Powell County planning board approved the casino and three logo signs but denied approval for the LCD sign and the palm trees. Defendant believed that the planning board did not have jurisdiction over the geographical area where the casino was located, and he installed 25 palm trees in violation of the planning board's decision. The county then sought and was granted an injunction prohibiting any more palm trees and requiring removal of the 25 trees previously installed. The District Court granted the injunction and denied a motion to amend the judgment, and defendant appealed. Although the area outside the Deer Lodge city limits was located in a planning area donut jointly administered by the city and the county, that interlocal agreement was terminated in September 2006 and the area was thereafter administered by the county planning board, so the planning board did in fact have jurisdiction over defendant's conditional use permit. The District Court correctly determined that the permit was based on the change in use from primarily a convenience store to a casino, not on the erection of lighted palm trees. Zoning regulations allowed the planning board to review signage for conformity with surrounding property use when a change in use was contemplated. The county growth policy focused on maintenance of open spaces and historic heritage that reasonably promoted the general welfare of the community. The defendant had no vested right to erect artificial palm trees without county approval, and defendant's private property rights were not infringed by denial of portions of the conditional use permit. Powell County v. Country Village, LLC, 2009 MT 294, 352 M 291, 217 P3d 508 (2009).

### 76-2-227. Appeals — board of county commissioners or board of adjustment to court of record — county commissioners may establish appeal process.

**Compiler's Comments**

*2021 Amendment:* Chapter 263 in (1)(b) at end substituted "specifying the grounds of the appeal" for "setting forth that the decision is illegal, in whole or in part, and specifying the grounds of the illegality"; in (1)(d) at end substituted "shall properly notice and hold a public hearing de novo" for "may"; deleted former (1)(d)(i) through (1)(d)(iii) (see 2021 Session Law for former text); and made minor changes in style. Amendment effective October 1, 2021.

*2015 Amendment:* Chapter 171 inserted (1) concerning the process of appeal of a decision by the board of adjustment to the board of county commissioners; in (2) substituted "board of county commissioners or the board of adjustment" for "board of adjustment or a taxpayer or an officer, department, board, or bureau of the county" and at end of second sentence after "office of the" inserted "appropriate"; in (3) in first and third sentences substituted "board of county commissioners or the board of adjustment" for "board of adjustment", in first sentence after "decision of the board" deleted "of adjustment", and in second sentence substituted "board of county commissioners or the board of adjustment" for "board"; and made minor changes in style. Amendment effective October 1, 2015.

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

**Case Notes**

*Date of Rendition of Judgment Controlling, Not Date of Filing Complaint — Res Judicata — Effect of Voluntary Dismissal:* The plaintiffs filed two complaints within a week of each other that both challenged the county's denial of their request for a zoning change. The complaints named the same parties and addressed the same issues. Ultimately, the plaintiffs voluntarily dismissed the later-filed action with prejudice and the defendants amended their answer to the other complaint to include res judicata as an affirmative defense. The Supreme Court affirmed the District Court's grant of summary judgment in favor of the defendants, concluding that the plaintiffs' claims were barred under res judicata. The court held that the voluntary dismissal of the later-filed case constituted a final judgment that barred the claims set forth in the earlier-filed complaint. Touris v. Flathead County, 2011 MT 165, 361 Mont. 172, 258 P.3d 1, followed in Estate of Kinnaman v. Mtn. W. Bank, 2016 MT 25, 382 Mont. 153, 365 P.3d 486.

*County Planning Board Jurisdiction of Conditional Use Permit — Restraining Order Regarding Artificial Lighted Palm Trees Properly Granted:* Defendant applied for a conditional use permit in 2007 to allow four logo signs, including an LCD display sign, and 50 lighted artificial palm trees to be installed at defendant's casino near Deer Lodge. The Powell County planning board approved the casino and three logo signs but denied approval for the LCD sign and the palm trees. Defendant believed that the planning board did not have jurisdiction over the geographical area where the casino was located, and he installed 25 palm trees in violation of the planning board's decision. The county then sought and was granted an injunction prohibiting any more palm trees and requiring removal of the 25 trees previously installed. The District Court granted the injunction and denied a motion to amend the judgment, and defendant appealed. Although the area outside the Deer Lodge city limits was located in a planning area donut jointly administered by the city and the county, that interlocal agreement was terminated in September 2006 and the area was thereafter administered by the county planning board, so the planning board did in fact have jurisdiction over defendant's conditional use permit. The District Court correctly determined that the permit was based on the change in use from primarily a convenience store to a casino, not on the erection of lighted palm trees. Zoning regulations allowed the planning board to review signage for conformity with surrounding property use when a change in use was contemplated. The county growth policy focused on maintenance of open spaces and historic heritage that reasonably promoted the general welfare of the community. The defendant had no vested right to erect artificial palm trees without county approval, and defendant's private property rights were not infringed by denial of portions of the conditional use permit. Powell County v. Country Village, LLC, 2009 MT 294, 352 M 291, 217 P3d 508 (2009).

*Res Judicata Applicable to Action Regarding County's Failure to Transfer Conditional Use Permit:* Plaintiff filed an 18-count complaint for damages contending that Flathead County did not follow zoning regulations and violated plaintiff's due process and property rights when the County Board of Adjustment failed to transfer a conditional use permit to plaintiff to allow a gravel pit on property plaintiff purchased. However, plaintiff's petition for a writ of mandamus to compel the Board to transfer the conditional use permit was properly dismissed (see Beasley v. Flathead County Bd. of Adjustment, 2009 MT 120, 350 M 171, 205 P3d 812 (2009)), so the County argued that the damage complaint was res judicata. Plaintiff had appealed the Board's decision pursuant to 76-2-227 but moved to dismiss the appeal with prejudice after a local citizens' group intervened to defend the Board's decision. The District Court held that the damage complaint involved the same issues as the appeal of the decision to deny transfer of the conditional use permit, so the damage complaint was dismissed as res judicata. On appeal, the Supreme Court affirmed. Plaintiff failed to establish a protected property interest in obtaining the transfer of the permit, so the constitutional claims were properly dismissed. Likewise, plaintiff's purported tort claims involved the same subject matter and issues as the prior appeal, so res judicata applied. Plaintiff's opportunity to challenge the legality of the Board's decision to deny transfer of the permit ended when plaintiff elected to dismiss the appeal under 76-2-227 with prejudice. Section 76-2-227 remained an available remedy if plaintiff chose to apply for a conditional use permit in his own right and the application was denied, but that remedy was no longer available for the current challenges. Beasley v. Flathead County, 2009 MT 121, 350 M 177, 206 P3d 915 (2009).

*Issuance of Writ of Mandamus Based on Existence of Clear Legal Duty Involving Discretionary Act Properly Denied:* Plaintiff sought a writ of mandamus as the appropriate mechanism to compel a County Board of Adjustments to transfer a conditional use permit to plaintiff to allow a gravel pit on property plaintiff purchased. Plaintiff contended that all available administrative remedies had been exhausted and that no remedy existed in the course of law other than the remedies sought by the writ. The Board argued that plaintiff incorrectly used the writ for relief and that a mandamus petition did not lie to correct a previously made Board decision or to control Board discretion. The District Court agreed with the Board and pointed out that plaintiff had a remedy under 76-2-227 to have the court review an alleged previous illegal board decision, rendering a writ of mandamus inapplicable. The writ was therefore dismissed, and plaintiff appealed, but the Supreme Court affirmed. A writ of mandamus must be granted if a clear legal duty exists and no speedy and adequate legal remedy is available, but the clear legal duty must involve a ministerial act. Here, the Board's decision to deny transfer of the conditional use permit constituted a discretionary, not ministerial, act. Thus, the Board's decision constituted a completed act that was not reviewable under a writ of mandamus. Plaintiff had an adequate remedy under 76-2-227, despite the fact that the Board failed to issue findings of fact or a written decision. Beasley v. Flathead County Bd. of Adjustment, 2009 MT 120, 350 M 171, 205 P3d 812 (2009), followed in Bostwick Properties, Inc. v. Dept. of Natural Resources and Conservation, 2009 MT 181, 351 M 26, 208 P3d 868 (2009). See also Smith v. Missoula County, 1999 MT 330, 297 M 368, 992 P2d 834 (1999), and Flathead Citizens for Quality Growth, Inc. v. Flathead County Bd. of Adjustment, 2008 MT 1, 341 M 1, 175 P3d 282 (2008).

*Conditions Met for Residential Zoning Variance:* After plaintiffs built an addition on their house, they applied for a zoning variance because the addition violated the subdivision setback requirement. The variance was denied by the defendant board of adjustment, and plaintiffs appealed to District Court for a writ of certiorari. The court appointed a referee, who concluded that the variance should have been granted because: (1) the addition was not injurious to the public health or dangerous to the traveling public; (2) the addition did not impair the intent of the zoning regulation because it did not significantly alter the density of the property and actually improved the look of the property; (3) the house had suffered extensive fire damage prior to the building of the addition; (4) the configuration of the house was unusual because the main living area was on the second floor; (5) the only direction to expand the house was toward the street; and (6) plaintiffs' claim that the need to add the addition to avoid hardship was legitimate in order to accommodate plaintiffs' relative who lived in the house but was unable to negotiate the stairs to the second floor because of postpolio syndrome. The District Court adopted the referee's findings and granted the variance, and the board of adjustment appealed. The Supreme Court affirmed. Evidence was substantial and sufficient to support the referee's findings. Expansion in any direction but toward the street was not a reasonable option, and without the variance, plaintiffs would have suffered a unique and unnecessary hardship. Thus, the District Court did not abuse its discretion by overturning the board's denial and granting the variance. Arkell v. Middle Cottonwood Bd. of Zoning Adjustment, 2007 MT 160, 338 M 77, 162 P3d 856 (2007).

*District Court Standard of Review of Decision of County Board of Adjustment:* This section authorizes a District Court to hold a hearing and reverse, affirm, or modify a decision made by a county board of adjustment. Thus, a District Court must review a decision of a county board of adjustment for abuse of discretion, but the court is not limited to being a court of review. The court also has authority under this section to take additional evidence and issue findings and conclusions. Arkell v. Middle Cottonwood Bd. of Zoning Adjustment, 2007 MT 160, 338 M 77, 162 P3d 856 (2007). See also In re Petition of Sutey Oil Co., Inc. v. Anaconda-Deer Lodge County Planning Bd., 1998 MT 127, 289 M 99, 959 P2d 496 (1998).

*Standing of Board of Adjustment to Appeal District Court Review of Board Decision:* After plaintiffs built an addition on their house, they applied for a zoning variance because the addition violated the subdivision setback requirement. The variance was denied by the defendant board of adjustment, and plaintiffs appealed to District Court for a writ of certiorari. The court granted the variance, and the board appealed. Plaintiffs contended that the board lacked standing because the board was a quasi-judicial body, not an aggrieved party, and because under 7-1-201, an administrative board may not sue or be sued independently of the local government unless authorized by state law. The Supreme Court disagreed. The writ of certiorari was directed to the board, and plaintiffs' petition named the board as the opposing party, so the board was a party to the litigation and had standing to appeal. Arkell v. Middle Cottonwood Bd. of Zoning Adjustment, 2007 MT 160, 338 M 77, 162 P3d 856 (2007).

*Scope of Review:* Although scope of review on Writ of Certiorari is ordinarily limited to whether the inferior tribunal has exceeded its jurisdiction, further inquiry is permitted under provisions of this statute which grant the District Courts a broader scope of review than the general Montana statutes pertaining to certiorari. Bryant Dev. Ass'n v. Dagel, 166 M 252, 531 P2d 1320 (1975).

### 76-2-228. Awarding of costs upon appeal from board decision.

**Compiler's Comments**

*2015 Amendment:* Chapter 171 substituted "board of county commissioners or the board of adjustment" for "board"; and made minor changes in style. Amendment effective October 1, 2015.

### 76-2-229. Referendum to terminate zoning district.

**Compiler's Comments**

*Effective Date:* Section 5, Ch. 380, L. 2021, provided: "[This act] is effective on passage and approval." Approved May 3, 2021.

*Applicability:* Section 6, Ch. 380, L. 2021, provided: "[Sections 1 and 2] apply to zoning districts created pursuant to Title 76, chapter 2, part 2, on or after January 1, 2021."

### 76-2-240. Effect on amateur radio antenna.

**Compiler's Comments**

*Effective Date:* Section 8, Ch. 56, L. 2013, provided: "[This act] is effective on passage and approval." Approved February 28, 2013.

## Part 3
## Municipal Zoning

**Part Administrative Rules**

ARM 36.15.204 Local flood plain regulations — requirements.

**Part Case Notes**

*Mobile Homes — Restrictive Zoning Based on Health and Safety Reasons:* Summary judgment striking down a zoning ordinance restricting mobile homes to certain areas that comprised a very small percentage of the municipal area was improperly granted because factual controversies existed. The first issue to be resolved was whether the ordinance required overly restrictive placement of all mobile homes, thus unconstitutionally excluding them, or whether restrictions applied for health or safety reasons only to those mobile homes not in compliance with Uniform Building Code (UBC) standards (which had been adopted by the local government), thus allowing all UBC complying mobile homes to be located with other complying residences. If the ordinance was to be construed as excluding only non-UBC complying structures, it should then be determined whether mobile homes complied or could reasonably be altered to comply with UBC standards before determining they were unconstitutionally excluded. Martz v. Butte-Silver Bow, 196 M 348, 641 P2d 426, 39 St. Rep. 149 (1982).

*Constitutionality of Planning and Zoning Districts — Interrelationship of Provisions:* In 1978, a group of landowners in the Gallatin Valley initiated meetings to propose a general planning and zoning district for the approval of the County Commissioners. They hired a planner to create a master plan (now growth policy) and a lawyer to do the preliminary legal work. In the meantime, owners of two parcels of land, one of 120 acres and one of 80 acres, located within the area proposed for general planning, filed petitions for creation of separate planning and zoning districts for their own land. The petitions were filed with the express purpose of escaping the application of the proposed large zoning district. A comprehensive plan (now growth policy) was never prepared for either parcel, and the County Commissioners adopted the planning and zoning districts over the objections of the county subdivision staff. Appellants challenged the creation and implementation of the two zoning districts on the ground that they were inconsistent with governing statutory standards. Appellants further claimed that the districts were defective on constitutional grounds because the zoning decisions had not been based on rational criteria and were arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare. The Supreme Court held the statutes constitutional, ruling that when the provisions of 76-2-101 and 76-2-104 are read together, as they must be, the law provides sufficient substantive and procedural guidelines. Mont. Wildlife Fed'n v. Sager, 190 M 247, 620 P2d 1189, 37 St. Rep. 1897 (1980).

*No City Commission Duty to Keep Formal Record:* It was inappropriate for the District Court to issue a Writ of Mandamus, in essence directing the City Commission to undertake certain procedures that it had no duty to perform. There was no requirement under law that the City Commission, in support of a decision granting or denying a rezoning request, enter written findings of fact, keep a verbatim record of the proceedings, or conduct its proceedings in an adjudicative manner so as to give an applicant full procedural due process rights. Foster v. City Comm'n, 189 M 64, 614 P2d 1072, 37 St. Rep. 1362 (1980).

*Void Building Permit:* Building permit that was issued in violation of city zoning ordinance is void ab initio and creates no legal rights. State ex rel. Russell Center v. Missoula, 166 M 385, 533 P2d 1087 (1975).

*Constitutionality:* This part, authorizing the creation of zoning ordinances in cities and towns and the appointment of a Board of Adjustment, as well as such an ordinance involved in the case at bar, is free from constitutional objections. Freeman v. Bd. of Adjustment, 97 M 342, 34 P2d 534 (1934).

*State Delegation of Police Power to Municipality:* The state, in which the police power is lodged, may by act of the Legislature delegate such power to a municipality for the purpose of enacting zoning ordinances, as it did in this state by enacting Ch. 136, L. 1929 (this part). Freeman v. Bd. of Adjustment, 97 M 342, 34 P2d 534 (1934).

### Part Attorney General's Opinions

*Municipal Planning Board Not to Be Vested With Municipal Zoning Commission Powers:* Authorization does not exist for designation of a city planning board as a zoning commission, and 7-1-114 prohibits establishment of an alternative zoning system by local ordinance. Therefore, a city exercising self-government powers may not vest its municipal planning board with powers vested in municipal zoning commissions by 76-2-307. 47 A.G. Op. 4 (1997).

## 76-2-301. Municipal zoning authorized.

### Case Notes

*Denial of Conditional Use Permit Was Discretionary Act — No Abuse of Discretion to Deny Permit Due to Lack of Growth Policy Compliance and Potential Traffic Impact.* Whitefish 57 Commercial, LLC v. Whitefish, 2023 MT 176, 413 Mont. 349, 536 P.3d 395.

*City Commission Denial of Application for Site Plan Not Violative of Due Process or Equal Protection — Summary Judgment Proper:* Plaintiff sought to build several mini-stores in a Bozeman area that was zoned as a neighborhood business district, but the City Commission denied the building application. Plaintiff sued the city on grounds that the Commission violated plaintiff's constitutional right to due process by arbitrarily and capriciously deciding to consider the application rather than allowing the decision to be made by the planning director, and by denying the application. The District Court concluded that the zoning ordinance gave the Commission broad discretion in granting applications for site plan approval and that because plaintiff had no protected interest in the application, plaintiff was prevented from establishing a substantive due process or equal protection claim. The Commission was held to have followed proper procedures, and because no material facts were in dispute, summary judgment was granted to the city. On appeal, the Supreme Court affirmed. A constitutional substantive due process analysis was inapplicable in this case because plaintiff did not allege that the zoning ordinance was unconstitutional. Likewise plaintiff did not allege that the Commission treated plaintiff's application differently from applications of others owning property in the zoning district, so any equal protection claim failed as well. The City Commission considered the relevant criteria and stated its reason why plaintiff's site plan did not conform to the zoning regulations, and it was within the discretion of the Commission to reclaim and pass on plaintiff's application. Town & Country Foods, Inc. v. Bozeman, 2009 MT 72, 349 M 453, 203 P3d 1283 (2009). See also Raisler v. Burlington N. RR Co., 219 M 254, 717 P2d 535 (1985).

*Onsite Construction Zoning Regulation Violative of Substantive Due Process:* The Yellowstone Board of County Commissioners created a zoning district wherein dwellings had to be single-family units with not less than 1,500 square feet of floor area, with a requirement for onsite construction with new materials and for completion within 1 year. Plaintiffs moved a new modular home onto their lot, and although the home conformed to required building standards, plaintiffs were informed that the modular home did not meet the onsite construction provision. The District Court held that plaintiffs' substantive due process rights were violated because the onsite construction provision did not have a substantial bearing on the public health, safety, morals, or general welfare and was not based on a legitimate government objective. The county appealed on grounds that the regulation did have a bearing on community welfare by preserving property values. The Supreme Court disagreed. Neither the city-county planner nor a County Commissioner was able to identify any health and only minimal safety concerns. Although a resident's ability to control the environment and the preservation of property values may implicate legitimate government concerns in some zoning situations, nothing in the record indicated that those concerns actually drove the formulation of these regulations. Absent a rational relationship to a legitimate governmental interest, the onsite construction requirement violated plaintiffs' substantive due process rights. Yurczyk v. Yellowstone County, 2004 MT 3, 319 M 169, 83 P3d 266 (2004), following Boland v. Great Falls, 275 M 128, 910 P2d 890 (1996).

*Onsite Construction Zoning Regulation Void for Vagueness:* A county zoning regulation required that residences be built onsite. Plaintiffs who wished to place a modular home on a lot contended that the regulation was void for vagueness because the term "onsite construction" was not defined in the regulation, there was no indication of what percentage of the structure had to be built onsite, and members of the Board of County Commissioners and the zoning commission were unable to determine whether a modular home satisfied the restriction. The Supreme Court agreed that the regulation was vague, finding it difficult to imagine how the general public could be any more informed as to what the term meant when the very officials who adopted the regulation and who were to enforce it could not agree on the term's meaning. Yurczyk v. Yellowstone County, 2004 MT 3, 319 M 169, 83 P3d 266 (2004), following St. v. Martel, 273 M 143, 902 P2d 14 (1995).

*Salvation Army Goods Not Junk:* A citizens group sought to have a building permit for a Salvation Army warehouse revoked, arguing that it violated a local building code prohibiting the storing of junk. The Supreme Court affirmed the lower court's decision that used items intended for resale were not junk. Westside Neighborhood Betterment Comm. v. Great Falls, 242 M 58, 788 P2d 335, 47 St. Rep. 542 (1990).

*Annexation Agreement — Issue of Intent One of Fact — Summary Judgment Improper:* The term "residential purposes" in a "Waiver of Right to Protest Annexation and Agreement on Non-Conforming Use" was not so clear on its face as to preclude multifamily residential purposes. Supreme Court held that District Court erred in granting summary judgment for city based on the District Court's determination of the intention of the parties and remanded the case for trial on the issue of intent. Issue of intent is one of fact and cannot be decided on summary judgment. Derrenger v. Billings, 213 M 469, 691 P2d 1379, 41 St. Rep. 2276 (1984).

*No Abuse of Zoning Authority:* Based upon the record, Anaconda-Deer Lodge County acted within the authority delegated under this section by formulating its zoning ordinances with sensitivity to the peculiar suitabilities and most appropriate use of the land throughout the municipality. Were the Supreme Court to hold that a zoning ordinance must ensure each property owner the highest and best use of his property, an intolerable burden would be placed on local governments and the entire purpose of local planning legislation would be defeated. Cutone v. Anaconda-Deer Lodge County, 187 M 515, 610 P2d 691, 37 St. Rep. 693 (1980).

*Elemental Fairness:* Where plaintiff's building permit was denied after he had moved a house onto his lot in reliance upon Mayor's representation that the building permit had been approved, the conduct of the Town Council and the Mayor was so fundamentally unfair as to require reversal. State ex rel. Barker v. Stevensville, 164 M 375, 523 P2d 1388 (1974).

*Constitutionality:* Zoning ordinances and statutes authorizing them are conditional under both the Due Process Clause and the Equal Protection Clause, in that they constitute a valid exercise of the police power; i.e., they have a substantial bearing upon the public health, safety, morals, and general welfare of a community. Freeman v. Bd. of Adjustment, 97 M 342, 34 P2d 534 (1934), followed in Mack T. Anderson Ins. Agency, Inc. v. Belgrade, 246 M 112, 803 P2d 648, 47 St. Rep. 2287 (1990), and Boland v. Great Falls, 275 M 128, 910 P2d 890, 53 St. Rep. 69 (1996).

## 76-2-302. Zoning districts.

### Compiler's Comments

*2023 Amendments — Composite Section:* Section 2, Ch. 178, L. 2023, in (1) at end inserted "including the creation of zoning districts that allow tiny dwelling units"; in (4)(a) near middle of first sentence after "in a factory" deleted "on or after January 1, 1990, that is placed on a permanent foundation, is at least 1,000 square feet in size, has a pitched roof and siding and roofing materials that are customarily, as defined by local regulations, used on site-built homes, and"; inserted (4)(b)(i) providing definition of tiny dwelling unit; inserted (4)(b)(ii) providing that the International Building Code governs tiny dwelling unit requirements; and made minor changes in style. Amendment effective October 1, 2023.

Section 1, Ch. 501, L. 2023, in (5) inserted second sentence concerning local design review standards; inserted (8)(a) and (8)(b) requiring that municipal employees conduct design review rather than an external board, except for structures or districts designated or listed as historic. Amendment effective October 1, 2023.

*2021 Amendment:* Chapter 249 inserted (6) concerning prohibition on zoning regulations requiring a fee or dedication of real property for the purpose of providing housing; and inserted (7) concerning the meaning of a dedication of real property. Amendment effective April 19, 2021.

*2005 Amendment:* Chapter 542 in (4) at end of second sentence substituted "61-1-101" for "61-1-501". Amendment effective January 1, 2006.

The amendment to this section made by sec. 124, Ch. 596, L. 2005, was rendered void by sec. 167, Ch. 596, L. 2005, a coordination section.

*1997 Amendment:* Chapter 42 in (4), near end, substituted "mobile home or housetrailer, as defined in 61-1-501" for "mobile home, as defined in 61-4-309, or a housetrailer, as defined in 61-1-501"; and made minor changes in style. Amendment effective March 12, 1997.

*1993 Amendment:* Chapter 505 inserted (3) relating to rebuttable presumption concerning manufactured housing within residential zoning district; inserted (4) defining manufactured housing; inserted (5) prohibiting section being construed to limit conditions imposed in historic districts, local design review standards, existing covenants, or ability to enter into covenants; and made minor changes in style.

*Preamble:* The preamble attached to Ch. 505, L. 1993, provided: "WHEREAS, certain zoning codes in Montana prohibit the placement of manufactured housing within districts where the construction of comparable site-built housing is permitted; and

WHEREAS, the reasons for treating manufactured housing differently from site-built housing have, because of significant improvements in the quality and regulation of manufactured housing, lost whatever historical justification they may once have had.

THEREFORE, the Legislature of the State of Montana finds it desirable and appropriate to discourage discrimination within zoning districts between manufactured and site-built housing."

### Case Notes

*Section Not Violated When Rezoned to Seek Commercial Development:* Section 76-2-302 requires uniformity within individual geographic districts in a city's zoning map. However, rezoning for a commercial development using a conditional use permit was appropriate when the planned unit development process became unavailable. Hartshorne v. Whitefish, 2021 MT 116, 404 Mont. 150, 486 P.3d 693.

*Local Building Code Not Zoning Ordinance — No Legal Authority for City to Adopt — Code Invalid and Unenforceable:* The District Court ruled that the city had no legal authority to adopt or enforce a local building code that prohibited wooden roof materials in certain areas of the city. The District Court rejected the city's argument that the rule was a zoning ordinance. The city appealed to the Supreme Court, which affirmed and agreed with the District Court that the local code contravened state law, which designated the Department of Labor and Industry as the sole agency with the authority to promulgate building regulations. Helena v. Svee, 2014 MT 311, 377 Mont. 158, 339 P.3d 32.

*Void Building Permit:* Building permit which was issued in violation of city zoning ordinance is void ab initio and creates no legal rights. State ex rel. Russell Center v. Missoula, 166 M 385, 533 P2d 1087 (1975).

## 76-2-303. Procedure to administer certain annexations and zoning laws — hearing and notice.

### Compiler's Comments

*2011 Amendment:* Chapter 19 in (3)(a)(iii) near end after "chapter 1" deleted "or in a master plan, as provided for in 76-2-304(3)"; and made minor changes in style. Amendment effective October 1, 2011.

*2003 Amendment:* Chapter 87 in (3)(a)(iii) after "title" inserted "or in a master plan, as provided for in 76-2-304(3)"; and made minor changes in style. Amendment effective March 20, 2003.

*1999 Amendment — Code Commissioner Change:* Chapter 355 in (1) near end after "enforced, and" deleted "from time to time amended, supplemented, or" and after "changed" inserted "subject to the requirements of subsection (2)"; in (3)(a) near end after "provided that the" substituted "proposed municipal zoning regulations for" for "municipality continues on"; in (3)(a)(i) at beginning inserted "authorize"; inserted (3)(a)(ii) allowing a hearing on an annexation that authorizes land uses consistent with approved land uses; inserted (3)(a)(iii) allowing a hearing on an annexation that is consistent with zoning requirements; and made minor changes in style. Amendment effective October 1, 1999.

Pursuant to sec. 34, Ch. 582, L. 1999, in (3)(a)(iii) the code commissioner changed "master plan" to "growth policy".

*1997 Amendment:* Chapter 217 inserted (3) regarding a municipal annexation hearing or joint annexation and zoning hearing; and made minor changes in style.

### Case Notes

*Proper Application of Statutory and Regulatory Procedure in Adoption of Zoning Amendment:* A citizens' group challenged the approval of a zoning change in Polson, asserting that the city council failed to properly consider the criteria in Lowe v. Missoula, 165 M 38, 525 P2d 551 (1974), and failed to issue sufficient findings of fact. The District Court found no error and the Supreme Court agreed. The zoning amendment application addressed each Lowe criterion in detail, and the city council properly considered each element, including a report by the city planning department and public comments. Further, there is no requirement that a governing body explain in detail why it has determined whether each criterion has or has not been met. Rather, the proper standard of review is whether the information upon which the decision was based was so lacking in fact and foundation that it was clearly unreasonable and constituted an abuse of discretion. In this case, the city council had sufficient evidence to make an informed decision and followed the proper statutory and regulatory procedure in adopting the zoning amendment. The council's decision that the Lowe criteria were satisfied was not random, unreasonable, arbitrary, or capricious. The District Court was affirmed. Lake County First v. Polson City Council, 2009 MT 322, 352 M 489, 218 P3d 816 (2009). See also N. 93 Neighbors, Inc. v. Flathead County Bd. of County Comm'rs, 2006 MT 132, 332 M 327, 137 P3d 557 (2006).

*When Written Record Not Required:* Because there is no statutory requirement that a City Commission, in granting or denying a rezoning request, enter written findings of fact, keep a verbatim record of the proceedings, and conduct the proceedings in an adjudicative manner so as to preserve applicant's full procedural due process rights, it was improper for lower court to issue Writ of Mandamus ordering City Commission to hold rehearing, when applicant failed to raise these procedural questions during initial hearing. Foster v. City Comm'n, 189 M 64, 614 P2d 1072 (1980).

*Board of Adjustment Discretionary Power for Variances:* Variance order granted for the operation of a law office in a zoned residential area will not be set aside without a showing that the variance was contrary to public interest and thus an abuse of discretion. Rygg v. Kalispell Bd. of Adjustment, 169 M 93, 544 P2d 1228 (1976).

*Zoning Modification:* Where zoning ordinance amending preexisting zoning ordinances of city to reclassify lots was unanimously passed by City Commission, amendatory ordinance was valid irrespective of number of protests by landowners in area. Olson v. City Comm'n, 146 M 386, 407 P2d 374 (1965).

**76-2-304. Criteria and guidelines for zoning regulations.**

**Compiler's Comments**

*2023 Amendments — Composite Section:* Section 1, Ch. 445, L. 2023, inserted (3) concerning allowing duplex housing in a city with a population of at least 5,000 residents; and inserted (5) providing definitions of duplex housing, family unit, and single-family residence. Amendment effective January 1, 2024.

Section 1, Ch. 499, L. 2023, inserted (4) concerning multiple-unit dwellings and mixed-use developments in a municipality designated as an urban area with a population over 5,000; and inserted (5) providing definitions of mixed-use development and multiple-unit dwelling. Amendment effective May 17, 2023.

*Retroactive Applicability:* Section 4, Ch. 499, L. 2023, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to municipal zoning regulations enacted or adopted on or before [the effective date of this act]." Effective May 17, 2023.

*2009 Amendment:* Chapter 446 in (1)(a) at beginning deleted "except as provided in subsection (3)"; deleted former (1)(b)(i) that read: "(i) lessen congestion in the streets"; in (1)(b)(i) after "fire" deleted "panic"; in (1)(b)(ii) before "health" inserted "public" and after "health" inserted "public safety"; deleted former (1)(b)(iv) through (1)(b)(vi) that read: "(iv) provide adequate light and air;

(v) prevent the overcrowding of land;

(vi) avoid undue concentration of population"; in (2) at beginning substituted introductory clause for "Zoning regulations must be made with reasonable consideration, among other things, to"; inserted (2)(a) through (2)(c) related to light and air, transportation systems, and urban growth; in (2)(e) at end substituted "jurisdictional area" for "municipality"; deleted former (3) that read: "(3) Until October 1, 2006, zoning regulations may be adopted or revised in accordance with a master plan that was adopted pursuant to Title 76, chapter 1, before October 1, 1999"; and made minor changes in style. Amendment effective May 5, 2009.

*2003 Amendment:* Chapter 87 at beginning of (1)(a) inserted exception clause; inserted (3) authorizing zoning regulations to be adopted or revised until October 1, 2006, in accordance with a master plan adopted before October 1, 1999; and made minor changes in style. Amendment effective March 20, 2003.

*1999 Amendment:* Chapter 582 in (1) substituted "growth policy" for "comprehensive plan"; and made minor changes in style. Amendment effective October 1, 1999.

*Saving Clause:* Section 35, Ch. 582, L. 1999, was a saving clause.

*Transition:* Section 36, Ch. 582, L. 1999, provided: "A governing body that adopts a master plan pursuant to Title 76, chapter 1, before October 1, 1999, may adopt zoning regulations that are consistent with the master plan pursuant to Title 76, chapter 2, part 2 or 3, until October 1, 2001."

**Case Notes**

*Denial of Conditional Use Permit Was Discretionary Act — No Abuse of Discretion to Deny Permit Due to Lack of Growth Policy Compliance and Potential Traffic Impact.* Whitefish 57 Commercial, LLC v. Whitefish, 2023 MT 176, 413 Mont. 349, 536 P.3d 395.

*Garage Built in Violation of Zoning Regulations — No Abuse of Discretion to Deny Variance:* The plaintiff started construction on a large garage on his property without obtaining a zoning compliance permit. During construction, the county notified the plaintiff that the garage violated county zoning regulations; however, the plaintiff continued work on the garage. When it was nearly completed, the plaintiff filed a petition for a variance with the Yellowstone County Board of Adjustment. Following a hearing, the Board unanimously denied the petition, and the plaintiff appealed to District Court, which affirmed the Board. The plaintiff appealed to the Supreme Court, which also affirmed, noting that the Board did not abuse its discretion by concluding that allowing the variance would confer a special benefit on the plaintiff and that the economic waste of tearing down the garage was in large part due to the plaintiff's actions of continuing to build the garage after being notified by the county. Carlson v. Yellowstone County Bd. of Adjustment, 2017 MT 186, 388 Mont. 232, 399 P.3d 322.

*Local Building Code Not Zoning Ordinance — No Legal Authority for City to Adopt — Code Invalid and Unenforceable:* The District Court ruled that the city had no legal authority to adopt or enforce a local building code that prohibited wooden roof materials in certain areas of the city. The District Court rejected the city's argument that the rule was a zoning ordinance. The city appealed to the Supreme Court, which affirmed and agreed with the District Court that the local code contravened state law, which designated the Department of Labor and Industry as the sole agency with the authority to promulgate building regulations. Helena v. Svee, 2014 MT 311, 377 Mont. 158, 339 P.3d 32.

*Agreement Donating Money to Rural Special Improvement District Held Not to Supersede City Obligation to Follow Growth Policy Adopted Pursuant to Statute:* Defendant developer's predecessor in interest, Sunlight, donated $335,000 to a rural special improvement district and the developer's property was allocated a certain number of "sewer loading units". Many years later, Sunlight's successor argued that this donation and agreement with the city granted the developer certain "vested density rights" to locate more homes on the subject property than the city's growth policy allowed. The Supreme Court held that the city was statutorily required to be guided by and give consideration to the general policy and pattern of development set out in the city's growth policy and that the agreement with Sunlight could not be read as superseding that statutory duty. Heffernan v. Missoula City Council, 2011 MT 91, 360 Mont. 207, 255 P.3d 80.

*Proper Application of Statutory and Regulatory Procedure in Adoption of Zoning Amendment:* A citizens' group challenged the approval of a zoning change in Polson, asserting that the city council failed to properly consider the criteria in Lowe v. Missoula, 165 M 38, 525 P2d 551 (1974), and failed to issue sufficient findings of fact. The District Court found no error and the Supreme Court agreed. The zoning amendment application addressed each Lowe criterion in detail, and the city council properly considered each element, including a report by the city planning department and public comments. Further, there is no requirement that a governing body explain in detail why it has determined whether each criterion has or has not been met. Rather, the proper standard of review is whether the information upon which the decision was based was so lacking in fact and foundation that it was clearly unreasonable and constituted an abuse of discretion. In this case, the city council had sufficient evidence to make an informed decision and followed the proper statutory and regulatory procedure in adopting the zoning amendment. The council's decision that the Lowe criteria were satisfied was not random, unreasonable, arbitrary, or capricious. The District Court was affirmed. Lake County First v. Polson City Council, 2009 MT 322, 352 M 489, 218 P3d 816 (2009). See also N. 93 Neighbors, Inc. v. Flathead County Bd. of County Comm'rs, 2006 MT 132, 332 M 327, 137 P3d 557 (2006).

*Zoning Arguments Based on Expired County Growth Policy Dismissed as Moot:* Plaintiffs raised issues concerning a 2005 zoning amendment that were dependent upon a 1987 Flathead County growth policy. While the case was pending, the policy was subsequently replaced by a new growth policy in 2007, which provided that land use zoning in existence at the time the 2007 policy was adopted would remain in place. Because the issues were dependent on an expired growth policy, any decision by the Supreme Court on appeal would not grant effective relief or return plaintiffs to their original position, so the appeal was considered moot and was dismissed. Country Highlands Homeowners Ass'n, Inc., v. Flathead Bd. of County Commr's, 2008 MT 286, 345 M 379, 191 P3d 424 (2008), explained in Plains Grains L.P. v. Bd. of County Commr's, 2010 MT 155, 357 Mont. 61, 238 P.3d 332.

*Proper Consideration of Statutory Criteria in Adopting Zoning Amendments:* A Board of County Commissioners must make zoning amendments in accordance with the criteria in 76-2-203 and follow statutory procedures, including allowing a protest period, consideration of public comments, and holding a public hearing. In reviewing a zoning amendment, the Supreme Court decides whether the information upon which a Board based its decision is so lacking in fact and foundation that it is clearly unreasonable and constitutes an abuse of discretion. In this case, the Board followed the proper statutory and regulatory procedure for adopting zoning amendments and had sufficient evidence before it to make an informed decision. Absent an abuse of discretion, the zoning amendment was affirmed. N. 93 Neighbors, Inc. v. Flathead County Bd. of County Comm'rs, 2006 MT 132, 332 M 327, 137 P3d 557 (2006), following Lowe v. Missoula, 165 M 38, 525 P2d 551 (1974), and Schanz v. Billings, 182 M 328, 597 P2d 67 (1979).

*Expansion of Anchor Institutions Part of Neighborhood Plan — Approval of Zoning Proposal Affirmed:* Plaintiffs contended that allowing expansion of a grocery store and a hospital did not comport with the goal of a neighborhood plan to maintain a sense of history and protect key landmarks, that the expansion would increase traffic congestion and create a pedestrian unfriendly environment, and that the scale of the big box style store was inconsistent with the character of the neighborhood, which the neighborhood plan sought to preserve. Defendants argued that the expansion stabilized two of the neighborhood's most important anchor institutions, thereby fulfilling a goal of the neighborhood plan to expand and enhance existing businesses. The City Council approved the expansion, and plaintiffs sued. The District Court granted summary judgment to defendants, and plaintiffs appealed, also contending that the zoning proposal constituted illegal spot zoning. The Supreme Court affirmed. Not every zoning proposal will be consistent with every goal and objective expressed in a city's growth plan documents. However, the modified zoning proposal in this case complied with the growth plan by improving existing businesses and enhancing the growth of the anchor institutions, which was considered to be in the public interest. In addition, similar businesses had historically used the area, so the zoning proposal did not constitute illegal spot zoning. Citizen Advocates for a Livable Missoula, Inc. v. City Council, 2006 MT 47, 331 M 269, 130 P3d 1259 (2006), following Little v. Bd. of County Comm'rs, 193 M 334, 631 P2d 1282 (1981).

*Onsite Construction Zoning Regulation Violative of Substantive Due Process:* The Yellowstone Board of County Commissioners created a zoning district wherein dwellings had to be single-family units with not less than 1,500 square feet of floor area, with a requirement for onsite construction with new materials and for completion within 1 year. Plaintiffs moved a new modular home onto their lot, and although the home conformed to required building standards, plaintiffs were informed that the modular home did not meet the onsite construction provision. The District Court held that plaintiffs' substantive due process rights were violated because the onsite construction provision did not have a substantial bearing on the public health, safety, morals, or general welfare and was not based on a legitimate government objective. The county appealed on grounds that the regulation did have a bearing on community welfare by preserving property values. The Supreme Court disagreed. Neither the city-county planner nor a County Commissioner was able to identify any health and only minimal safety concerns. Although a resident's ability to control the environment and the preservation of property values may implicate legitimate government concerns in some zoning situations, nothing in the record indicated that those concerns actually drove the formulation of these regulations. Absent a rational relationship to a legitimate governmental interest, the onsite construction requirement violated plaintiffs' substantive due process rights. Yurczyk v. Yellowstone County, 2004 MT 3, 319 M 169, 83 P3d 266 (2004), following Boland v. Great Falls, 275 M 128, 910 P2d 890 (1996).

*Onsite Construction Zoning Regulation Void for Vagueness:* A county zoning regulation required that residences be built onsite. Plaintiffs who wished to place a modular home on a lot contended that the regulation was void for vagueness because the term "onsite construction" was not defined in the regulation, there was no indication of what percentage of the structure had to be built onsite, and members of the Board of County Commissioners and the zoning commission were unable to determine whether a modular home satisfied the restriction. The Supreme Court agreed that the regulation was vague, finding it difficult to imagine how the general public could be any more informed as to what the term meant when the very officials who adopted the regulation and who were to enforce it could not agree on the term's meaning. Yurczyk v. Yellowstone County, 2004 MT 3, 319 M 169, 83 P3d 266 (2004), following St. v. Martel, 273 M 143, 902 P2d 14 (1995).

*Equitable Estoppel Not Applicable Absent Misrepresentation or Concealment of Material Facts:* When Sutey Oil Company (Sutey) requested an expansion of its convenience store business that would involve adding a room with gambling machines, Sutey was informed by the county permit official that a special permit would not be required because gambling would be considered an expansion of an existing retail and service use but that Sutey would have to adhere to all county and state requirements before construction could commence. Sutey contended that the official's statement that a special-use permit was not required equitably estopped the county from denying the request for gambling machines. The District Court properly found nothing in the record showing any conduct, act, language, or silence on the part of the county that would lend itself to equitable estoppel because, despite the official's statement, Sutey had failed to demonstrate misrepresentation or concealment of material fact, the first element of equitable estoppel. In re Petition of Sutey Oil Co., Inc. v. Anaconda-Deer Lodge County Planning Bd., 1998 MT 127, 289 M 99, 959 P2d 496, 55 St. Rep. 499 (1998).

*Impact of Special-Use On-Premises Gambling on Neighboring Land Uses — Sufficient Information as Basis for Denial of Permit Notwithstanding Statutory Criteria:* Sutey Oil Company (Sutey) petitioned for a special-use permit for on-premises gambling at its convenience store in Anaconda. The permit was denied by the county planning board, and the denial was affirmed by the District Court. Sutey contended that failure by the planning board to consider and comply with the statutory criteria in this section was an abuse of discretion similar to Lowe v. Missoula, 165 M 38, 525 P2d 551 (1974). Although each of the 12 statutory criteria was not specifically evaluated, the District Court did not err in rejecting Sutey's argument that each of the criteria had to be examined or in holding that the planning board had sufficient information on which to deny the permit, based on grounds of incompatibility with neighboring single-family residential land use. In re Petition of Sutey Oil Co., Inc. v. Anaconda-Deer Lodge County Planning Bd., 1998 MT 127, 289 M 99, 959 P2d 496, 55 St. Rep. 499 (1998).

*Arbitrary Failure to Issue Building Permit — Violation of Due Process Rights:* A citizens group sought to have the building permit for a Salvation Army warehouse revoked on the grounds that the warehouse adversely impacted the character of the neighborhood. The Supreme Court upheld the city's issuance of the permit, stating that the proposed building was in compliance with all building codes and any denial of the permit would have violated the property owner's substantive due process rights. Westside Neighborhood Betterment Comm. v. Great Falls, 242 M 58, 788 P2d 335, 47 St. Rep. 542 (1990).

*Mobile Homes — Restrictive Zoning Based on Health and Safety Reasons:* Summary judgment striking down a zoning ordinance restricting mobile homes to certain areas that comprised a very small percentage of the municipal area (now jurisdictional area) was improperly granted because factual controversies existed. The first issue to be resolved was whether the ordinance required overly restrictive placement of all mobile homes, thus unconstitutionally excluding them, or whether restrictions applied for health or safety reasons only to those mobile homes not in compliance with Uniform Building Code (UBC) standards (which had been adopted by the local government), thus allowing all UBC complying mobile homes to be located with other complying residences. If the ordinance was to be construed as excluding only non-UBC complying structures, it should then be determined whether mobile homes complied or could reasonably be altered to comply with UBC standards before determining they were unconstitutionally excluded. Martz v. Butte-Silver Bow, 196 M 348, 641 P2d 426, 39 St. Rep. 149 (1982).

*Consolidated City-County Government — Holdover Plan — No New Planning Board:* A zoning ordinance enacted after city-county consolidation based upon a comprehensive plan (now growth policy) adopted by the old City-County Planning Board prior to consolidation was proper in that the new consolidated government had not by that time formed a Planning Board having the same jurisdictional area as the consolidated local government. Martz v. Butte-Silver Bow, 196 M 348, 641 P2d 426, 39 St. Rep. 149 (1982).

*Highest and Best Use of Land Not Valid Consideration in Itself:* This section does not require that zoning ordinances take into account highest and best use of each parcel of real estate within a zone but rather that peculiar suitabilities and most appropriate use of land throughout municipality (now jurisdictional area) be considered. Cutone v. Anaconda-Deer Lodge County, 187 M 515, 610 P2d 691 (1980), followed in Mack T. Anderson Ins. Agency, Inc. v. Belgrade, 246 M 112, 803 P2d 648, 47 St. Rep. 2287 (1990), and Boland v. Great Falls, 275 M 128, 910 P2d 890, 53 St. Rep. 69 (1996).

*Formal Record Requirement:* The record made by the City Council (and relied on by the District Court) in exercising its zoning authority was so lacking in factual information that it cannot be said that the requirements of this section have been followed. Schanz v. Billings, 182 M 328, 597 P2d 67 (1979); Lowe v. Missoula, 165 M 38, 525 P2d 551 (1974).

*Rezoning Ordinance:* A rezoning ordinance, like a zoning ordinance, is a legislative enactment and is entitled to the presumption of validity and reasonableness. However, where the information upon which a City Council and District Court act is so lacking in fact and foundation as to make judicial review impossible, it is clearly unreasonable and constitutes an abuse of discretion. An ordinance for zoning or rezoning is invalid unless made in accordance with the provisions of this section. Schanz v. Billings, 182 M 328, 597 P2d 67, 36 St. Rep. 1163 (1979), followed in The Greens at Fort Missoula, LLC v. Missoula, 271 M 398, 897 P2d 1078, 52 St. Rep. 501 (1995).

*Zoning as Legislative Action — Rezoning or Granting or Denying Variance as Administrative or Quasi-Judicial Action:* There is sound distinction between "zoning" and "rezoning" or granting or denying a variance. The former constitutes a legislative act, while the latter is more of an administrative or quasi-judicial act in applying provisions of existing ordinance or law and requires the making of a record upon which judicial review can be had. Lowe v. Missoula, 165 M 38, 525 P2d 551 (1974). Distinction overruled in Schanz v. Billings, 182 M 328, 597 P2d 67 (1979). The contradictory language in the opinion was overruled in The Greens at Fort Missoula, LLC v. Missoula, 271 M 398, 897 P2d 1078, 52 St. Rep. 501 (1995), which followed Schanz. See also Foster v. City Comm'n, 189 M 64, 614 P2d 1072 (1980).

**Attorney General's Opinions**

*No Legal Effect of Comprehensive Plan Adopted Before October 1, 1999, as Basis for New Zoning Regulations:* Pursuant to the transition and applicability language in Senate Bill No. 97 (1999) (Ch. 582, L. 1999), a comprehensive plan adopted prior to October 1, 1999, has no legal effect as the basis for new local zoning or subdivision regulations unless it meets the requirements of a growth policy under 76-1-601. Zoning regulations that were adopted pursuant to master plans, comprehensive plans, and comprehensive development plans prior to October 1, 2001, are enforceable, but county and municipal zoning regulations may not be adopted or substantively revised after October 1, 2001, unless a growth policy is adopted for the entire area of the planning board having jurisdiction. Application of previously adopted zoning regulations does not constitute the adoption of zoning regulations, so rezoning is not precluded, and routine minor revisions that do not have any impact on growth policy may be made. 49 A.G. Op. 23 (2002).

**Law Review Articles**

The Role of Fish and Wildlife Evidence in Local Land Use Regulation, Mudd, Dunning, & Hayes, 30 Pub. Land & Resources L. Rev. 107 (2009).

## 76-2-305. Alteration of zoning regulations — protest.

**Compiler's Comments**

*2011 Amendment:* Chapter 88 in (2)(b) inserted "or units, as defined in 70-23-102"; and inserted (3) relating to method of determining unit owner's undivided interest for purposes of protest. Amendment effective March 30, 2011.

*1999 Amendment:* Chapter 492 in (2) at beginning inserted prohibition against amendment becoming effective unless approved by a two-thirds vote of council or legislative body of municipality, inserted "pursuant to subsection (1)", and increased number of required signers of protest from 20% to 25%; in (2)(b) substituted "those lots 150 feet from a lot included in a proposed change" for "those immediately adjacent in the rear thereof extending 150 feet therefrom or of those adjacent on either side thereof within the same block or of those directly opposite thereof extending 150 feet from the street frontage of such opposite lots, such amendment shall not become effective except by the favorable vote of three-fourths of all the members of the city or town council or legislative body of such municipality"; and made minor changes in style. Amendment effective October 1, 1999.

*Saving Clause:* Section 2, Ch. 492, L. 1999, was a saving clause.

**Case Notes**

*Proper Application of Statutory and Regulatory Procedure in Adoption of Zoning Amendment:* A citizens' group challenged the approval of a zoning change in Polson, asserting that the city council failed to properly consider the criteria in Lowe v. Missoula, 165 M 38, 525 P2d 551 (1974), and failed to issue sufficient findings of fact. The District Court found no error and the Supreme Court agreed. The zoning amendment application addressed each Lowe criterion in detail, and the city council properly considered each element, including a report by the city planning department and public comments. Further, there is no requirement that a governing body explain in detail why it has determined whether each criterion has or has not been met. Rather, the proper standard of review is whether the information upon which the decision was based was so lacking in fact and foundation that it was clearly unreasonable and constituted an abuse of discretion. In this case, the city council had sufficient evidence to make an informed decision and followed the proper statutory and regulatory procedure in adopting the zoning amendment. The council's decision that the Lowe criteria were satisfied was not random, unreasonable, arbitrary, or capricious. The District Court was affirmed. Lake County First v. Polson City Council, 2009 MT 322, 352 M 489, 218 P3d 816 (2009). See also N. 93 Neighbors, Inc. v. Flathead County Bd. of County Comm'rs, 2006 MT 132, 332 M 327, 137 P3d 557 (2006).

*Administrative Remedies to Be Exhausted Before Seeking District Court Relief:* The Supreme Court upheld the lower court's dismissal of a suit on the basis that state law and city ordinances provided procedures for protesting zoning changes and that the plaintiffs had not exhausted those remedies. Kunz v. Butte-Silver Bow, 244 M 271, 797 P2d 224, 47 St. Rep. 1615 (1990).

*When Written Record Not Required:* Because there is no statutory requirement that a City Commission, in granting or denying a rezoning request, enter written findings of fact, keep a verbatim record of the proceedings, and conduct the proceedings in an adjudicative manner so as to preserve applicant's full procedural due process rights, it was improper for lower court to issue Writ of Mandamus ordering City Commission to hold rehearing, when applicant failed to raise these procedural questions during initial hearing. Foster v. City Comm'n, 189 M 64, 614 P2d 1072 (1980).

*Conditions for Granting Variance:* In exercise of its authority the Board of Adjustment must determine that grant of a variance would not be contrary to the public interest, that literal enforcement of the zoning ordinance would create unnecessary hardship due to conditions unique to the property, and that the spirit of the ordinance is observed and substantial justice is done. Cutone v. Anaconda-Deer Lodge County, 187 M 515, 610 P2d 691 (1980); Rygg v. Kalispell Bd. of

Adjustment, 169 M 93, 544 P2d 1228 (1976); Lambros v. Bd. of Adjustment, 153 M 20, 452 P2d 398 (1969).

*Void Building Permit:* Building permit which allowed owner to use land for a purpose for which it was not zoned had the effect of rezoning without compliance with this section and was therefore void. State ex rel. Russell Center v. Missoula, 166 M 385, 533 P2d 1087 (1975).

*Zoning Modification:* Where zoning ordinance amending preexisting zoning ordinances of city to reclassify lots was unanimously passed by City Commission, amendatory ordinance was valid irrespective of number of protests by landowners in area. Olson v. City Comm'n, 146 M 386, 407 P2d 374 (1965).

**Attorney General's Opinions**

*Protest Provisions Applicable When Zoning Regulation Changed by Interim Zoning Authority:* The protest provisions in subsection (2) of this section are available to affected landowners whenever an existing zoning regulation is changed within the scope of subsection (1) of this section through exercise by a city or town council of the zoning authority in 76-2-306. 46 A.G. Op. 5 (1995).

*Applicability of Protest Provisions to Irregularly Shaped Parcels:* The protest provisions of this section apply to proposed zoning amendments affecting nonrectangular or nonsquare parcels of land. Identification of the statutorily defined protest areas must be made with reference to the particular facts. 41 A.G. Op. 68 (1986).

*Area for Computing Valid Protest:* A single rezoning proposal which entails separable changes in two separate districts must be considered as two separate proposals for the purpose of mapping protest areas and determining the voting requirements. 37 A.G. Op. 58 (1977).

## 76-2-306. Interim zoning ordinances.

**Compiler's Comments**

*2013 Amendment:* Chapter 56 in (1) at beginning inserted exception clause; in (1), (2), and (3) in two places substituted "interim zoning ordinance" for "interim ordinance"; and made minor changes in style. Amendment effective February 28, 2013.

**Case Notes**

*Moratorium on Conditional-Use Permits — Zoning — Mandamus — Prohibition — Declaratory Judgment:* Appellant requested a conditional-use permit for a planned shopping center. In response, the city of Helena established a 1-year moratorium on the granting of all conditional-use permits. Appellant then filed his complaint and petition for a declaratory judgment, Writ of Mandate, and order to show cause. On appeal, the court found: (1) the city may adopt a reasonable general moratorium, but the procedure required by this section must be followed; (2) the discretion of the City Commission to approve, modify, or deny the recommendation of the zoning commission cannot be controlled by Writ of Mandate, prohibition, or by declaratory judgment; and (3) a Writ of Mandate requiring the city to act on appellant's application within a reasonable time is proper under the circumstances in this case. State ex rel. Diehl Co. v. Helena, 181 M 306, 593 P2d 458, 36 St. Rep. 735 (1979).

**Attorney General's Opinions**

*When Interim Zoning May Be Implemented — Failure to Adopt Growth Policy Not Considered Exigency That Permits Emergency Interim Zoning:* In the case of both counties and municipalities, interim zoning measures may be adopted: (1) when proper zoning procedures have not been satisfied; (2) when some matter of urgency requires zoning to protect public health, safety, and welfare; (3) if the interim measure addresses the urgent matter; and (4) as long as more formal planning processes have been initiated or will be initiated within a reasonable time. The absence of a growth policy satisfies the first provision, but interim zoning cannot be implemented unless all four requirements are satisfied. Failure to adopt a growth policy does not in itself constitute an exigency that allows implementation of emergency zoning. 49 A.G. Op. 23 (2002).

*Protest Provisions Applicable When Zoning Regulation Changed by Interim Zoning Authority:* The protest provisions in 76-2-305(2) are available to affected landowners whenever an existing zoning regulation is changed within the scope of 76-2-305(1) through exercise by a city or town council of the zoning authority in this section. 46 A.G. Op. 5 (1995).

## 76-2-307. Zoning commission.

**Attorney General's Opinions**

*Municipal Planning Board Not to Be Vested With Municipal Zoning Commission Powers:* Authorization does not exist for designation of a city planning board as a zoning commission, and 7-1-114 prohibits establishment of an alternative zoning system by local ordinance. Therefore, a city exercising self-government powers may not vest its municipal planning board with powers vested in municipal zoning commissions by this section. 47 A.G. Op. 4 (1997).

### 76-2-308. Enforcement of zoning regulations and ordinances.

**Case Notes**

*Writ of Mandate Improper Where Other Adequate Remedy Lies:* Where builders had invested approximately $114,000 and were one-third completed, city was estopped from revoking building permit, after builders relied on it to their detriment, to meet setback requirements of city zoning ordinance. Writ of Mandate brought by residents to command builders to conform to setback requirements could not lie, as 76-2-321 through 76-2-328 provide residents with a speedy and adequate remedy at law and a Writ of Mandate is an extraordinary remedy to be permitted only when no other adequate remedy lies. State ex rel. May v. Hartson, 167 M 441, 539 P2d 376 (1975).

### 76-2-309. Conflict with other laws.

**Compiler's Comments**

*2023 Amendments — Composite Section:* Section 2, Ch. 445, L. 2023, in (1) and (2) near end substituted "must" for "shall"; in (2) after "authority of this part" inserted exception clause referring to 76-2-304(3); and made minor changes in style. Amendment effective January 1, 2024.

Section 2, Ch. 499, L. 2023, in (1) and (2) near end after "regulation" deleted "shall"; in (2) near end inserted exception clause referring to 76-2-403(4) and substituted "the other" for "such"; and made minor changes in style. Amendment effective May 17, 2023.

*Retroactive Applicability:* Section 4, Ch. 499, L. 2023, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to municipal zoning regulations enacted or adopted on or before [the effective date of this act]." Effective May 17, 2023.

### 76-2-310. Extension of municipal zoning and subdivision regulations beyond municipal boundaries.

**Compiler's Comments**

*2003 Amendment:* Chapter 599 in (1) near end after "chapter 1" inserted "for the area to be affected by the regulations". Amendment effective May 9, 2003.

*1999 Amendment:* Chapter 582 at beginning of (1) inserted exception clause, after "adopted" substituted "growth policy" for "master plan", and after "direction" substituted "subject to the following limits" for "but not in a county which has adopted such regulations within the contemplated area"; at beginning of (1)(a) inserted "up to 3 miles beyond the limits of" and after "7-1-4111" deleted "may not extend the application of its zoning or subdivision regulations, or both, more than 3 miles beyond its limits"; at beginning of (1)(b) inserted "up to 2 miles beyond the limits of" and after "class" deleted "may not so extend more than 2 miles beyond its limits"; at beginning of (1)(c) inserted "up to 1 mile beyond the limits of" and after "class" deleted "may not so extend more than 1 mile beyond its limits"; and made minor changes in style. Amendment effective October 1, 1999.

*Saving Clause:* Section 35, Ch. 582, L. 1999, was a saving clause.

*Transition:* Section 36, Ch. 582, L. 1999, provided: "A governing body that adopts a master plan pursuant to Title 76, chapter 1, before October 1, 1999, may adopt zoning regulations that are consistent with the master plan pursuant to Title 76, chapter 2, part 2 or 3, until October 1, 2001."

**Attorney General's Opinions**

*What Electors Considered Qualified Voters for County Zoning Initiatives:* A zoning regulation is subject to citizen initiative, and nothing in county zoning law limits qualified electors to only voters living in the area affected by the zoning regulations. Thus, in the case of county zoning regulation initiatives effective in all unincorporated areas of a county, all county residents are considered qualified voters, including those residing within incorporated areas of the county. 52 A.G. Op. 6 (2008).

*Extraterritorial Extension of City Zoning Regulations:* In the absence of applicable county zoning regulations, this section authorizes a city of the first class that has adopted a master plan (now growth policy) to extend its zoning regulations extraterritorially within a 3-mile radius of its corporate limits without reference to county boundary lines. 43 A.G. Op. 22 (1989).

### 76-2-311. Administration of regulations in extended area.

**Compiler's Comments**

*1999 Amendment:* Chapter 582 in two places substituted "growth policy" for "master plan"; in (1) after "regulations" substituted "adopted pursuant to 76-2-310" for "in the area to the same extent"; and made minor changes in style. Amendment effective October 1, 1999.

*Saving Clause:* Section 35, Ch. 582, L. 1999, was a saving clause.

*Transition:* Section 36, Ch. 582, L. 1999, provided: "A governing body that adopts a master plan pursuant to Title 76, chapter 1, before October 1, 1999, may adopt zoning regulations that are consistent with the master plan pursuant to Title 76, chapter 2, part 2 or 3, until October 1, 2001."

### 76-2-312. Exclusion for commission-manager plan municipalities.

**Case Notes**

*Authority of Board of County Commissioners to Approve Subdivisions Within Three-Mile Area Outside Corporate Limits:* The city of Bozeman sought a reversal of 43 A.G. Op. 26 (1989), in which the Attorney General held that the Board of County Commissioners has final authority to approve subdivisions that are within the 3-mile area immediately outside the corporate limits of the city when the city has a commission-manager form of government. Bozeman asserted that this section was not a limitation on the authority of commission-manager governments but rather an acknowledgement by the Legislature that such municipal governments already had extraterritorial subdivision authority under 7-3-4444 and that this section exempted cities with a commission-manager form of government from procedural requirements that other forms of municipal government have to follow in order to exercise their extraterritorial subdivision authority. However, 7-3-4444 does not refer to the city commission, but instead clearly provides that the authority granted is to the city director of public services to ensure that the involved plat complies with platting regulations. If the plat complies, the director must approve it. The District Court properly found that this section took away the extraterritorial subdivision authority over subdivisions that Bozeman, as a commission-manager form of government, would otherwise have had under 76-2-310 and 76-2-311. Bozeman v. Racicot, 253 M 204, 832 P2d 767, 49 St. Rep. 435 (1992).

**Attorney General's Opinions**

*Authority of County Commissioners to Approve Subdivisions Under Commission-Manager Government:* The Board of County Commissioners has final authority to approve subdivisions that are within the 3-mile area immediately outside the corporate limits of the city when the city has a commission-manager form of government. 43 A.G. Op. 26 (1989).

### 76-2-321. Board of adjustment.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

**Case Notes**

*Zoning Board of Adjustment Did Not Abuse Discretion in Issuing Conditional Use Permit — Not Clearly Unreasonable When Board Considered Zoning Administrator's Recommendations and Staff Input, Published Notice and Considered Public Comment, Held 19.5 Hours of Public Hearing, Weighed Pros and Cons of Application, and Approved Permit by Vote of Board.* Hamilton Southside Historic Preservation Ass'n v. Hamilton Zoning Bd. of Adjustment, 2023 MT 119, 412 Mont. 519, 531 P.3d 584.

*Board of Adjustment's Discretionary Power for Variances:* Variance order granted for the operation of a law office in a zoned residential area will not be set aside without a showing that the variance was contrary to public interest and thus an abuse of discretion. Rygg v. Kalispell Bd. of Adjustment, 169 M 93, 544 P2d 1228 (1976). (Comment: Case gives three criteria for the establishment of variances in Montana.)

**Attorney General's Opinions**

*Local Government Subject to State Zoning Laws — Ordinance Creating Appeal Prohibited:* Section 7-1-114 prohibits a local legislative body from providing for an option appeal of decisions from the local zoning Board of Adjustment to the legislative body since 76-2-327 provides that appeal may only be to a court of record. This section authorizes the local legislative body to act instead of the Board of Adjustment in certain cases, not in addition to the Board. 38 A.G. Op. 98 (1980).

## 76-2-322. Membership and term of board members — vacancies.

**Compiler's Comments**

*1987 Amendment:* In (1) authorized increase of Board size from mandatory five members to not more than seven members.

*1985 Amendment:* In (1) after "term", inserted provision that legislative body may specify the term; and made minor changes in phraseology.

## 76-2-323. Powers of board of adjustment.

**Case Notes**

*Approval of Variance to Rear Setback Requirement Not Abuse of Discretion — No Requirement for City to Hold Zoning Board Hearing and Take Public Comment Before Reviewing and Analyzing Formal Variance Request — No Duty to Alter Board's Variance Approval Just Because Contrary Evidence or Analysis Received — Record Not So Lacking in Fact and Foundation That Variance Approval Was Clearly Unreasonable.* Hamilton Southside Historic Preservation Ass'n v. Hamilton Zoning Bd. of Adjustment, 2023 MT 119, 412 Mont. 519, 531 P.3d 584.

*Board of Adjustment Has Discretion to Rely on Professional Parking Review and Traffic Study and Recommendations of City Staff and Zoning Administrator Over Other Information Related to Parking Issues — No Abuse of Discretion by Board to Uphold Zoning Administrator's Approval of Joint Use Parking Agreement as Variance to Zoning Code.* Hamilton Southside Historic Preservation Ass'n v. Hamilton Zoning Bd. of Adjustment, 2023 MT 119, 412 Mont. 519, 531 P.3d 584.

*Zoning Board of Adjustment Did Not Abuse Discretion in Issuing Conditional Use Permit — Not Clearly Unreasonable When Board Considered Zoning Administrator's Recommendations and Staff Input, Published Notice and Considered Public Comment, Held 19.5 Hours of Public Hearing, Weighed Pros and Cons of Application, and Approved Permit by Vote of Board.* Hamilton Southside Historic Preservation Ass'n v. Hamilton Zoning Bd. of Adjustment, 2023 MT 119, 412 Mont. 519, 531 P.3d 584.

*Garage Built in Violation of Zoning Regulations — No Abuse of Discretion to Deny Variance:* The plaintiff started construction on a large garage on his property without obtaining a zoning compliance permit. During construction, the county notified the plaintiff that the garage violated county zoning regulations; however, the plaintiff continued work on the garage. When it was nearly completed, the plaintiff filed a petition for a variance with the Yellowstone County Board of Adjustment. Following a hearing, the Board unanimously denied the petition, and the plaintiff appealed to District Court, which affirmed the Board. The plaintiff appealed to the Supreme Court, which also affirmed, noting that the Board did not abuse its discretion by concluding that allowing the variance would confer a special benefit on the plaintiff and that the economic waste of tearing down the garage was in large part due to the plaintiff's actions of continuing to build the garage after being notified by the county. Carlson v. Yellowstone County Bd. of Adjustment, 2017 MT 186, 388 Mont. 232, 399 P.3d 322.

*Authority of Board of Adjustment Regarding Land Use Upheld:* The Bozeman Board of Adjustment acted within its jurisdiction under this section in granting a zoning variance that imposed limits on the number of waterfowl landowners can raise on their land. Schendel v. Bd. of Adjustment, 237 M 278, 774 P2d 379, 46 St. Rep. 800 (1989).

*Denial of Variance Request — No Abuse:* Because the record reveals that granting of a variance request to use certain property as a tavern would increase fire hazards, traffic congestion, and interference with emergency vehicle access, the Anaconda-Deer Lodge County Board of Adjustment and the District Court did not abuse their discretion in denying the request. Cutone v. Anaconda-Deer Lodge County, 187 M 515, 610 P2d 691, 37 St. Rep. 693 (1980).

*Conditions for Granting Variance:* In exercise of its authority the Board of Adjustment must determine that grant of a variance would not be contrary to the public interest, that literal enforcement of the zoning ordinance would create unnecessary hardship due to conditions unique to the property, and that the spirit of the ordinance is observed and substantial justice is done. Cutone v. Anaconda-Deer Lodge County, 187 M 515, 610 P2d 691 (1980); Rygg v. Kalispell Bd. of Adjustment, 169 M 93, 544 P2d 1228 (1976); Lambros v. Bd. of Adjustment, 153 M 20, 452 P2d 398 (1969).

*Writ of Mandate Improper Where Other Adequate Remedy Lies:* Where builders had invested approximately $114,000 and were one-third completed, city was estopped from revoking building permit, after builders relied on it to their detriment, to meet setback requirements of city zoning ordinance. Writ of Mandate brought by residents to command builders to conform to setback requirements could not lie, as 76-2-321 through 76-2-328 provide residents with a speedy and adequate remedy at law and a Writ of Mandate is an extraordinary remedy to be permitted only when no other adequate remedy lies. State ex rel. May v. Hartson, 167 M 441, 539 P2d 376 (1975).

*Refusal of Variance:* Refusal of variance to expand trailer court was sufficiently supported by evidence that there were sanitation problems in the neighborhood and that the hardship conditions were self-imposed by the act of the owner in proceeding with expansion before receiving the variance. Wheeler v. Armstrong, 166 M 363, 533 P2d 964 (1975).

*Powers of Board of Adjustment Broad, General, and Discretionary:* Contention that the powers of the Board of Adjustment (or Appeal) created by this act, authorizing the enactment of zoning ordinances in cities and towns, are limited to slight variations, such as the height of a building, the distance it must be from the street, etc., held not meritorious, but that on the contrary the Board, an administrative body vested with general power to act as a factfinding body and determine whether in any specific case unusual hardship might result from an enforcement of the strict letter of the ordinance, possesses broad and general powers with a considerable latitude for the exercise of discretion, the conferring of which powers does not constitute an unlawful delegation of legislative authority. Freeman v. Bd. of Adjustment, 97 M 342, 34 P2d 534 (1934), distinguished in Doull v. Wohlschlager, 141 M 354, 377 P2d 758 (1963).

## 76-2-326. Appeals to board of adjustment.

### Compiler's Comments

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### Case Notes

*Frivolous Lawsuit Filed by Developer Over Board of Adjustment Decision to Revoke Building Permit — Attorney Fees to Neighbors Challenging Issuance of Work Permit Granted — Zoning Regulations Not Unconstitutionally Vague:* The plaintiff applied for a building permit, which was denied because the proposed structure was too large. Five months later, he applied for a different permit, which was issued. His neighbors appealed the permit after they learned the construction was not intended as an accessory to an existing unit as required. The city, through the Board of Adjustment, issued a stop-work order, and the building permit was revoked. The plaintiff then filed suit against the city and the two neighbors who appealed the permit. The District Court dismissed the suit against the neighbors and granted their motion for $25,000 in attorney fees because it found the plaintiff's case against them to be utterly frivolous. The District Court also rejected the plaintiff's argument that the zoning rules were unconstitutionally vague, concluding that a person of ordinary understanding could comprehend the rules. On appeal, the Supreme Court agreed with the District Court's analysis and affirmed. DeVoe v. Missoula, 2012 MT 72, 364 Mont. 375, 274 P.3d 752.

*Writ of Mandate Improper Where Other Adequate Remedy Lies:* Where builders had invested approximately $114,000 and were one-third completed, city was estopped from revoking building permit, after builders relied on it to their detriment, to meet setback requirements of city zoning ordinance. Writ of Mandate brought by residents to command builders to conform to setback requirements could not lie, as 76-2-321 through 76-2-328 provide residents with a speedy and adequate remedy at law and a Writ of Mandate is an extraordinary remedy to be permitted only when no other adequate remedy lies. State ex rel. May v. Hartson, 167 M 441, 539 P2d 376 (1975).

## 76-2-327. Appeals from board to court of record.

### Compiler's Comments

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### Case Notes

*Denial of Conditional Use Permit Was Discretionary Act — No Abuse of Discretion to Deny Permit Due to Lack of Growth Policy Compliance and Potential Traffic Impact.* Whitefish 57 Commercial, LLC v. Whitefish, 2023 MT 176, 413 Mont. 349, 536 P.3d 395.

*Garage Built in Violation of Zoning Regulations — No Abuse of Discretion to Deny Variance:* The plaintiff started construction on a large garage on his property without obtaining a zoning compliance permit. During construction, the county notified the plaintiff that the garage violated county zoning regulations; however, the plaintiff continued work on the garage. When it was nearly completed, the plaintiff filed a petition for a variance with the Yellowstone County Board of Adjustment. Following a hearing, the Board unanimously denied the petition, and the plaintiff appealed to District Court, which affirmed the Board. The plaintiff appealed to the Supreme Court, which also affirmed, noting that the Board did not abuse its discretion by concluding that allowing the variance would confer a special benefit on the plaintiff and that the economic waste of tearing down the garage was in large part due to the plaintiff's actions of continuing to build the garage after being notified by the county. Carlson v. Yellowstone County Bd. of Adjustment, 2017 MT 186, 388 Mont. 232, 399 P.3d 322.

*Frivolous Lawsuit Filed by Developer Over Board of Adjustment Decision to Revoke Building Permit — Attorney Fees to Neighbors Challenging Issuance of Work Permit Granted — Zoning Regulations Not Unconstitutionally Vague:* The plaintiff applied for a building permit, which was denied because the proposed structure was too large. Five months later, he applied for a different permit, which was issued. His neighbors appealed the permit after they learned the construction was not intended as an accessory to an existing unit as required. The city, through the Board of Adjustment, issued a stop-work order, and the building permit was revoked. The plaintiff then filed suit against the city and the two neighbors who appealed the permit. The District Court dismissed the suit against the neighbors and granted their motion for $25,000 in attorney fees because it found the plaintiff's case against them to be utterly frivolous. The District Court also rejected the plaintiff's argument that the zoning rules were unconstitutionally vague, concluding that a person of ordinary understanding could comprehend the rules. On appeal, the Supreme Court agreed with the District Court's analysis and affirmed. DeVoe v. Missoula, 2012 MT 72, 364 Mont. 375, 274 P.3d 752.

*City Commission Denial of Application for Site Plan Not Violative of Due Process or Equal Protection — Summary Judgment Proper:* Plaintiff sought to build several mini-stores in a Bozeman area that was zoned as a neighborhood business district, but the City Commission denied the building application. Plaintiff sued the city on grounds that the Commission violated plaintiff's constitutional right to due process by arbitrarily and capriciously deciding to consider the application rather than allowing the decision to be made by the planning director, and by denying the application. The District Court concluded that the zoning ordinance gave the Commission broad discretion in granting applications for site plan approval and that because plaintiff had no protected interest in the application, plaintiff was prevented from establishing a substantive due process or equal protection claim. The Commission was held to have followed proper procedures, and because no material facts were in dispute, summary judgment was granted to the city. On appeal, the Supreme Court affirmed. A constitutional substantive due process analysis was inapplicable in this case because plaintiff did not allege that the zoning ordinance was unconstitutional. Likewise plaintiff did not allege that the Commission treated plaintiff's application differently from applications of others owning property in the zoning district, so any equal protection claim failed as well. The City Commission considered the relevant criteria and stated its reason why plaintiff's site plan did not conform to the zoning regulations, and it was within the discretion of the Commission to reclaim and pass on plaintiff's application. Town & Country Foods, Inc. v. Bozeman, 2009 MT 72, 349 M 453, 203 P3d 1283 (2009). See also Raisler v. Burlington N. RR Co., 219 M 254, 717 P2d 535 (1985).

*District Court's Subject Matter Jurisdiction Not Affected by Party's Lack of Standing — Appeal of Board of Adjustment Decision:* Defendants asserted that the District Court lacked subject matter jurisdiction over them because plaintiffs failed to establish standing to challenge a boundary line relocation. The Supreme Court disagreed. Defendants mistakenly linked the requirement that a court have subject matter jurisdiction with the requirement that a plaintiff have standing to sue. Both are required, but they are not interdependent. Subject matter jurisdiction refers to a court's power to hear a particular type of case, while standing refers to the threshold justiciability requirement that a plaintiff have a personal stake in a particular case. If a plaintiff lacks standing, a court can grant no relief because a justiciable controversy does not exist, but a party's lack of standing does not deprive a District Court of subject matter jurisdiction. A court lacks the power to resolve a case brought by a party without standing because that party can present no actual case or controversy, not because the court has been stripped of subject matter jurisdiction. Here, the District Court had statutory subject matter jurisdiction under this section to hear the boundary line appeal of the City Board of Adjustment decision and determined that plaintiffs had standing to challenge the boundary relocation. Even though defendants stylized the appeal as a subject matter jurisdiction issue, which may be appealed by interlocutory appeal prior to final judgment, the actual issue was the District Court's ruling on plaintiffs' standing, which the Supreme Court will not review prior to final judgment. Defendants' appeal was therefore premature, so the Supreme Court dismissed the appeal and remanded for further proceedings. Ballas v. Missoula City Bd. of Adjustment, 2007 MT 299, 340 M 56, 172 P3d 1232 (2007). See also Gottlob v. DesRosier, 2020 MT 210, 401 Mont. 50, 470 P.3d 188, distinguishing between a lack of subject matter jurisdiction and a failure to state a claim on which relief can be granted.

*Taxpayer Standing to Petition for Review of Decision of Board of Adjustment — Dismissal of Petition Proper for Failure to State Claim:* Plaintiffs lived two blocks away from a property where a landowner was granted a variance to build a home on an undersized plot. Plaintiffs alleged that the Board of Adjustment abused its discretion by granting the variance. The Board moved to dismiss the claim on grounds that plaintiffs failed to state a claim for which relief could be granted because plaintiffs were not neighboring landowners and were not involved in the variance decision and also argued that plaintiffs lacked standing to challenge the variance because they did not allege any injury other than their right to orderly development of residential property zones. The District Court held that plaintiffs lacked standing and alternately dismissed plaintiffs' appeal for failure to state a claim for which relief could be granted. Plaintiffs appealed to the Supreme Court. The court disagreed that plaintiffs lacked standing. Under this section, any taxpayer of a municipality may petition for review of a decision of a Board of Adjustment. However, even when taking all the allegations contained in the petition in a light most favorable to plaintiffs, including an unfounded allegation that the petition was granted before the hearing date, plaintiffs' petition failed to state a claim for which relief could be granted and was properly dismissed, so the District Court was affirmed. Druffel v. Bd. of Adjustment, 2007 MT 220, 339 M 57, 168 P3d 640 (2007).

*Review of Board of Adjustment Decision — Scope Broader Than General:* A District Court's scope of review upon a writ of certiorari ordinarily cannot be extended further than to determine whether an inferior tribunal, board, or officer has regularly acted within its authority. However, under this section, a District Court has a broader scope of review of an appeal from a decision by the Board of Adjustment. The court may hold a hearing and reverse, modify, or affirm a Board decision. In reviewing a District Court decision involving the exercise of the statutory option to take additional evidence, the standard applied by the Supreme Court is whether the District Court abused its discretion and whether the decision was supported by substantial evidence. In re Petition of Sutey Oil Co., Inc. v. Anaconda-Deer Lodge County Planning Bd., 1998 MT 127, 289 M 99, 959 P2d 496, 55 St. Rep. 499 (1998), followed in Arkell v. Middle Cottonwood Bd. of Zoning Adjustment, 2007 MT 160, 338 M 77, 162 P3d 856 (2007). See also Lambros v. Bd. of Adjustment, 153 M 20, 452 P2d 398 (1969), Cutone v. Anaconda-Deer Lodge County, 187 M 515, 610 P2d 691 (1980), and Whistler v. Burlington N. RR Co., 228 M 150, 741 P2d 422 (1987).

*Taking Additional Evidence Within Discretion of Trial Court:* This section provides the District Court with authorization to take additional evidence on an appeal from a board of adjustment. The court may, in the exercise of its discretion, determine not to take additional evidence if it appears that additional evidence is not necessary to properly dispose of the matter. Mack T. Anderson Ins. Agency, Inc. v. Belgrade, 246 M 112, 803 P2d 648, 47 St. Rep. 2287 (1990).

*Review of Board of Adjustment Decision:* The District Court's review under 27-25-303 of a zoning decision of the Bozeman Board of Adjustment was proper because the court determined that the Board lawfully granted a zoning variance upon which it properly placed restrictions. Schendel v. Bd. of Adjustment, 237 M 278, 774 P2d 379, 46 St. Rep. 800 (1989).

*Substantial and Competent Evidence:* When the evidence showed that the refusal of the Zoning Board was based on a concern for public health, that the hardship caused the owners of a trailer court was of their own creation, and that the spirit of the zoning ordinance would be observed by denying a variance for an expansion of the trailer court, there was substantial and competent evidence to sustain the action of the court sustaining the denial of the variance. Wheeler v. Armstrong, 166 M 363, 533 P2d 964 (1975).

*Evidence at Hearing:* Taking of additional evidence by District Court on appeal from Board of Adjustment's denial of zoning variance was not abuse of discretion even though Board did not present any additional evidence. Lambros v. Bd. of Adjustment, 153 M 20, 452 P2d 398 (1969).

**Attorney General's Opinions**

*Local Government Subject to State Zoning Laws — Ordinance Creating Appeal Prohibited:* Section 7-1-114 prohibits a local legislative body from providing for an optional appeal of decisions from the local zoning Board of Adjustment to the legislative body since 76-2-327 provides that appeal may only be to a court of record. This section authorizes the local legislative body to act instead of the Board of Adjustment in certain cases, not in addition to the Board. 38 A.G. Op. 98 (1980).

### 76-2-340. Effect on amateur radio antenna.

**Compiler's Comments**

*Effective Date:* Section 8, Ch. 56, L. 2013, provided: "[This act] is effective on passage and approval." Approved February 28, 2013.

### 76-2-345. Accessory dwelling units — regulations — restrictions.

**Compiler's Comments**

*Effective Date:* Section 3, Ch. 502, L. 2023, provided: "[This act] is effective January 1, 2024."

## Part 4
## Application to Governmental Agencies
## Group and Foster Homes

### 76-2-402. Local zoning regulations — application to agencies.

**Compiler's Comments**

*2021 Amendment:* Chapter 362 in (1) at end substituted "a public hearing must be held and the agency shall attend the public hearing" for "a public hearing, as defined below, shall be held"; in (2) at beginning substituted "The local governing body" for "The local board of adjustments, as provided in this chapter" and in middle substituted "the local governing body" for "the board"; deleted former (2) that read: "(2) The board shall have no power to deny the proposed use but shall act only to allow a public forum for comment on the proposed use"; and made minor changes in style. Amendment effective October 1, 2021.

**Case Notes**

*Notice at Public Hearing of Planned Water Storage Facility Sufficient:* The fact that the public was allowed the opportunity at a public hearing to present opinions and objections to the building of a water tower on municipal land in violation of city zoning regulations constituted sufficient notice under this section, regardless of the fact that the tower was already under construction at the time of hearing. Hagfeldt v. Bozeman, 231 M 417, 757 P2d 753, 45 St. Rep. 728 (1988).

### 76-2-411. Definition of community residential facility.

**Compiler's Comments**

*2003 Amendments — Coordination — Composite Section:* Chapter 400 inserted (5) including licensed personal-care facility in definition of community residential facility; and made minor changes in style. Amendment effective October 1, 2003.

Pursuant to sec. 2, Ch. 400, L. 2003, a coordination section, in (5) substituted "an assisted living facility" for "a personal-care facility".

Chapter 504 at end of (2) inserted "a kinship foster home, a youth shelter care facility, a transitional living program"; and made minor changes in style. Amendment effective October 1, 2003.

*Applicability:* Section 3, Ch. 400, L. 2003, provided: "[This act] applies to personal-care [assisted living] facilities established in a residential zone after October 1, 2003."

*1995 Amendments:* Chapter 418 in (3) substituted "department of public health" for "department of health and environmental sciences". Amendment effective July 1, 1995.

Chapter 546 in (3) substituted "department of public health and human services" for "department of health and environmental sciences". Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clauses:* Section 503, Ch. 418, L. 1995, was a saving clause.

Section 571, Ch. 546, L. 1995, was a saving clause.

*1987 Amendment:* In (1) substituted "severely disabled" for "physically disabled".

*1985 Amendment:* In (1) substituted language defining community residential facility as a community group home for: "a group, foster, or other home specifically provided as a place of residence for developmentally disabled or handicapped persons who do not require nursing care"; and in (2) inserted "youth foster home or".

*1983 Amendment:* In (2), substituted "a youth group home as defined in 41-3-1102" for "a district youth guidance home established pursuant to 41-5-903".

**Case Notes**

*Legislative Power Paramount to City Zoning Regulations:* When the Legislature determines that the constitutional rights of developmentally disabled are to live and develop within community structure as a family unit rather than be segregated in isolated institutions, city zoning regulations should be revised to meet legislative requirements, as a city has no power except as conferred by legislative grants, which the legislative branch may modify or withdraw at its pleasure. State ex rel. Thelen v. Missoula, 168 M 375, 543 P2d 173 (1975).

### 76-2-412. Relationship of foster homes, kinship foster homes, youth shelter care facilities, youth group homes, community residential facilities, and day-care homes to zoning.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 1, Ch. 553, L. 2023. Amendment effective October 1, 2023.

*2003 Amendment:* Chapter 504 at beginning of (1) after "foster" inserted "home, kinship foster home, youth shelter care facility"; and made minor changes in style. Amendment effective October 1, 2003.

*1995 Amendments:* Chapter 418 in (4), in first sentence, substituted "department of public health" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 546 in (2) substituted "department of public health and human services" for "department of family services"; in (3), in second sentence, substituted "department of public health and human services" for "department"; in (4), in first sentence, substituted "department of public health and human services" for "department of health and environmental sciences and the department of family services" and at end of second sentence substituted "department of public health and human services" for "department of family services"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clauses:* Section 503, Ch. 418, L. 1995, was a saving clause.

Section 571, Ch. 546, L. 1995, was a saving clause.

*1987 Amendment:* Inserted (2) designating a family day-care home or group day-care home registered by Department as a residential use of property for zoning purposes; at beginning of (3) substituted "facilities listed in subsections (1) and (2)" for "homes"; at end of (3) inserted "or a day-care home serving 12 or fewer children"; and in (4) substituted reference to subsection (1) for "this section" and inserted second sentence prohibiting a city or county from requiring a conditional use permit to maintain a day-care home registered by Department of Family Services.

*Function Transfer:* Pursuant to sec. 117, Ch. 609, L. 1987, the Governor by executive order transferred the function and authority contained in this section from the Department of Social and Rehabilitation Services to the Department of Family Services.

*1983 Amendment:* In (1), changed "boarding home" to "youth group home".

**Case Notes**

*Frivolous Resistance to Group Homes and Facilities:* There is absolutely no question that under Montana law a group home for eight or fewer people is a residence and may be located in any area in the state zoned residential. The Supreme Court will not require community residential facilities to repeatedly defend their well-established right to locate in any residential area. The city's appeal from a lower court order upholding this principle is dismissed as frivolous, with costs of $500 assessed against the city in favor of the regional mental health center seeking a conditional use permit to locate a group home for eight or fewer mentally disabled adults in a residential area. Mahrt v. Kalispell, 213 M 96, 690 P2d 418, 41 St. Rep. 1979 (1984).

*Effect of Restrictive Covenant on Use of Residence as Home for Developmentally Disabled Children:* Restrictive covenants are to be strictly construed, and where residence for developmentally disabled children was structured as single housekeeping unit and was to all outside appearances a usual, stable, and permanent family unit, it was within the ambit and intent of subdivision restrictive covenant limiting use of property to single-family dwellings. State ex rel. Region II Child & Family Serv., Inc. v. District Court, 187 M 126, 609 P2d 245 (1980).

*Constitutionality:* This section is constitutional within purview of 1972 Montana Constitution and supersedes city ordinances that restrict use of residential areas to one-family dwellings only. State ex rel. Thelen v. Missoula, 168 M 375, 543 P2d 173 (1975).

**Attorney General's Opinions**

*Certain Community Residential Facilities Excluded From Building Code Compliance:* Subsection (3) of this section excludes from state building code compliance community residential facilities serving 8 or fewer persons and day-care homes serving 12 or fewer persons. 45 A.G. Op. 3 (1993).

### Part 9
### Agricultural Activities

**Part Compiler's Comments**

*Saving Clause:* Section 5, Ch. 309, L. 1995, was a saving clause.

*Severability:* Section 6, Ch. 309, L. 1995, was a severability clause.

### Part 10
### Digital Asset Mining

**76-2-1003. Right to mine digital assets.**

**Compiler's Comments**

*Effective Date:* Section 7, Ch. 344, L. 2023, provided: "[This act] is effective on passage and approval." Approved May 2, 2023.

*Preamble:* The preamble attached to Ch. 344, L. 2023, provided: "WHEREAS, digital asset mining provides positive economic value for individuals and companies throughout the United States; and

WHEREAS, digital asset mining has often faced difficulty with regulations at the state and local level; and

WHEREAS, the State of Montana wants to protect the right of individuals and businesses to mine digital assets and create legal certainty for the digital asset mining industry; and

WHEREAS, digital asset mining has the potential to stabilize the grid and provide revenue for infrastructure upgrades statewide."

## CHAPTER 3
## LOCAL REGULATION OF SUBDIVISIONS

**Chapter Compiler's Comments**

*Severability Clause:* Section 19, Ch. 500, L. 1973, was a severability clause.

*Validation Clause Not Codified:* Subsection (2) and part of subsection (4) of section 11-3870, R.C.M. 1947, validating clauses, were not codified. The sections were not repealed and are still valid law. Citation may be made to sec. 12, Ch. 500, L. 1973, as amended by sec. 8, Ch. 334, L. 1974.

**Chapter Administrative Rules**

ARM 36.15.204 Local flood plain regulations — requirements.

**Chapter Case Notes**

*Failure to File for Stay of Execution of Judgment or Injunction to Delay Subdivision Approval — Subsequent Approval Rendering Issue Moot:* Plaintiff filed a complaint alleging that Gallatin County unlawfully gave preliminary approval for a subdivision. However, plaintiff did not seek an injunction to prohibit the approval process from continuing. While the action was pending, the county granted final approval of the subdivision, and the District Court granted the county's motion for summary judgment. Plaintiff timely appealed, but did not apply to the District Court or the Supreme Court for a stay of judgment. Thus, there was no order in effect that prohibited the county from approving the subdivision or to prevent the selling of subdivision lots. Plaintiff could not complain that the subdivision approval process continued when plaintiff failed to seek available remedies to preserve the status quo pending appeal. At the time of appeal, the lots had been sold and the parties could not be returned to the status quo, so the appeal was dismissed as moot. Henesh v. Bd. of Comm'rs of Gallatin County, 2007 MT 335, 340 M 239, 173 P3d 1188 (2007), followed in Povsha v. Billings, 2007 MT 353, 340 M 346, 174 P3d 515 (2007).

*Shared Well Agreement Valid Despite Subdivision Requirement for Individual Wells When Approved by State and County Regulators:* Despite conditions in the subdivision certificate that called for individual water wells on each tract, the predecessors in interest to the Williamses and the Schwagers entered a shared water well agreement that endured between the tract owners for about 20 years. The subdivision certificate was approved by both the state and county. A disagreement arose between the Williamses and the Schwagers regarding use of the shared well, and the Williamses sought to enjoin the Schwagers from interfering with the well. The Schwagers responded that the well was in violation of the subdivision certificate and that the shared water well agreement was thus void. The District Court concluded that the agreement was valid and enforceable, and granted the Williamses' injunction. The Schwagers appealed, but the Supreme

Court affirmed. The agreement was not void ab initio because the subdivision certificate was approved as required prior to installation of the water system, nor was the agreement illegal per se, because a county health department official testified that the parties could still obtain approval for a shared well, which was encouraged by the county in cases in which sufficient water existed, despite the requirement in the subdivision certificate that called for individual water systems. Further, the Schwagers could not attempt to benefit from repudiating the contract after previously accepting the benefits of the agreement in the form of water fees from the Williamses, and the District Court did not err in enforcing the agreement. Williams v. Schwager, 2002 MT 107, 309 M 455, 47 P3d 839 (2002).

*Subdivision and Platting Act Constitutional — Permissible Delegation of Legislative Authority:* Plaintiff challenged the constitutionality of the Montana Subdivision and Platting Act on the grounds that the statutory preamble to the Act's exemptions amounted to an unconstitutional delegation or usurpation of legislative authority on the basis that the Act contains insufficient guidelines. The Supreme Court distinguished this case from cases relating to a legislative grant of rulemaking authority to administrative agencies based on differences in nature between agencies and local governments. The delegation of authority by the Legislature was not impermissible, and rules adopted by the county pursuant to the Act are constitutional when the rules are not inconsistent with or contradictory to the Act and when they give notice to the property owner as to what the county will look at in making a determination. State ex rel. Dreher v. Fuller, 257 M 445, 849 P2d 1045, 50 St. Rep. 349 (1993).

*County Not Acting as State's Agent in Denial of Disposal Permit — Mandamus Erroneously Granted:* Where the plaintiff applied to the county health department for a disposal permit but was not informed for a period of 6 years whether the permit would be granted, the District Court erred in holding that the Department of Health and Environmental Sciences (now Department of Environmental Quality) was estopped from denying the permit by the county's failure to act. There were no statutes or decisions that made the county the agent of the Department at the time of the 1971 permit application. Under the rationale of St. v. District Court, 170 M 15, 550 P2d 382 (1976), the record and statutes show that the county did not act as an agent for the state in the denial of the 1971 application. Huttinga v. Pringle, 205 M 482, 668 P2d 1068, 40 St. Rep. 1444 (1983).

**Chapter Attorney General's Opinions**

*Subsequent Sale of Parcel Originally Used as Lien Security — State and Local Regulation Inapplicable:* The provisions of Title 76 relating to local and state regulation of subdivisions do not apply to the subsequent sale of an undivided parcel that was originally used as security for a construction lien pursuant to 76-3-201, and nothing in the Montana Subdivision and Platting Act requires that the parcel be reviewed or surveyed upon subsequent sale. 42 A.G. Op. 101 (1988).

*Conveyance of Land From Private Owner to U.S.D.A. — Transaction Exempt From Regulation:* In the case of land conveyed from a private owner to the U.S. Department of Agriculture pursuant to 16 U.S.C. § 485, since the land was subject to condemnation by the U.S. in the absence of agreement and because the term "law of eminent domain", as defined in 76-3-201, includes federal condemnation proceedings, the transaction was exempted from regulation under the Montana Subdivision and Platting Act. Further, the Department is immune from direct enforcement of the Act because of general sovereignty principles. 42 A.G. Op. 36 (1987).

*Exemption of U.S. From Filing and Enforcement Provisions:* The filing and enforcement provisions of the Montana Subdivision and Platting Act are inapplicable to a conveyance by the federal government pursuant to 43 U.S.C. § 1716 and in which transaction the United States is the subdivider. 42 A.G. Op. 36 (1987).

*Violation of Statute — Contracts Voidable:* Deeds and contracts that convey land in violation of the Montana Subdivision and Platting Act are voidable. The effect of the voidability of such an illegal contract or deed varies depending on the circumstances of the case. 38 A.G. Op. 106 (1980).

*Curing Defect:* Violations of the Montana Subdivision and Platting Act may be corrected by the parties to the transaction by voiding the prior improper conveyance and conveying the land in accordance with the Act. 38 A.G. Op. 106 (1980).

*Subdivision Remainders:* The Department of Health and Environmental Sciences (now Department of Environmental Quality) may require that plats show the remainder of land less than 20 acres left after the segregation of subdivided parcels and has authority to review such remainders under Title 76, ch. 4. 37 A.G. Op. 74 (1977).

*Affidavit of Good Faith Not to Circumvent Act — When Required:* A transaction involving a contract for deed which allows the purchaser to acquire title to a portion of the land is subject to 76-3-101, et seq., if the transaction is undertaken for the purpose of evading the act, and a local governing body may require a person claiming the 76-3-201 exemption to file an affidavit of good faith without intent to circumvent. 37 A.G. Op. 41 (1977).

*Contracts or Deeds:* Contracts to convey land or deeds executed after July 1, 1973, in violation of the Montana Subdivision and Platting Act are void. 35 A.G. Op. 65 (1974).

*Effect on Prior Contracts:* Montana Subdivision and Platting Act does not govern the recording of deeds prepared and executed under contracts for deed prior to July 1, 1973, but not presented for recording until after June 30, 1973. 35 A.G. Op. 55 (1973).

**Chapter Law Review Articles**

How House Bill 666 and Grass Roots Democracy Won Subdivision Reform for Montana, Vincent, 43 Pub. Land & Resources L. Rev. 161 (2020).

**Chapter Collateral References**

Draft Montana Model Subdivision Regulations, Montana Department of Commerce (2020).

Model Subdivision Regulations, Joint Powers Insurance Authority of the Montana Association of Counties et al. (2006).

## Part 1
## General Provisions

**Part Administrative Rules**

ARM 24.183.1104 Uniform standards for certificates of survey.

ARM 24.183.1107 Uniform standards for final subdivision plats.

**Part Case Notes**

*Regulatory Powers Regarding Subdivision Control:* The 1973 Montana Subdivision and Platting Act vests control of subdivisions in local government units. The Department of Health and Environmental Sciences (now Department of Environmental Quality) has no regulatory functions regarding subdivisions outside water supply, sewage, and solid waste disposal. Mont. Wilderness Ass'n v. Bd. of Health & Environmental Sciences, 171 M 477, 559 P2d 1157 (1976).

**Part Attorney General's Opinions**

*Definition of Subdivision Includes Divisions of Land for Residential or Nonresidential Purposes:* The term "subdivision" as defined in 76-3-103 does not refer only to a division of land for the purpose of providing a "residential dwelling." Because the language in the Montana Subdivision and Platting Act does not specify that divisions must be residential, a subdivision may include a division for either residential or nonresidential purposes. 54 A.G. Op. 5 (2012).

*Subdivision Exemption Includes Only One Building on Single Tract of Land:* In a dispute between the City of Missoula and Missoula County, the city argued that the subdivision review exemption in 76-3-204 (now repealed) included the conveyance of several buildings on a single tract of record. Missoula County disagreed, arguing that the exemption was limited to the conveyance of one or more parts of a single building on a single tract of record. Reasoning that the term "building" was unambiguously in the singular form and that interpreting it in the plural to include several buildings on a single tract of land would undermine the purpose of the Subdivision and Platting Act, the Attorney General concluded that the exemption did not apply to the construction or conveyance of more than one building, structure, or improvement on a single tract of record. 54 A.G. Op. 5 (2012).

*State Agency Subject to Local Review in Creation of Recreational Vehicle Camping Area:* The term "subdivision" is defined in 76-3-103 to include the provision of multiple space for recreational camping vehicles. The Department of Fish, Wildlife, and Parks argued that, as a state agency, it was exempt from the review requirement. Because exemptions are provided for some state activities but not for activities to provide multiple space for recreational camping vehicles on state land, the clear implication is that the state is to stand on the same footing as a private person in this matter. It was noted that there is a trend toward abandoning the traditional view that activities of the state may be exercised free of local control. The Department is subject to local subdivision review to the extent that it creates an area which will provide multiple space for recreational camping vehicles. 39 A.G. Op. 14 (1981).

### 76-3-101. Short title.

**Case Notes**

*Any Division of Land Smaller Than One Hundred Sixty Acres Subject to Subdivision Review — No Exception Created by "Remainder Doctrine":* Defendant filed some 30 certificates of survey with the Gallatin County Clerk and Recorder, nearly all of which divided land into two parcels, one of which was greater than 160 acres and one of which was a "remainder parcel" of less than 160 acres. The Clerk and Recorder initially believed that the parcels were not subject to subdivision review because each certificate of survey created a tract of land greater than 160 acres. However, the Clerk and Recorder subsequently initiated an action for declaratory judgment, seeking a declaration that the certificates of survey were illegal subdivisions of land because they had not been submitted for subdivision review or statutorily exempted from review. The District Court held that subdivision review was not required because the transactions created tracts of land greater than 160 acres. The Clerk and Recorder appealed, and the Supreme Court reversed. By definition, a subdivision is a division of land that creates one or more parcels containing less than 160 acres. Defendant argued that divisions of land that create a tract greater than 160 acres with a "remainder" left over, even if the remainder is less than 160 acres, were not subject to review, but that argument defied the clear language of 76-3-103. Under this suggested "remainder doctrine", all land divisions would be exempt from regulation as long as one parcel greater than 160 acres was created, which was beyond the scope of the legislative intent in defining a subdivision and in creating subdivision regulations. Further, there is no exemption in 76-3-201 that encompasses a "remainder doctrine", nor is an exception or exemption to subdivision review created by the Legislature's silence on the issue. The court declined to read such an exception or exemption into the law when the Legislature did not expressly provide one. Because all but one certificate of survey created one parcel of less than 160 acres, each of those certificates of survey was subject to subdivision review, and the District Court erred in concluding otherwise. Mills v. Alta Vista Ranch, LLC, 2008 MT 214, 344 M 212, 187 P3d 627 (2008).

*Approval of Preliminary Plat Not Appealable:* Kalispell argued that the issuing of a preliminary plat approval by the city-county planning board was illegal because it did not conform with the master zoning plan adopted by the city and county. The Supreme Court followed the precedent of its decision in Sourdough v. Bd. of County Comm'rs, 253 M 325, 833 P2d 207 (1992), holding that there is no statutory appeal process from the approval of a preliminary plat. Kalispell v. Flathead County, 260 M 258, 859 P2d 458, 50 St. Rep. 1033 (1993).

## **76-3-102. Statement of purpose.**

### **Compiler's Comments**

*2017 Amendment:* Chapter 363 inserted (10) concerning phased developments; and made minor changes in style. Amendment effective May 8, 2017.

*Applicability:* Section 7, Ch. 363, L. 2017, provided: "[This act] applies to phased development applications submitted on or after [the effective date of this act]." Effective May 8, 2017.

*2001 Amendment:* Chapter 348 inserted (6) regarding preservation of open space; inserted (7) regarding promotion of cluster development approaches minimizing costs to citizens and promotion of effective and efficient public service; and made minor changes in style. Amendment effective October 1, 2001.

*Preamble:* The preamble attached to Ch. 348, L. 2001, provided: "WHEREAS, agricultural land is increasingly being taken out of production for development and becoming unavailable for production of food; and

WHEREAS, farmers and ranchers are often forced to sell their land to generate sufficient income to retire; and

WHEREAS, cluster development can facilitate the preservation of Montana's unique landscape; and

WHEREAS, cluster development can reduce local government costs for infrastructure and provision of services by concentrating building sites on smaller lots so that services and utilities can be concentrated in a smaller area; and

WHEREAS, the Montana Department of Commerce is charged with providing technical assistance and information related to community development; and

WHEREAS, local governments need mechanisms to encourage development approaches that minimize costs to local citizens and that promote effective and efficient provision of public services."

*1995 Amendment:* Chapter 468 inserted (6) concerning protection of rights of property owners; and made minor changes in style.

*1995 Statement of Intent:* The statement of intent attached to Ch. 468, L. 1995, provided: "It is the intent of the legislature that the department of commerce, local government assistance division, update its model subdivision rules to minimize the fiscal impacts to local governments in implementing this legislation."

*Applicability:* Section 13, Ch. 468, L. 1995, provided: "Funds in a park fund that exceed $10,000 as of [the effective date of this act] [October 1, 1995] must be used for park land acquisition and initial development. Funds in a park fund up to $10,000 as of [the effective date of this act] [October 1, 1995] may be used for park maintenance in accordance with a formally adopted park plan."

*1993 Amendment:* Chapter 272 after "natural environment" deleted "to require that whenever necessary, the appropriate approval of subdivisions be contingent upon a written finding of public interest by the governing body". Amendment effective April 6, 1993.

*Applicability:* Section 7(1), Ch. 272, L. 1993, provided that this section applies "to all subdivision applications filed after passage and approval of [this act]". Approved April 6, 1993.

**Case Notes**

*Statute of Limitations Not to Begin to Run on Covenant Running With the Land Until Demand for Performance Made:* The landowners did not request that the developer build a covenanted road until 16 years after they purchased the property. The Supreme Court determined that a covenant to dedicate is an affirmative, written covenant running with the land. It is meant to benefit a purchaser's property. The Supreme Court held that public policy demands that real estate developers be strictly held to their covenants and that the statute of limitations does not begin to run on an affirmative covenant until a demand for performance has been made. Scherpenseel v. Bitney, 263 M 68, 865 P2d 1145, 50 St. Rep. 1709 (1993), distinguished in Country Estates Homeowners Ass'n, Inc. v. McMillan, 276 M 100, 915 P2d 806, 53 St. Rep. 297 (1996).

*Subdivision and Platting Act Constitutional — Permissible Delegation of Legislative Authority:* Plaintiff challenged the constitutionality of the Montana Subdivision and Platting Act on the grounds that the statutory preamble to the Act's exemptions amounted to an unconstitutional delegation or usurpation of legislative authority on the basis that the Act contains insufficient guidelines. The Supreme Court distinguished this case from cases relating to a legislative grant of rulemaking authority to administrative agencies based on differences in nature between agencies and local governments. The delegation of authority by the Legislature was not impermissible, and rules adopted by the county pursuant to the Act are constitutional when the rules are not inconsistent with or contradictory to the Act and when they give notice to the property owner as to what the county will look at in making a determination. State ex rel. Dreher v. Fuller, 257 M 445, 849 P2d 1045, 50 St. Rep. 349 (1993).

*Dismissal of Appeal of Preliminary Subdivision Plat Approval Upheld:* The Sourdough Protective Association petitioned the District Court for a writ of mandamus and moved to stay the Board of County Commissioners from further proceedings concerning a subdivision project for which it had granted preliminary approval. The Supreme Court held that the association had no basis to support its petition because the Board was not subject to the Montana Administrative Procedure Act and the Legislature had not created an appeal process for cases involving conditional approval of preliminary plats. Sourdough Protective Ass'n, Inc. v. Bd. of County Comm'rs of Gallatin County, 253 M 325, 833 P2d 207, 49 St. Rep. 563 (1992).

**Attorney General's Opinions**

*Local Government Required to Adopt Subdivision Water Supply and Sewage and Solid Waste Disposal That Conform to State Regulations:* Unless a local governing body makes specific findings to support the conclusion that more stringent rules are required to protect public health, a local governing body must adopt subdivision regulations for water supply and sewage and solid waste disposal that are as stringent as the state standards adopted by the Department of Environmental Quality under Title 76, ch. 4, part 1. The local government may incorporate the state regulations by reference, but the actual method of adoption is up to the discretion of the local government. 49 A.G. Op. 7 (2001).

*Original Property Boundary Established by United States Government Survey — Parcels Not Exempt From Subdivision and Platting Act:* The sole fact that a parcel of land was described by references to boundaries established by a United States government survey does not exempt the parcel from the requirements of the Montana Subdivision and Platting Act. Federal survey laws that were adopted to facilitate the conveyance of land in the public domain into private ownership are distinct from Montana subdivision laws that generally regulate divisions of land and conveyances of property among private landowners. Therefore, a property owner may not convey, without complying with Montana subdivision laws, component aliquot parts of sections and government lots that are described and identified in a deed on file with a County Clerk and Recorder and that are less than 160 acres in size. 47 A.G. Op. 10 (1997), clarifying 38 A.G. Op. 66 (1980).

*Strong Public Interest in Compliance:* The purpose of the Montana Subdivision and Platting Act contained in 76-3-102 is in accord with the inalienable right of all Montanans to "a clean and healthful environment" (Art. II, sec. 3, Mont. Const.). The unauthorized approval of the Board of County Commissioners of a certificate of survey cannot, by itself, overcome the strong public interest (see 1993 amendment) in compliance with the provisions of the subdivision and platting law. 38 A.G. Op. 106 (1980).

## 76-3-103. Definitions.

### Compiler's Comments

*2017 Amendment:* Chapter 363 inserted definition of phased development; and made minor changes in style. Amendment effective May 8, 2017.

*Applicability:* Section 7, Ch. 363, L. 2017, provided: "[This act] applies to phased development applications submitted on or after [the effective date of this act]." Effective May 8, 2017.

*2013 Amendment:* Chapter 379 in definition of division of land in first sentence near middle after "title to" deleted "or possession of"; in definition of subdivision in first sentence near middle after "title to" deleted "or possession of", after "sold" substituted "or otherwise transferred" for "rented, leased, or otherwise conveyed", at end deleted "or area, regardless of its size, that provides or will provide multiple space for recreational camping vehicles or mobile homes", and inserted second sentence regarding multiple spaces for rent or lease; and made minor changes in style. Amendment effective September 1, 2013.

*Preamble:* The preamble attached to Ch. 379, L. 2013, provided: "WHEREAS, The Montana Subdivision and Platting Act provides for the local review of proposed subdivisions; and

WHEREAS, Title 76, chapter 3, part 2, provides miscellaneous exemptions from subdivision review for certain divisions of land and conveyances; and

WHEREAS, sections 76-3-202, 76-3-204, and 76-3-208, MCA, address the sale, lease, or rent or other conveyance of one or more parts of a building, structure, or other improvement; and

WHEREAS, section 76-3-204, MCA, provides that the sale, lease, rent, or other conveyance of one or more parts of a building, structure, or other improvement is not subject to subdivision review; and

WHEREAS, this exemption has been interpreted to exempt only one or more parts of a single building, structure, or improvement on a tract of record from subdivision review; and

WHEREAS, a strict interpretation of section 76-3-204, MCA, places an undue burden of undergoing full subdivision review on property owners who seek to lease or rent certain buildings; and

WHEREAS, it is the intent of the Legislature to provide an alternative process to subdivision review for the creation of buildings for lease or rent on tracts of land."

*Saving Clause:* Section 16, Ch. 379, L. 2013, was a saving clause.

*Severability:* Section 17, Ch. 379, L. 2013, was a severability clause.

*Applicability:* Section 19, Ch. 379, L. 2013, provided: "[This act] applies to buildings created for lease or rent on a single tract on or after [the effective date of this act]." Effective September 1, 2013.

*2011 Amendment:* Chapter 214 in definition of public utility after "parts 22 and 23" inserted remainder of sentence regarding municipal systems; and made minor changes in style. Amendment effective October 1, 2011.

*Saving Clause:* Section 13, Ch. 214, L. 2011, was a saving clause.

*Severability:* Section 14, Ch. 214, L. 2011, was a severability clause.

*2005 Amendment:* Chapter 298 inserted definitions of minor subdivision and public utility; deleted definition of irregularly shaped tract of land that read: ""Irregularly shaped tract of land" means a parcel of land other than an aliquot part of the United States government survey section or a United States government lot, the boundaries or areas of which cannot be determined without a survey or trigonometric calculation"; deleted definition of registered land surveyor that read: ""Registered land surveyor" means a person licensed in conformance with Title 37, chapter 67, to practice surveying in the state of Montana"; deleted definition of registered professional engineer that read: ""Registered professional engineer" means a person licensed in conformance with Title 37, chapter 67, to practice engineering in the state of Montana"; and made minor changes in style. Amendment effective April 19, 2005.

*Applicability:* Section 19(1), Ch. 298, L. 2005, provided: "(1) [This act] applies to subdivision applications submitted on or after [the effective date of this act]." Effective April 19, 2005.

*2001 Amendment:* Chapter 348 inserted definition of cluster development; and made minor changes in style. Amendment effective October 1, 2001.

*Preamble:* The preamble attached to Ch. 348, L. 2001, provided: "WHEREAS, agricultural land is increasingly being taken out of production for development and becoming unavailable for production of food; and

WHEREAS, farmers and ranchers are often forced to sell their land to generate sufficient income to retire; and

WHEREAS, cluster development can facilitate the preservation of Montana's unique landscape; and

WHEREAS, cluster development can reduce local government costs for infrastructure and provision of services by concentrating building sites on smaller lots so that services and utilities can be concentrated in a smaller area; and

WHEREAS, the Montana Department of Commerce is charged with providing technical assistance and information related to community development; and

WHEREAS, local governments need mechanisms to encourage development approaches that minimize costs to local citizens and that promote effective and efficient provision of public services."

*1997 Amendment:* Chapter 503 in definition of division of land inserted second sentence concerning exclusions from definition; inserted definition of immediate family; in definition of tract of record, before "parcel of land", inserted "an individual" and inserted (b) and (c) concerning individual tract of record and instrument of conveyance; and made minor changes in style. Amendment effective May 1, 1997.

*Severability:* Section 4, Ch. 503, L. 1997, was a severability clause.

*Effective Date — Retroactive Applicability:* Section 5, Ch. 503, L. 1997, provided: "[This act] [76-3-103, 76-3-201, and 76-3-507] is effective on passage and approval [approved May 1, 1997], and [section 1] [76-3-103] applies retroactively, within the meaning of 1-2-109, to tracts filed before [the effective date of this act]." Effective May 1, 1997.

*1993 Amendment:* Chapter 272 deleted definition of occasional sale; in definition of subdivision substituted "parcels containing less than 160 acres that cannot be described as a one-quarter aliquot part of a United States government section" for "parcels containing less than 20 acres"; inserted definition of tract of record; and made minor changes in style. Amendment effective April 6, 1993.

*Applicability:* Section 7(1), Ch. 272, L. 1993, provided that this section applies "to all subdivision applications filed after passage and approval of [this act]". Approved April 6, 1993.

*1987 Amendment:* In (12) and (13), after "conformance with", deleted "the Montana Professional Engineers' Registration Act" and deleted parentheses around "Title 37, chapter 67".

**Case Notes**

*Lakeside Property Dispute — Presumption That Grantee Takes Land to Low-Water Mark:* In a property dispute relating to a subdivided lakeside parcel, the defendant asserted ownership of all land between the high- and low-water marks on the lake. The Army Corps of Engineers previously declared that the lake was a nonnavigable intrastate body and not subject to the Corps' jurisdiction. The District Court held that the plaintiff owned the land between the high- and low-water marks of the lake bordering her property. On appeal, the Supreme Court held that Montana's public trust easement was not at issue, that a conveyance of riparian property by reference to a specific metes and bounds description along the high-water mark is insufficient alone to overcome the presumption of 70-16-201 that the grantee takes at least to the low-water mark, and that the District Court correctly held that the plaintiff's property included the disputed land between the high- and low-water marks of the lake. Ash v. Merlette, 2017 MT 305, 389 Mont. 486, 407 P.3d 304.

*Any Division of Land Smaller Than One Hundred Sixty Acres Subject to Subdivision Review — No Exception Created by "Remainder Doctrine":* Defendant filed some 30 certificates of survey with the Gallatin County Clerk and Recorder, nearly all of which divided land into two parcels, one of which was greater than 160 acres and one of which was a "remainder parcel" of less than 160 acres. The Clerk and Recorder initially believed that the parcels were not subject to subdivision review because each certificate of survey created a tract of land greater than 160 acres. However, the Clerk and Recorder subsequently initiated an action for declaratory judgment, seeking a declaration that the certificates of survey were illegal subdivisions of land because they had not been submitted for subdivision review or statutorily exempted from review. The District Court held that subdivision review was not required because the transactions created tracts of land greater than 160 acres. The Clerk and Recorder appealed, and the Supreme Court reversed. By definition, a subdivision is a division of land that creates one or more parcels containing less than 160 acres. Defendant argued that divisions of land that create a tract greater than 160 acres with a "remainder" left over, even if the remainder is less than 160 acres, were not subject to review, but that argument defied the clear language of 76-3-103. Under this suggested "remainder doctrine", all land divisions would be exempt from regulation as long as one parcel greater than 160 acres was created, which was beyond the scope of the legislative intent in defining a subdivision and in creating subdivision regulations. Further, there is no exemption in 76-3-201 that encompasses a "remainder doctrine", nor is an exception or exemption to subdivision review created by the Legislature's silence on the issue. The court declined to read such an exception or exemption into the law when the Legislature did not expressly provide one. Because all but one certificate of survey created one parcel of less than 160 acres, each of those certificates of survey was subject to subdivision review, and the District Court erred in concluding otherwise. Mills v. Alta Vista Ranch, LLC, 2008 MT 214, 344 M 212, 187 P3d 627 (2008).

*Agricultural-Use Only Covenant Running With the Land — Covenant Enforceable Against Subsequent Owners Who Had Notice of Covenant:* The Turners placed an agricultural-use only restrictive covenant on a 12.3-acre parcel of property, which lay within the city limits of Helena, in order to sever it from a 14.5-acre parcel and avoid subdivision review. A private residence was located on the retained parcel. After dividing the property, the Turners sold the retained parcel to another party and quit-claimed the remaining 12.3-acre parcel to the Hamptons. Greg Hampton had owned the parcel prior to its acquisition by the Turners, who had originally agreed to reconvey the parcel to Hampton under an agreement that stemmed from ongoing divorce proceedings between Hampton and his former wife. Hampton had previously sought to divide the property with a restrictive covenant in the same manner as the Turners, but Hampton's certificate of survey was rejected because Hampton was not the titled owner at the time. Shortly after the 12.3-acre parcel was quit-claimed to them, the Hamptons sought to have the county lift the covenant, but the Board of County Commissioners refused to revoke the covenant. It was undisputed that the parcel was never used for any agricultural purposes and that the parcel was in a mostly residential area coupled with undeveloped open space. On appeal, the Hamptons did not question the legality of the process by which the county chose not to lift the covenant, but rather questioned whether the covenant was one that ran with the land, thereby binding the subsequent owners of both the covenantor and covenantee. Despite the fact that Hampton claimed to be unaware of the covenant when it was quit-claimed, the District Court concluded that Hampton was well aware of the covenant and took the property subject to the covenant as would anyone else. A narrow interpretation of the agricultural-use covenant requires a covenantor and a covenantee, and the county does not satisfy that requirement; nevertheless, the Turners' estate in the retained land was benefited in that neither the Turners nor their subsequent grantee was required to undergo subdivision review. Thus, the District Court did not err in determining that the Turners placed a valid agricultural-use only covenant on the 12.3-acre parcel that ran with the land. The Hamptons' argument that no "transaction" occurred, because the conveyance should have been simultaneous with the placement of the covenant, did not comport with the Montana Subdivision and Platting Act, which requires county approval of the exemption prior to the sale and conveyance of any divided property. That the county, as a party to the covenant, may choose to enforce the agricultural-use restriction was a foreseeable event that the Hamptons were willing to risk for the sake of taking title to the parcel. No material facts remained in dispute as to whether the Hamptons had notice of the restrictive covenant, so the covenant was enforceable against them as a matter of law. Hampton v. Lewis & Clark County, 2001 MT 81, 305 M 103, 23 P3d 908 (2001).

*No Duty of County to Determine Whether Land Transaction Constituted Attempt to Evade Subdivision Act Review:* A county has no affirmative duty to analyze or investigate an exemption claimed under 76-3-207 beyond the duty to accept for review a certificate of survey or other evidence establishing the claimed exemption, nor must any defined threshold of evidence be met in order for the county to accept a claimed exemption. Hampton v. Lewis & Clark County, 2001 MT 81, 305 M 103, 23 P3d 908 (2001).

*Sale of Lot Presumptively Including Access:* It is a presumption, albeit disputable, that the complete use and enjoyment of a parcel of land includes access to that parcel. To overcome the presumption, the seller must offer evidence or some legal basis that would controvert the buyer's reliance on the presumption. Here, the Kester's sold the Erkers a house in Big Sky for approximately $310,000. The Kesters' attorney later discovered through the title company that a portion of the driveway, which provided sole access to the house, had not been conveyed by the deed to the lot and requested additional money for the deed to the driveway. There was no indication at the time of sale that any parcel was separate and distinct from the lot, nor did the Kesters reveal any intention to reserve the driveway from the purchase of the lot. Although the

Erkers were charged with constructive notice of the contents of properly recorded instruments describing prior conveyances of the property, under Montana subdivision laws, the driveway was not an individual parcel of land at the time of purchase, so the Erkers could be charged only with knowledge that the purchase of the lot described in the common metes and bounds description included the driveway. Absent evidence to the contrary, the Erkers were entitled to the presumption that purchase of the lot included access to it and to summary judgment as a matter of law. Erker v. Kester, 1999 MT 231, 296 M 123, 988 P2d 1221, 56 St. Rep. 912 (1999), following Yellowstone Valley Co. v. Assoc. Mtg. Investors, Inc., 88 M 73, 290 P 255, 70 ALR 1002 (1930).

*Local Board of Health Not Considered Governing Body Despite Interlocal Agreement:* Despite the fact that a county board of health was created by interlocal agreement, the District Court erred in concluding that a local board of health is considered a governing body by definition under this section. The Montana Subdivision and Platting Act does not, under 76-3-501 and 76-3-504, authorize local boards of health to adopt and enforce regulations governing sanitation in subdivisions, regardless of size. The authority of a local board of health to regulate subdivisions derives from 50-2-116, not from the Montana Subdivision and Platting Act. Skinner Enterprises, Inc. v. Lewis & Clark County Bd. of Health, 286 M 256, 950 P2d 733, 54 St. Rep. 1398 (1997).

*Review, Not Regulatory, Function Applicable to Local Board of Health Control of Minor Subdivision:* Section 50-2-106, when read in conjunction with 76-4-104, does not authorize a local board of health to regulate sanitation in minor subdivisions containing five or fewer parcels. By its plain language, 76-4-104 delegates to local boards of health the power to review select subdivisions but not the power to promulgate regulations. As a reviewing authority, the board's function is limited to reviewing the proposed water supply, sewage, and solid waste disposal facilities and advising the Department of Environmental Quality of its recommendation for approval or disapproval of the subdivision. However, 50-2-116 explicitly authorizes a local board of health to regulate sewage control and disposal that is not regulated by the Montana Subdivision and Platting Act. The Act limits state sanitation regulation to subdivisions containing parcels of fewer than 20 acres each and precludes regulation of subdivisions in which each parcel of land contains more than 20 acres. Thus, the regulation of sanitation in subdivisions containing parcels of more than 20 acres each is clearly the responsibility of local boards of health. Nevertheless, 76-4-122 requires both state and local approval before filing a subdivision plat with the County Clerk and Recorder, and to hold that approval by the local board of health is a ministerial, nondiscretionary act would render 76-4-122 inoperative. Giving effect to the purpose of all the applicable statutes and examining the legislative history of 50-2-116, the Supreme Court held that the 1991 enactment of 50-2-116(1)(i) revealed a legislative intent to expand, rather than diminish, the authority of local boards of health to regulate subdivision sanitation. Thus, local boards of health have discretionary statutory authority to regulate all subdivisions, regardless of size, notwithstanding the state's authority to regulate certain subdivisions under the Montana Subdivision and Platting Act. Skinner Enterprises, Inc. v. Lewis & Clark County Bd. of Health, 286 M 256, 950 P2d 733, 54 St. Rep. 1398 (1997).

*Certificate of Survey Filed Before Monuments Set Not Properly Filed Within Meaning of Subdivision Act:* Stanchfield Cattle Company sought to subdivide land by dividing it into 20-acre parcels and having it surveyed. After completion of the survey, the surveyor had the certificate of survey filed, with a note on the face of the certificate stating that the monuments had not been set because of winter conditions but would be set before July 1. NFC, which held a right of first refusal on the property, sued to prevent the transfer of any property to prospective buyers, claiming that the certificate of survey had not been filed in accordance with the Montana Subdivision and Platting Act. The Supreme Court reversed the District Court decision, holding that despite whatever practices might be common among surveyors, 76-3-404(3) and an administrative rule of the Department of Commerce (now Department of Labor and Industry), ARM 8.94.3002 (renumbered 24.183.1104), require that the monuments be set at the time that the certificate of survey is filed. The Supreme Court noted that it could not change the requirements of the Act and the Department rule. NFC Partners v. Stanchfield Cattle Co., 274 M 46, 905 P2d 1106, 52 St. Rep. 1115 (1995).

*Certificate of Survey — May Meet Definition of Plat:* Owens argued that the incorporation by reference of the certificate of survey into a sales agreement for real property could not establish an easement because under the statute, the easement would have to be created by reference to the plat describing the property being transferred. The Supreme Court held that identifying the establishing document as a plat pursuant to the statute is not a critical element in the creation of an easement and that a certificate of survey could meet the definition of a plat as set out in the statute. The certificate must do more than establish boundaries and do more than provide a property description of a single parcel of land. The certificate must establish the division of land into two parcels and show a right-of-way for a private roadway and public utility easement. Bache v. Owens, 267 M 279, 883 P2d 817, 51 St. Rep. 1001 (1994), distinguishing Swart v. Stucky, 167 M 171, 536 P2d 762 (1975). Bache v. Owens was followed in Ruana v. Grigonis, 275 M 441, 913 P2d 1247, 53 St. Rep. 216 (1996). See also Bache v. Owens, 280 M 106, 929 P2d 217, 53 St. Rep. 1320 (1996).

*Division of Land by Deed in Which Grantor and Grantee Same Party — No Transfer of Title:* A transfer of land requires a conveyance of title from one person to another. If the persons are the same, no transfer occurs. If there is no transfer, there is no division of land. Therefore, a landowner cannot divide a large parcel of land into smaller parcels by executing a deed in which the grantor and the grantee are the same party. Rocky Mtn. Timberlands, Inc. v. Lund, 265 M 463, 877 P2d 1018, 51 St. Rep. 653 (1994), followed in Elk Park Ranch, Inc. v. Park County, 282 M 154, 935 P2d 1131, 54 St. Rep. 293 (1997).

*Condominiums as Subdivision — Unreasonable Reliance by Developers on County Opinion as to Review Requirements:* The District Court awarded damages against the county in an action by condominium developers who claimed they reasonably relied to their detriment on the county's opinion that the condominiums would not be subject to subdivision review. The Supreme Court reversed after finding that the County Attorney's office maintained no confidential or professional relationship with the developers—therefore, the developers' reliance on the county's opinion was unreasonable in light of: (1) the state's determination that review would be necessary; (2) the fact that developers were represented by their own counsel; (3) the inclusion of condominiums in the definitions of "subdivision" in 76-4-102 and this section; and (4) the actual opposition to the lack of subdivision review expressed by opponents of the project, who ultimately filed suit. Young v. Flathead County, 232 M 274, 757 P2d 772, 45 St. Rep. 1047 (1988).

*Subdivision Review of Four-Plex Apartments Unnecessary:* Appellants brought an action to stop construction of an apartment building for failure of its builders to comply with subdivision review. The lower court granted the county's summary judgment motion based on the fact that 40 A.G. Op. 57 (1984) was rendered after construction began. During the pendency of the action, 76-3-204 (now repealed) was amended to clarify that new apartment buildings are exempt from subdivision review. Since an appellate court must apply the law in effect at the time it renders its decision, the Supreme Court upheld the lower court decision because the law as amended makes subdivision review unnecessary for the respondents' four-plex apartment building. Lee v. Flathead County, 217 M 370, 704 P2d 1060, 42 St. Rep. 1258 (1985).

*"Dedication":* An action was filed to quiet title to a county road that had been established as a public road in 1909. The certificate of dedication of the 1909 plat stated that the streets therein were "granted and dedicated to the use of the public forever". In 1944, pursuant to section 1635, R.C.M. 1935, a petition for county road closure was filed. That same year the petition was granted by the County Commissioners. After 1944, neither the plaintiffs nor their predecessors in interest paid any taxes on the roadway and no portion of the roadway was fenced into the lands now belonging to the plaintiffs until 1980. The court quieted title in the plaintiffs, ruling that the 1909 plat dedication was the equivalent of a right-of-way deed under which the public acquired only the right-of-way and the incidents necessary to its enjoyment and that upon abandonment the fee in the street reverted to the abutting landowners, with each abutting landowner taking fee from the edge of his property to the center of the street. Bailey v. Ravalli Co., 201 M 138, 653 P2d 139, 39 St. Rep. 2010 (1982), followed in Herreid v. Hauck, 254 M 496, 839 P2d 571, 49 St. Rep. 884 (1992).

*Definition of "Plat" — Applicability:* Whenever the meaning of a word or phrase is defined in any part of the code, such definition is applicable to the same word or phrase wherever it occurs, except where a contrary intention plainly appears. The definition of "plat" found in this section of the Montana Subdivision and Platting Act is clearly applicable to Title 76, ch. 4, part 1, on sanitation in subdivisions. The Department of Health and Environmental Sciences' (now Department of Environmental Quality) contention that it has broad authority in defining the term "plat" by virtue of the lack of a statutory definition under the sanitation in subdivisions law is without merit. (Case considered under pre-1977 law.) State ex rel. Dept. of Health and Environmental Sciences v. Lasorte, 182 M 267, 596 P2d 477, 36 St. Rep. 1126 (1979).

*State Agency Review Under Sanitation in Subdivision Law Not Applicable to Certificate of Survey:* Where after a series of real estate transactions, each denominated an "occasional sale" and evidenced by a certificate of survey, one 14-acre parcel of land became 13 separate and distinct parcels reconveyed to the original owner, the Department of Health and Environmental

Sciences (now Department of Environmental Quality) had no authority under the sanitation in subdivisions law to review the certificates of survey. That act provides for Department review only of subdivision plats, and Department regulation which included certificate of survey within definition of plat was held void. (Case considered under pre-1977 law; see 1993 amendments.) State ex rel. Dept. of Health and Environmental Sciences v. Lasorte, 182 M 267, 596 P2d 477, 36 St. Rep. 1126 (1979).

*Agency Regulation Conflicting With Occasional Sale Exemption:* Court upheld issuance of a Writ of Mandate to compel the lifting of sanitary restrictions, the filing of a certificate of survey, and an award of relator's attorney fees because the Montana Subdivision and Platting Act (prior to 1977 and 1993 amendments) clearly and unambiguously exempts occasional sales in resubdivisions and state agency's regulations were in direct conflict with the Act and exceeded delegated authority. State ex rel. Swart v. Casne, 172 M 302, 564 P2d 983 (1977), followed in State ex rel. Leach v. Visser, 234 M 438, 767 P2d 858, 45 St. Rep. 2035 (1988), with Leach distinguished in State ex rel. Dreher v. Fuller, 257 M 445, 849 P2d 1045, 50 St. Rep. 349 (1993).

*Certificate of Survey Distinguished From Plat:* A document entitled "A Certificate of Survey . . .", which established boundaries and property description for deed on entire single parcel and did not contain representations of a subdivision of the parcel or otherwise conform to requirements of "plat" set forth in subsection (9) of this section, was a "certificate of survey". State ex rel. Swart v. Stucky, 167 M 171, 536 P2d 762 (1975), distinguished in Bache v. Owens, 267 M 279, 883 P2d 817, 51 St. Rep. 1001 (1994).

**Attorney General's Opinions**

*Definition of Subdivision Includes Divisions of Land for Residential or Nonresidential Purposes:* The term "subdivision" as defined in 76-3-103 does not refer only to a division of land for the purpose of providing a "residential dwelling." Because the language in the Montana Subdivision and Platting Act does not specify that divisions must be residential, a subdivision may include a division for either residential or nonresidential purposes. 54 A.G. Op. 5 (2012).

*Original Property Boundary Established by United States Government Survey — Parcels Not Exempt From Subdivision and Platting Act:* The sole fact that a parcel of land was described by references to boundaries established by a United States government survey does not exempt the parcel from the requirements of the Montana Subdivision and Platting Act. Federal survey laws that were adopted to facilitate the conveyance of land in the public domain into private ownership are distinct from Montana subdivision laws that generally regulate divisions of land and conveyances of property among private landowners. Therefore, a property owner may not convey, without complying with Montana subdivision laws, component aliquot parts of sections and government lots that are described and identified in a deed on file with a County Clerk and Recorder and that are less than 160 acres in size. 47 A.G. Op. 10 (1997), clarifying 38 A.G. Op. 66 (1980).

*Condominiums Not Exempt From Provisions of Subdivision and Platting Act:* Condominiums are subdivisions that are not exempted under 76-3-204 (now repealed) from the provisions of the Montana Subdivision and Platting Act. 45 A.G. Op. 12 (1993).

*Occasional Sale by Division Into Two Parcels — Restriction on Sale of Second Parcel:* If a parcel of land is divided into two parcels, each under 20 acres in size, and one of the parcels is sold as an occasional sale, the remaining parcel may not, in the absence of another legitimately claimed exemption, be sold without subdivision review within 12 months following the sale of the first parcel. (See 1993 amendments.) 41 A.G. Op. 40 (1986).

*Application of "Occasional Sale" Exception:* When a 600-acre parcel of land was divided into parcels of 20 or more acres and sold to new owners who, on the same day, filed certificates of survey to divide their 20-acre parcels into two 10-acre parcels, the new owners were entitled to use the "occasional sale" exception in the Montana Subdivision and Platting Act because the initial division of the 600-acre parcel into 20-acre parcels was not a "subdivision". (See 1993 amendments.) 41 A.G. Op. 21 (1985).

*Duplex, Office Building, Second Dwelling for Family Member, and Motel Room as Subdivisions:* Construction of a duplex for rental or sale purposes nominally falls within the scope of a subdivision because a legally enforceable possessory interest in a portion of a formerly integrated parcel of land will be conveyed. However, the duplex project may, under certain circumstances, be excepted from subdivision status or subjected to less stringent surveying and filing requirements under 76-3-207 and 76-3-208 (now repealed). The availability of exception from some or all of this chapter's requirements must be determined by a careful analysis of the particular facts. The construction of an office building for rental purposes will, for similar reasons, constitute a subdivision. An exemption from full compliance with the Montana Subdivision and

Platting Act may nonetheless exist under 76-3-207 and 76-3-208 (now repealed). The existence of a legally enforceable possessory interest determines if the construction of a second dwelling for a family member constitutes a division of land. Whether such a possessory interest exists must be resolved with reference to the involved facts. Again, an exception to subdivision status and to full compliance with the Subdivision and Platting Act may arise under 76-3-207 and 76-3-208 (now repealed) even if a division of land has occurred. Summary review procedures under 76-3-505 (now repealed) applicable to minor subdivisions may be available as to each of these projects. Rental of hotel rooms will not, however, constitute a subdivision. Although a hotel or motel guest has a form of possessory right in his room, the involved transaction is actually the sale of a product or service which is temporary lodging. The guest is a licensee. 41 A.G. Op. 3 (1985). (Opinion rendered prior to 1985 amendment of 76-3-204, now repealed.)

*Tract of Four-Plexes Considered a Subdivision:* A developer's construction of 48 four-plexes, to be used as rental occupancy buildings, on a tract of land owned by the developer is a "subdivision" subject to local review under the Montana Subdivision and Platting Act. Each dwelling unit constitutes a parcel and will be segregated from the larger tract by transference of possession. Since the units will be newly constructed, the exemption in 76-3-204 (now repealed) does not apply. 40 A.G. Op. 57 (1984). (Opinion rendered prior to 1985 amendment of 76-3-204, now repealed.)

*Commencement of Time Limitation for Occasional Sale:* The filing of a certificate of survey merely creates a parcel for purposes of the Montana Subdivision and Platting Act. The filing of the certificate is not subject to time restrictions. It is the actual sale that is restricted by 76-3-207(1)(d). The 12-month limitation period on occasional sales of land commences with the actual transfer of interest in the parcel of land from the grantor to the grantee. (See 1993 amendments.) 38 A.G. Op. 117 (1980).

*Platted City Not a Platted Subdivision:* A platted city does not constitute a platted subdivision for purposes of applying 76-3-207. Therefore, dividing a city lot into two parcels does not need to be reviewed as a subdivision. 38 A.G. Op. 108 (1980).

*Division of Land by Deed Description:* A segregation of one or more parcels of land from a larger tract held in single or undivided ownership constitutes a division of land regardless of whether the deed describes the larger tract in relation to aliquot parts of a U.S. Government survey. 38 A.G. Op. 66 (1980).

**Law Review Articles**

Blazer v. Wall: The Restriction of the Easement by Reservation Doctrine, Warhank, 71 Mont. L. Rev. 183 (2010).

## 76-3-104. What constitutes subdivision.

**Compiler's Comments**

*1993 Amendment:* Chapter 272 in first sentence changed description of subdivision from "parcels less than 20 acres" to "parcels containing less than 160 acres that cannot be described as a one-quarter aliquot part of a United States government section"; and made minor changes in style. Amendment effective April 6, 1993.

*Applicability:* Section 7(1), Ch. 272, L. 1993, provided that this section applies "to all subdivision applications filed after passage and approval of [this act]". Approved April 6, 1993.

**Case Notes**

*Contract Remedy Providing Transfer of Twenty-Acre Parcel of Land as Security for Contractual Obligations Violative of Subdivision Laws:* As part of a sale of real property, Canton pledged a 20-acre parcel to Riverview Homes II, Ltd. (Riverview), as security in the event that Canton breached his contractual obligation to complete a proposed subdivision and construct an artificial lake. Canton breached the contract, and Riverview sought to quiet title to the 20-acre parcel. The District Court agreed that Canton breached the contract, but held that the contract remedy violated subdivision laws. Riverview appealed, contending that the parcel was exempted from subdivision review as a division of land created to provide security for a lien under 76-3-201 and that the security provision was an enforceable construction lien because of Canton's contractual obligation to construct the lake. The Supreme Court noted that Riverview neither furnished services or materials to Canton for the lake construction nor satisfied any other requirement applicable to construction liens in Title 71, ch. 3, part 5, so the construction lien theory failed. If it was not a construction lien, it had to be considered a general lien under 71-3-101, which, pursuant to Reiter v. Reiter, 237 M 220, 772 P2d 314 (1989), can be claimed only as arising from dealings in particular trades or businesses in which the existence of a general lien has been recognized by judicial decisions or if a custom to that effect can be established by evidence.

General liens are looked upon with disfavor, and the court refused to recognize a general lien for breach of a contract to provide equity in land in this case. The District Court's conclusion that the 20-acre parcel was not transferable under 76-3-302, and failed to qualify for an exemption under 76-3-201, was affirmed. Riverview Homes II, Ltd. v. Canton, 2001 MT 309, 307 M 517, 38 P3d 848 (2001).

*Agency Regulation Conflicting With Occasional Sale Exemption:* Court upheld issuance of a Writ of Mandate to compel the lifting of sanitary restrictions, the filing of a certificate of survey, and an award of relator's attorney fees because the Montana Subdivision and Platting Act (prior to 1977 amendment of 76-3-207) clearly and unambiguously exempts occasional sales in resubdivisions and state agency's regulations were in direct conflict with the Act and exceeded delegated authority. (See 1993 amendments.) State ex rel. Swart v. Casne, 172 M 302, 564 P2d 983 (1977), followed in State ex rel. Leach v. Visser, 234 M 438, 767 P2d 858, 45 St. Rep. 2035 (1988).

**Attorney General's Opinions**

*Application of "Occasional Sale" Exception:* When a 600-acre parcel of land was divided into parcels of 20 or more acres and sold to new owners who, on the same day, filed certificates of survey to divide their 20-acre parcels into two 10-acre parcels, the new owners were entitled to use the "occasional sale" exception in the Montana Subdivision and Platting Act because the initial division of the 600-acre parcel into 20-acre parcels was not a "subdivision". (See 1993 amendments.) 41 A.G. Op. 21 (1985).

*Portion of Lot Sold to Satisfy Delinquent Assessment:* Where only a portion of a lot is included in a rural special improvement district and a sale of that portion is made to satisfy a delinquent assessment, a division of property "by operation of law" has occurred, thereby exempting the sale from the operation of this chapter. 39 A.G. Op. 48 (1982).

## 76-3-105. Violations.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 1, Ch. 332, L. 2023. Amendment effective May 1, 2023.

**Case Notes**

*Agricultural Covenant — Fees Not Available to County:* The defendant, a real estate developer, attempted to lift an agricultural covenant. The county required multiple conditions before any development could proceed. The county subsequently sued the developer, finding that some of the conditions had not been met. On appeal, the county sought attorney fees. The Supreme Court held that the Montana Subdivision and Platting Act did not authorize a civil penalty and fees were not available under the court's equitable powers because there was no clear prevailing party. Lewis & Clark County v. Hampton, 2014 MT 207, 376 Mont. 137, 333 P.3d 205.

*Final Approval Granted Despite Failure to Meet Conditions of Plat Approval — No Impact on Validity of Title:* In a dispute involving the creation of an easement, the county argued that the underlying transfer of title to the plaintiff from the owner who subdivided the property was invalid because the county's Board of Commissioners (Board) approved the subdivision but the conditions of that approval were never met. The Supreme Court disagreed and found that the plaintiff held proper title. Although not all of the conditions of final plat approval were met, the Board reviewed and granted final approval, which was within the Board's authority under the Montana Subdivision and Platting Act (Act). Likewise, the defendant landowners argued that because no access agreement had ever been reached between them and the owner who subdivided the property as required by the Board, the owner lacked title to convey to the plaintiff. The court disagreed and held that because the defendant landowners failed to pursue the remedies provided for in the Act or to appeal the Board's final plat approval, they had established no basis for the conclusion that the owner lacked title. Yorlum Properties, Ltd. v. Lincoln County, 2013 MT 298, 372 Mont. 159, 311 P.3d 748.

*Failure of Condominium Projects to Meet Prerequisites for Exemption From Subdivision Review — Summary Judgment for County Proper:* In a case that consolidated possible exemption of two condominium projects from subdivision review, the District Court held that the projects did not qualify for the exemption and granted summary judgment to the county for not accepting deeds and posting a reminder notice that construction of the condominiums was prohibited until subdivision review was completed. The condominium developers appealed, but the Supreme Court affirmed. Under the 2005 version of 76-3-203 in effect at the time of the controversy, certain condominiums were exempt from review if the approval of the original division of land expressly contemplated the construction of the condominiums and the park dedication requirements in

76-3-621 were met, or if the condominium proposal was in conformance with applicable effective local zoning regulations. The developers of one project argued that the condominiums were exempt as part of the local scenic corridor zoning district. However, the scenic corridor zoning district did not address condominium development, so because the project did not conform to local zoning regulations, that project required subdivision review. The developers of the second project contended that because their parcels were created prior to enactment of state subdivision law in 1973, their parcels were entitled to a wholesale blanket exemption from subdivision review. The Supreme Court, citing Shults v. Liberty Cove, Inc., 2006 MT 247, 334 M 70, 146 P3d 710 (2006), concluded that no wholesale blanket exemption from subdivision review exists for pre-1973 tract land, so the second project was likewise subject to subdivision review. The District Court's grant of summary judgment was affirmed. Etzler v. Flathead County, 2009 MT 367, 353 M 252, 220 P3d 395 (2009).

*Improper Property Development — Right of Access:* Defendants developed a subdivision. Plaintiff, an adjoining landowner, sold parcels of his land to his brother and another party. The subdivision developers objected to plaintiff and his successors using the subdivision for access to their tracts. The parties could not agree on conditions of usage, and the developers attempted various methods of blocking plaintiffs' access through the subdivision. Plaintiffs sought damages from blocked access and a prescriptive easement. Defendant contended plaintiffs had intentionally violated state and local subdivision laws in the land transfers and that allowing them access would sanction the alleged illegal action. Defendant contended the trial court should not have excluded evidence of the alleged violation of subdivision laws. On appeal, the Supreme Court found nothing in Montana subdivision law which prevents an individual who has developed his property contrary to law from pursuing a claim against an adjoining subdivision for right of access. Public authorities must deal with any improprieties in development. The evidence was properly excluded as irrelevant. Smith v. Moran, 215 M 31, 693 P2d 1246, 42 St. Rep. 152 (1985).

**Attorney General's Opinions**

*Exemption of U.S. From Filing and Enforcement Provisions:* The filing and enforcement provisions of the Montana Subdivision and Platting Act are inapplicable to a conveyance by the federal government pursuant to 43 U.S.C. § 1716 and in which transaction the United States is the subdivider. 42 A.G. Op. 36 (1987).

## Part 2
## Miscellaneous Exemptions

**Part Administrative Rules**

ARM 24.183.1104 Uniform standards for certificates of survey.
ARM 24.183.1107 Uniform standards for final subdivision plats.

**Part Case Notes**

*Agency Regulation Conflicting With Occasional Sale Exemption:* Court upheld issuance of a Writ of Mandate to compel the lifting of sanitary restrictions, the filing of a certificate of survey, and an award of relator's attorney fees because the Montana Subdivision and Platting Act (prior to 1977 amendment of 76-3-207) clearly and unambiguously exempts occasional sales in resubdivisions and state agency's regulations were in direct conflict with the Act and exceeded delegated authority. State ex rel. Swart v. Casne, 172 M 302, 564 P2d 983 (1977), followed in State ex rel. Leach v. Visser, 234 M 438, 767 P2d 858, 45 St. Rep. 2035 (1988).

**Part Attorney General's Opinions**

*Sale of Existing Building to Condominium Unit Buyers:* An owner's sale of an existing office or apartment building to individual condominium owners is exempted from the requirements of this chapter by 76-3-204 (now repealed). However, the sale is subject to the general prohibition of this chapter that it not be simply the final step in a scheme to evade application of this chapter. 39 A.G. Op. 74 (1982).

*State Agency Subject to Local Review in Creation of Recreational Vehicle Camping Area:* The term "subdivision" is defined in 76-3-103 to include the provision of multiple space for recreational camping vehicles. The Department of Fish, Wildlife, and Parks argued that, as a state agency, it was exempt from the review requirement. Because exemptions are provided for some state activities but not for activities to provide multiple space for recreational camping vehicles on state land, the clear implication is that the state is to stand on the same footing as a private person in this matter. It was noted that there is a trend toward abandoning the traditional view that activities of the state may be exercised free of local control. The Department is subject to local subdivision review to the extent that it creates an area which will provide multiple space for recreational camping vehicles. 39 A.G. Op. 14 (1981).

**76-3-201. Exemption for certain divisions of land — fees for examination of division.**

**Compiler's Comments**

*2023 Amendments — Composite Section:* Section 1, Ch. 328, L. 2023, inserted (6)(c) and (6)(d) providing 20 days to complete examination and prohibiting imposition of conditions on division of land; and made minor changes in style. Amendment effective October 1, 2023.

Section 1, Ch. 549, L. 2023, in (6)(b) increased fee from $200 to $400. Amendment effective October 1, 2023.

*2021 Amendment:* Chapter 358 inserted (2) providing that an exempt division of land is not considered a subdivision if not more than four new lots or parcels are created from the original lot or parcel; and made minor changes in style. Amendment effective October 1, 2021.

*2017 Amendment:* Chapter 169 in (3)(b) in second sentence inserted exception clause; inserted (4) exempting from the requirements of the chapter certain conveyances of land created by a division; and made minor changes in style. Amendment effective April 7, 2017.

*2003 Amendments — Composite Section:* Chapter 549 in (1)(b) substituted "subject to subsection (3), is created to provide security for mortgages, liens, or trust indentures for the purpose of construction, improvements to the land being divided, or refinancing purposes" for "is created to provide security for construction mortgages, liens, or trust indentures"; inserted (1)(h) relating to rights-of-way or utility sites; inserted (3) relating to the applicability of the exception under subsection (1)(b); and made minor changes in style. Amendment effective October 1, 2003.

Chapter 563 inserted (4) authorizing governing body of municipality or county to charge up to $200 for examination of a division of land to determine if land exempt from subdivision review. Amendment effective May 5, 2003.

*2001 Amendment:* Chapter 340 inserted (1)(g) providing that land division requirements are inapplicable to land division in location where state has no jurisdiction unless method of disposition is adopted to evade requirements; and made minor changes in style. Amendment April 21, 2001.

*1997 Amendment:* Chapter 503 inserted (2) concerning notice to governing body in case of division of land under subsection (1)(a); and made minor changes in style. Amendment effective May 1, 1997.

*Severability:* Section 4, Ch. 503, L. 1997, was a severability clause.

**Administrative Rules**

ARM 17.36.605 Exclusions.

**Case Notes**

*Any Division of Land Smaller Than One Hundred Sixty Acres Subject to Subdivision Review — No Exception Created by "Remainder Doctrine":* Defendant filed some 30 certificates of survey with the Gallatin County Clerk and Recorder, nearly all of which divided land into two parcels, one of which was greater than 160 acres and one of which was a "remainder parcel" of less than 160 acres. The Clerk and Recorder initially believed that the parcels were not subject to subdivision review because each certificate of survey created a tract of land greater than 160 acres. However, the Clerk and Recorder subsequently initiated an action for declaratory judgment, seeking a declaration that the certificates of survey were illegal subdivisions of land because they had not been submitted for subdivision review or statutorily exempted from review. The District Court held that subdivision review was not required because the transactions created tracts of land greater than 160 acres. The Clerk and Recorder appealed, and the Supreme Court reversed. By definition, a subdivision is a division of land that creates one or more parcels containing less than 160 acres. Defendant argued that divisions of land that create a tract greater than 160 acres with a "remainder" left over, even if the remainder is less than 160 acres, were not subject to review, but that argument defied the clear language of 76-3-103. Under this suggested "remainder doctrine", all land divisions would be exempt from regulation as long as one parcel greater than 160 acres was created, which was beyond the scope of the legislative intent in defining a subdivision and in creating subdivision regulations. Further, there is no exemption in 76-3-201 that encompasses a "remainder doctrine", nor is an exception or exemption to subdivision review created by the Legislature's silence on the issue. The court declined to read such an exception or exemption into the law when the Legislature did not expressly provide one. Because all but one certificate of survey created one parcel of less than 160 acres, each of those certificates of survey was subject to subdivision review, and the District Court erred in concluding otherwise. Mills v. Alta Vista Ranch, LLC, 2008 MT 214, 344 M 212, 187 P3d 627 (2008).

*Contract Remedy Providing Transfer of Twenty-Acre Parcel of Land as Security for Contractual Obligations Violative of Subdivision Laws:* As part of a sale of real property, Canton pledged a

20-acre parcel to Riverview Homes II, Ltd. (Riverview), as security in the event that Canton breached his contractual obligation to complete a proposed subdivision and construct an artificial lake. Canton breached the contract, and Riverview sought to quiet title to the 20-acre parcel. The District Court agreed that Canton breached the contract, but held that the contract remedy violated subdivision laws. Riverview appealed, contending that the parcel was exempted from subdivision review as a division of land created to provide security for a lien under this section and that the security provision was an enforceable construction lien because of Canton's contractual obligation to construct the lake. The Supreme Court noted that Riverview neither furnished services or materials to Canton for the lake construction nor satisfied any other requirement applicable to construction liens in Title 71, ch. 3, part 5, so the construction lien theory failed. If it was not a construction lien, it had to be considered a general lien under 71-3-101, which, pursuant to Reiter v. Reiter, 237 M 220, 772 P2d 314 (1989), can be claimed only as arising from dealings in particular trades or businesses in which the existence of a general lien has been recognized by judicial decisions or if a custom to that effect can be established by evidence. General liens are looked upon with disfavor, and the court refused to recognize a general lien for breach of a contract to provide equity in land in this case. The District Court's conclusion that the 20-acre parcel was not transferable under 76-3-302, and failed to qualify for an exemption under this section, was affirmed. Riverview Homes II, Ltd. v. Canton, 2001 MT 309, 307 M 517, 38 P3d 848 (2001).

**Attorney General's Opinions**

*Survey Requirements for Remainder Created When Highway Right-of-Way Obtained by State:* A County Clerk and Recorder may not require a survey or plat for the recordation of an instrument transferring title to a remainder that was created when the state obtained property for a highway right-of-way. 44 A.G. Op. 25 (1992).

*Subsequent Sale of Parcel Originally Used as Lien Security — State and Local Regulation Inapplicable:* The provisions of Title 76 relating to local and state regulation of subdivisions do not apply to the subsequent sale of an undivided parcel that was originally used as security for a construction lien pursuant to this section, and nothing in the Montana Subdivision and Platting Act requires that the parcel be reviewed or surveyed upon subsequent sale. 42 A.G. Op. 101 (1988).

*Conveyance of Land From Private Owner to U.S.D.A. — Transaction Exempt From Regulation:* In the case of land conveyed from a private owner to the U.S. Department of Agriculture pursuant to 16 U.S.C. § 485, since the land was subject to condemnation by the U.S. in the absence of agreement and because the term "law of eminent domain", as defined in 76-3-201, includes federal condemnation proceedings, the transaction was exempted from regulation under the Montana Subdivision and Platting Act. Further, the Department is immune from direct enforcement of the Act because of general sovereignty principles. 42 A.G. Op. 36 (1987).

*Exemption of U.S. From Filing and Enforcement Provisions:* The filing and enforcement provisions of the Montana Subdivision and Platting Act are inapplicable to a conveyance by the federal government pursuant to 43 U.S.C. § 1716 and in which transaction the United States is the subdivider. 42 A.G. Op. 36 (1987).

*Reference Intended Only to Designate Law Governing State Condemnation:* The parenthetical reference to Title 70, chapter 30, in 76-3-201 does not limit the term "law of eminent domain" to proceedings under the state statute. The reference was intended only to designate that provision of Montana law which largely governs condemnation matters and was not designed to foreclose applicability of the exemption to agreements providing for divisions of land which could have been effected through federal condemnation proceedings. 42 A.G. Op. 36 (1987).

*Portion of Lot Sold to Satisfy Delinquent Assessment:* Where only a portion of a lot is included in a rural special improvement district and a sale of that portion is made to satisfy a delinquent assessment, a division of property "by operation of law" has occurred, thereby exempting the sale from the operation of this chapter. 39 A.G. Op. 48 (1982).

*Review of Certificate of Survey:* The Department of Health and Environmental Sciences (now Department of Environmental Quality) has authority under Title 76, ch. 4, part 1, to review certificates of survey. 38 A.G. Op. 81 (1980).

*Affidavit of Good Faith Not to Circumvent Act — When Required:* A transaction involving a contract for deed which allows the purchaser to acquire title to a portion of the land is subject to 76-3-101, et seq., if the transaction is undertaken for the purpose of evading the act, and a local governing body may require a person claiming the 76-3-201 exemption to file an affidavit of good faith without intent to circumvent. 37 A.G. Op. 41 (1977).

## 76-3-203. Exemption for certain condominiums and townhouses.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 1, Ch. 448, L. 2023. Amendment effective May 4, 2023.

*2019 Amendment:* Chapter 323 in first sentence near beginning inserted reference to conversions; and made minor changes in style. Amendment effective October 1, 2019.

*Nonapplicability:* Section 10, Ch. 323, L. 2019, provided: "Nothing in [this act] may be interpreted to modify or expand existing insurance coverage on a condominium unit, townhome, or townhouse."

*2011 Amendment:* Chapter 373 near beginning inserted "townhomes, or townhouses, as those terms are defined in 70-23-102"; in (1) and (2) inserted references to townhomes or townhouses; and made minor changes in style. Amendment effective May 12, 2011.

*2007 Amendment:* Chapter 229 in introductory clause after "with" inserted "parts 5 and 6" and after "chapter" inserted "or on lots within incorporated cities and towns"; and made minor changes in style. Amendment effective April 17, 2007.

*2001 Amendment:* Chapter 534 inserted (1) providing a compliance exemption for condominiums that are expressly contemplated in the original division of land and that meet park dedication requirements; inserted (2) providing a compliance exemption for condominiums that are in conformance with applicable local zoning regulations; and made minor changes in style. Amendment effective October 1, 2001.

**Case Notes**

*Failure of Condominium Projects to Meet Prerequisites for Exemption From Subdivision Review — Summary Judgment for County Proper:* In a case that consolidated possible exemption of two condominium projects from subdivision review, the District Court held that the projects did not qualify for the exemption and granted summary judgment to the county for not accepting deeds and posting a reminder notice that construction of the condominiums was prohibited until subdivision review was completed. The condominium developers appealed, but the Supreme Court affirmed. Under the 2005 version of 76-3-203 in effect at the time of the controversy, certain condominiums were exempt from review if the approval of the original division of land expressly contemplated the construction of the condominiums and the park dedication requirements in 76-3-621 were met, or if the condominium proposal was in conformance with applicable effective local zoning regulations. The developers of one project argued that the condominiums were exempt as part of the local scenic corridor zoning district. However, the scenic corridor zoning district did not address condominium development, so because the project did not conform to local zoning regulations, that project required subdivision review. The developers of the second project contended that because their parcels were created prior to enactment of state subdivision law in 1973, their parcels were entitled to a wholesale blanket exemption from subdivision review. The Supreme Court, citing Shults v. Liberty Cove, Inc., 2006 MT 247, 334 M 70, 146 P3d 710 (2006), concluded that no wholesale blanket exemption from subdivision review exists for pre-1973 tract land, so the second project was likewise subject to subdivision review. The District Court's grant of summary judgment was affirmed. Etzler v. Flathead County, 2009 MT 367, 353 M 252, 220 P3d 395 (2009).

*Subdivision Exempt From Subdivision Review — Condominium Project Also Exempt:* In 1983, a parcel of land was subdivided by defendant's predecessor in interest. The division was subject to the Montana Subdivision and Platting Act, but was exempt because the divided parcels exceeded the acreage threshold required for review. In 2002, defendant filed an application to divide the property into 70 lots, but the application was denied because of traffic and ground water concerns. Having been informed that condominiums could be built without subdivision review under this section, defendant did not appeal the denial of the application but went ahead with the project as a condominium development and received a zoning compliance permit and approval to create a sewer district from the county. Before building began, plaintiff filed an action to enjoin the development. The District Court found that the condominiums were subject to subdivision review the same as if they were being built on individual parcels. Defendant appealed, and the Supreme Court reversed. A division of land that was specifically exempt from subdivision review in 1983 was divided in compliance with the Montana Subdivision and Platting Act and could not then be considered to be out of compliance with the Act because of the very exemption. Therefore, assuming that the condominium project complied with applicable zoning regulations, the development was exempt from subdivision review under this section. Shults v. Liberty Cove, Inc., 2006 MT 247, 334 M 70, 146 P3d 710 (2006).

**Attorney General's Opinions**

*Condominiums Not Exempt From Provisions of Subdivision and Platting Act:* Condominiums are subdivisions that are not exempted under 76-3-204 (now repealed) from the provisions of the Montana Subdivision and Platting Act. 45 A.G. Op. 12 (1993).

### 76-3-205. Exemption for airport land and state-owned lands — exception.

**Compiler's Comments**

*1999 Amendment:* Chapter 548 inserted (1) regarding exemption for airport land; and made minor changes in style. Amendment effective October 1, 1999.

**Attorney General's Opinions**

*State Agency Subject to Local Review in Creation of Recreational Vehicle Camping Area:* The term "subdivision" is defined in 76-3-103 to include the provision of multiple space for recreational camping vehicles. The Department of Fish, Wildlife, and Parks argued that, as a state agency, it was exempt from the subdivision review requirement. Because exemptions are provided for some state activities but not for activities to provide multiple space for recreational camping vehicles on state land, the clear implication is that the state is to stand on the same footing as a private person in this matter. It was noted that there is a trend toward abandoning the traditional view that activities of the state may be exercised free of local control. The Department is subject to local subdivision review to the extent that it creates an area which will provide multiple space for recreational camping vehicles. 39 A.G. Op. 14 (1981).

### 76-3-206. Exemption for conveyances executed prior to July 1, 1974.

**Attorney General's Opinions**

*Original Property Boundary Established by United States Government Survey — Parcels Not Exempt From Subdivision and Platting Act:* The sole fact that a parcel of land was described by references to boundaries established by a United States government survey does not exempt the parcel from the requirements of the Montana Subdivision and Platting Act. Federal survey laws that were adopted to facilitate the conveyance of land in the public domain into private ownership are distinct from Montana subdivision laws that generally regulate divisions of land and conveyances of property among private landowners. Therefore, a property owner may not convey, without complying with Montana subdivision laws, component aliquot parts of sections and government lots that are described and identified in a deed on file with a County Clerk and Recorder and that are less than 160 acres in size. 47 A.G. Op. 10 (1997), clarifying 38 A.G. Op. 66 (1980).

### 76-3-207. Divisions or aggregations of land exempted from review but subject to survey requirements and zoning regulations — exceptions — fees for examination of division.

**Compiler's Comments**

*2023 Amendments — Composite Section:* Section 2, Ch. 328, L. 2023, inserted (4)(c) and (4)(d) providing 20 days to complete examination and prohibiting imposition of conditions on division of land; and made minor changes in style. Amendment effective October 1, 2023.

Section 2, Ch. 332, L. 2023, inserted (2)(b), (2)(c), and (2)(d) concerning an exemption from additional subdivision reviews if certain conditions are met and transfer of land to immediate family member; inserted (5) prohibiting immediate family member or spouse of immediate family member who receives a division of land from transferring or conveying the land for a period of 2 years; inserted (6) providing a penalty for knowingly evading subdivision regulations; and made minor changes in style. Amendment effective May 1, 2023.

Section 2, Ch. 549, L. 2023, in (4)(b) increased fee from $200 to $400. Amendment effective October 1, 2023.

*2019 Amendment:* Chapter 34 in (1)(c) substituted "the landowner enters into a covenant for the purposes of this chapter with the governing body that runs with the land and provides that the divided land will be used exclusively for agricultural purposes, subject to the provisions of 76-3-211" for "the parties to the transaction enter a covenant running with the land and revocable only by mutual consent of the governing body and the property owner that the divided land will be used exclusively for agricultural purposes"; deleted former (2)(b) that read: "(b) a change in use of the land exempted under subsection (1)(c) for anything other than agricultural purposes subjects the division to review under parts 5 and 6 of this chapter"; and made minor changes in style. Amendment effective October 1, 2019.

*2013 Amendment:* Chapter 351 in (1) in middle substituted "tracts of record of any size, regardless of the resulting size of any lot created by the division or aggregation" for "land". Amendment effective July 1, 2013.

*2009 Amendment:* Chapter 446 in (1) in two places after "divisions" inserted "or aggregations"; in (1)(d) at end after "boundaries" deleted "and the aggregation of lots"; inserted (1)(f) regarding aggregations of parcels or lots under certain conditions; in (2)(a) after "division" inserted "redesign, or rearrangement" and after "body" substituted "before an amended plat may be filed" for "and an amended plat must be filed"; in (2)(b) at end substituted "review under parts 5 and 6 of this chapter" for "the provisions of this chapter"; in (4) in two places after "division" inserted "or aggregation"; and made minor changes in style. Amendment effective May 5, 2009.

*2005 Amendment:* Chapter 252 in (1) at end inserted "and are subject to applicable zoning regulations adopted under Title 76, chapter 2". Amendment effective October 1, 2005.

*2003 Amendments — Composite Section:* Chapter 436 in (3)(a) at beginning inserted "Subject to subsection (3)(b)"; inserted (3)(b) providing for the proration of property taxes on centrally assessed land, requiring the owner of the land to ensure that the prorated taxes and assessments are paid prior to the division of the land, and authorizing the county treasurer to accept partial payments of the taxes due; and made minor changes in style. Amendment effective October 1, 2003.

Chapter 563 inserted (4) authorizing governing body of municipality or county to charge up to $200 for examination of a division of land to determine if land exempt from subdivision review. Amendment effective May 5, 2003.

*1995 Amendment:* Chapter 468 in (1)(c), near beginning, inserted "gift"; and made minor changes in style.

*1995 Statement of Intent:* The statement of intent attached to Ch. 468, L. 1995, provided: "It is the intent of the legislature that the department of commerce, local government assistance division, update its model subdivision rules to minimize the fiscal impacts to local governments in implementing this legislation."

*Applicability:* Section 13, Ch. 468, L. 1995, provided: "Funds in a park fund that exceed $10,000 as of [the effective date of this act] [October 1, 1995] must be used for park land acquisition and initial development. Funds in a park fund up to $10,000 as of [the effective date of this act] [October 1, 1995] may be used for park maintenance in accordance with a formally adopted park plan."

*1993 Amendments:* Chapter 272 in (1)(b) substituted "a single gift or sale in each county to each member" for "a gift or sale to any member"; deleted former (1)(d) that read: "(d) a single division of a parcel outside of platted subdivisions when the transaction is an occasional sale"; and made minor changes in style. Amendment effective April 6, 1993.

Chapter 366 in (3) substituted "certified that all real property taxes and special assessments assessed and levied on the land to be divided have been paid" for "certified that no real property taxes assessed and levied on the land to be divided are delinquent"; and made minor changes in style.

*Applicability:* Section 7(1), Ch. 272, L. 1993, provided that this section applies "to all subdivision applications filed after passage and approval of [this act]". Approved April 6, 1993.

*1989 Amendment:* Inserted (1)(f) relating to relocation of common boundary between lot within platted subdivision and adjoining land outside the subdivision; and made minor change in phraseology.

*1985 Amendment:* Inserted (3) prohibiting division of land unless County Treasurer has certified that property taxes are not delinquent.

**Administrative Rules**

ARM 17.36.605 Exclusions.

**Case Notes**

*Agricultural Covenant — Mutual Consent to Revoke:* Defendant real estate developer attempted to lift an agricultural covenant. The county required multiple conditions before any development could proceed. The county subsequently sued the developer, finding that some of the conditions had not been met. The issue was whether the county had revoked the covenant. The Supreme Court found that the parties had consented to revoke the covenant but that no development could occur without fulfilment of the conditions. Lewis & Clark County v. Hampton, 2014 MT 207, 376 Mont. 137, 333 P.3d 205.

*City Council Denial of Subdivision Exemption Not Violative of Constitutional Protections:* The Missoula City Council denied plaintiffs' applications for exemptions from subdivision requirements, and plaintiffs appealed on grounds that denial of the applications constituted violations of constitutional rights of equal protection and public participation, was a taking, and was a tortious violation of the city council's statutory duties. The District Court granted summary judgment for the city on all the claims and plaintiffs appealed, but the Supreme Court affirmed. The equal protection argument was merely a bald assertion that was largely unclear and poorly supported, failing to demonstrate a discriminatory purpose, and was properly dismissed on summary judgment. The takings claim failed because plaintiffs never possessed a right to obtain an exemption, but instead only lost the opportunity to obtain an exemption, and the discretion to grant or deny the exemption was properly exercised by the city council. Plaintiffs raised the public participation claim in District Court but failed to discuss the issue in briefs on appeal, so the Supreme Court declined to consider the issue. The claim of a tortious violation of the city council's statutory duties also failed as a cognizable negligence claim because plaintiffs failed to prove that the council's actions damaged plaintiffs. Roe v. Missoula, 2009 MT 417, 354 M 1, 221 P3d 1200 (2009). See also Gudmundsen v. State ex rel. Mont. St. Hosp. Warm Springs, 2009 MT 56, 349 M 297, 203 P3d 813 (2009).

*Failure of Subdivision Exemption Application to Meet Lot Aggregation or Boundary Line Relocation Exemption — Denial of Application Affirmed:* Plaintiffs, seeking to relocate the boundary line of their two city lots in order to create a vacant lot that could be sold, applied for a subdivision exemption. The city council denied the exemption and plaintiffs appealed, but the Supreme Court examined city regulations and affirmed. The city council concluded that the application failed to meet the lot aggregation exemption because it was essentially a boundary line relocation and not a lot aggregation, and the application failed to meet the boundary line relocation exemption because city regulations prohibited the creation of a new parcel transferable to anyone other than an adjoining property owner. The Supreme Court noted that plaintiffs questioned the process used by the city council to unilaterally review the applications, but the court held that process did not harm plaintiffs because the application suggested an intention to improperly evade subdivision review. The application would have been forwarded to the city council in any event, so it was not necessary to consider whether the application actually qualified for an exemption. The District Court was affirmed. Roe v. Missoula, 2009 MT 417, 354 M 1, 221 P3d 1200 (2009).

*Improper Version of Subdivision Law Applied to Survey Exemption Question — Remand:* The parents divided a parcel of land on Flathead Lake into two parcels and transferred one parcel to their daughter and her husband in 1973. The parents' adjoining parcel was transferred to other family members and ultimately transferred to plaintiff. Plaintiff sought to adjudicate the boundary between the properties. The District Court apparently applied the 2003 subdivision and platting law and found that the property division qualified for a family exemption and would not be considered as a subdivision under this section, but the court was unclear about the surveying criteria that it applied to the property division, apparently applying the subdivision law after finding that the subdivision law did not apply. The Supreme Court held that the District Court order was flawed because of the internal inconsistencies and because the District Court applied the 2003 law when it should have applied the law in effect when the property division was made in 1973. The case was therefore remanded for the District Court to determine whether additional factfinding or evidence was necessary in order to establish the proper survey criteria and resolve the boundary issue in accordance with the 1973 law. Karlson v. Rosich, 2006 MT 290, 334 M 370, 147 P3d 196 (2006).

*Agricultural-Use Only Covenant Running With the Land — Covenant Enforceable Against Subsequent Owners Who Had Notice of Covenant:* The Turners placed an agricultural-use only restrictive covenant on a 12.3-acre parcel of property, which lay within the city limits of Helena, in order to sever it from a 14.5-acre parcel and avoid subdivision review. A private residence was located on the retained parcel. After dividing the property, the Turners sold the retained parcel to another party and quit-claimed the remaining 12.3-acre parcel to the Hamptons. Greg Hampton had owned the parcel prior to its acquisition by the Turners, who had originally agreed to reconvey the parcel to Hampton under an agreement that stemmed from ongoing divorce proceedings between Hampton and his former wife. Hampton had previously sought to divide the property with a restrictive covenant in the same manner as the Turners, but Hampton's certificate of survey was rejected because Hampton was not the titled owner at the time. Shortly after the 12.3-acre parcel was quit-claimed to them, the Hamptons sought to have the county lift the covenant, but the Board of County Commissioners refused to revoke the covenant. It was undisputed that the parcel was never used for any agricultural purposes and that the parcel was in a mostly residential area coupled with undeveloped open space. On appeal, the Hamptons did not question the legality of the process by which the county chose not to lift the covenant, but rather questioned whether the covenant was one that ran with the land, thereby binding the subsequent owners of both the covenantor and covenantee. Despite the fact that Hampton claimed to be unaware of the covenant when it was quit-claimed, the District Court concluded that Hampton was well aware of the covenant and took the property subject to the covenant as would anyone else. A narrow interpretation of the agricultural-use covenant requires a covenantor and a covenantee, and the county does not satisfy that requirement; nevertheless, the Turners' estate in the retained land was benefited in that neither the Turners nor their subsequent grantee was required to undergo subdivision review. Thus, the District Court did not err in determining that the Turners placed a valid agricultural-use only covenant on the 12.3-acre parcel that ran with the land. The Hamptons' argument that no "transaction" occurred, because the conveyance should have been simultaneous with the placement of the covenant, did not comport with the Montana Subdivision and Platting Act, which requires county approval of the exemption prior to the sale and conveyance of any divided property. That the county, as a party to the covenant, may choose to enforce the agricultural-use restriction was a foreseeable event that the Hamptons were willing to risk for the sake of taking title to the parcel. No material facts remained in dispute as to whether the Hamptons had notice of the restrictive covenant, so the covenant was enforceable against them as a matter of law. Hampton v. Lewis & Clark County, 2001 MT 81, 305 M 103, 23 P3d 908 (2001).

*No Duty of County to Determine Whether Land Transaction Constituted Attempt to Evade Subdivision Act Review:* A county has no affirmative duty to analyze or investigate an exemption claimed under this section beyond the duty to accept for review a certificate of survey or other evidence establishing the claimed exemption, nor must any defined threshold of evidence be met in order for the county to accept a claimed exemption. Hampton v. Lewis & Clark County, 2001 MT 81, 305 M 103, 23 P3d 908 (2001).

*Sale of Lot Presumptively Including Access:* It is a presumption, albeit disputable, that the complete use and enjoyment of a parcel of land includes access to that parcel. To overcome the presumption, the seller must offer evidence or some legal basis that would controvert the buyer's reliance on the presumption. Here, the Kester's sold the Erkers a house in Big Sky for approximately $310,000. The Kesters' attorney later discovered through the title company that a portion of the driveway, which provided sole access to the house, had not been conveyed by the deed to the lot and requested additional money for the deed to the driveway. There was no indication at the time of sale that any parcel was separate and distinct from the lot, nor did the Kesters reveal any intention to reserve the driveway from the purchase of the lot. Although the Erkers were charged with constructive notice of the contents of properly recorded instruments describing prior conveyances of the property, under Montana subdivision laws, the driveway was not an individual parcel of land at the time of purchase, so the Erkers could be charged only with knowledge that the purchase of the lot described in the common metes and bounds description included the driveway. Absent evidence to the contrary, the Erkers were entitled to the presumption that purchase of the lot included access to it and to summary judgment as a matter of law. Erker v. Kester, 1999 MT 231, 296 M 123, 988 P2d 1221, 56 St. Rep. 912 (1999), following Yellowstone Valley Co. v. Assoc. Mtg. Investors, Inc., 88 M 73, 290 P 255, 70 ALR 1002 (1930).

*Clerk Under No Clear Duty to Record Deed — Mandamus Erroneously Granted:* Where the plaintiff attempted to record a deed to a 5-acre parcel of land without the removal or approval of sanitary restrictions by the county health department (which the court held was estopped from withholding its approval of a disposal permit) but was refused by the Clerk and Recorder, the District Court erred in granting a Writ of Mandamus ordering the Clerk to file a certificate of survey and record the warranty deed. The Clerk and Recorder was statutorily required to refuse to file the survey and record the deed and lacked any discretion to accept a survey absent compliance with the requirements of 76-4-122. Huttinga v. Pringle, 205 M 482, 668 P2d 1068, 40 St. Rep. 1444 (1983).

*State Agency Review Under Sanitation in Subdivision Law Not Applicable to Certificate of Survey:* Where after a series of real estate transactions, each denominated an "occasional sale" and evidenced by a certificate of survey, one 14-acre parcel of land became 13 separate and distinct parcels reconveyed to the original owner, the Department of Health and Environmental Sciences (now Department of Environmental Quality) had no authority under the sanitation in subdivisions law to review the certificates of survey. That act provides for Department review only of subdivision plats, and Department regulation which included certificate of survey within definition of plat was held void. (Case considered under pre-1977 law; see 1993 amendments.)

State ex rel. Dept. of Health & Environmental Sciences v. Lasorte, 182 M 267, 596 P2d 477, 36 St. Rep. 1126 (1979).

*Administrative Regulation Proscribing Occasional Sale in Resubdivision Void:* Administrative regulation under this section (prior to 1977 and 1993 amendments) requiring all resubdivisions or redesigns of previously filed subdivisions to be approved by local governing body and requiring approved amended plat to be filed was held void as proscribing the statutory exemption for occasional sales. State ex rel. Swart v. Casne, 172 M 302, 564 P2d 983 (1977), followed in State ex rel. Leach v. Visser, 234 M 438, 767 P2d 858, 45 St. Rep. 2035 (1988).

**Attorney General's Opinions**

*Occasional Sale by Division Into Two Parcels — Restriction on Sale of Second Parcel:* If a parcel of land is divided into two parcels, each under 20 acres in size, and one of the parcels is sold as an occasional sale, the remaining parcel may not, in the absence of another legitimately claimed exemption, be sold without subdivision review within 12 months following the sale of the first parcel. (See 1993 amendments.) 41 A.G. Op. 40 (1986).

*Application of "Occasional Sale" Exception:* When a 600-acre parcel of land was divided into parcels of 20 or more acres and sold to new owners who, on the same day, filed certificates of survey to divide their 20-acre parcels into two 10-acre parcels, the new owners were entitled to use the "occasional sale" exception in the Montana Subdivision and Platting Act because the initial division of the 600-acre parcel into 20-acre parcels was not a "subdivision". (See 1993 amendments.) 41 A.G. Op. 21 (1985).

*Duplex, Office Building, Second Dwelling for Family Member, and Motel Room as Subdivisions:* Construction of a duplex for rental or sale purposes nominally falls within the scope of a subdivision because a legally enforceable possessory interest in a portion of a formerly integrated parcel of land will be conveyed. However, the duplex project may, under certain circumstances, be excepted from subdivision status or subjected to less stringent surveying and filing requirements under 76-3-207 and 76-3-208 (now repealed). The availability of exception from some or all of this chapter's requirements must be determined by a careful analysis of the particular facts. The construction of an office building for rental purposes will, for similar reasons, constitute a subdivision. An exemption from full compliance with the Montana Subdivision and Platting Act may nonetheless exist under 76-3-207 and 76-3-208 (now repealed). The existence of a legally enforceable possessory interest determines if the construction of a second dwelling for a family member constitutes a division of land. Whether such a possessory interest exists must be resolved with reference to the involved facts. Again, an exception to subdivision status and to full compliance with the Subdivision and Platting Act may arise under 76-3-207 and 76-3-208 (now repealed) even if a division of land has occurred. Summary review procedures under 76-3-505 (now repealed) applicable to minor subdivisions may be available as to each of these projects. Rental of hotel rooms will not, however, constitute a subdivision. Although a hotel or motel guest has a form of possessory right in his room, the involved transaction is actually the sale of a product or service which is temporary lodging. The guest is a licensee. 41 A.G. Op. 3 (1985). (Opinion rendered prior to 1985 amendment of 76-3-204, now repealed.)

*Exemption Requests — Hearing and Decision:* Whether a particular exemption granted by this section is claimed "for the purpose of evading this chapter" is manifestly a question of fact and directed to the discretion of the local government. The Attorney General will not answer the question. However, to assist local government in analyzing the issue, the following observations are made: (1) since it promotes the public health and welfare, the chapter must be liberally construed to effectuate its objects and its exemptions must be narrowly applied; (2) local government may properly require one claiming an exemption to make an evidentiary showing that the exemption is justified and may establish by rule a procedure for a hearing and decision; (3) the local government should evaluate all relevant circumstances in assessing claimant's intent, including the nature of claimant's business, the prior history of the land in question and whether claimant has engaged in prior exempt transactions involving the land, and the proposed configuration of the land after the allegedly exempt transactions would be completed; and (4) a claimant who attempts to use a pattern of exempt transactions that will result in a subdivision which is not reviewed should be denied exemption. 40 A.G. Op. 16 (1983).

*Occasional Sale Exemption — Number of Lots Certificate of Survey May Include:* A single certificate of survey may not reflect the creation of more than one lot to be conveyed under this section's provision that a single division of a parcel outside of platted subdivisions is not a subdivision under this chapter if the transaction is an occasional sale. (See 1993 amendments.) 40 A.G. Op. 16 (1983).

*Commencement of Time Limitation for Occasional Sale:* The filing of a certificate of survey merely creates a parcel for purposes of the Montana Subdivision and Platting Act. The filing of the certificate is not subject to time restrictions. It is the actual sale that is restricted by subsection (1)(d) of this section. The 12-month limitation period on occasional sales of land commences with the actual transfer of interest in the parcel of land from the grantor to the grantee. (See 1993 amendments.) 38 A.G. Op. 117 (1980).

*Platted City Not a Platted Subdivision:* A platted city does not constitute a platted subdivision for purposes of applying this section. Therefore, dividing a city lot into two parcels does not need to be reviewed as a subdivision. 38 A.G. Op. 108 (1980).

*Review of Certificate of Survey:* The Department of Health and Environmental Sciences (now Department of Environmental Quality) has authority under Title 76, ch. 4, part 1, to review certificates of survey. 38 A.G. Op. 81 (1980).

*"Immediate Family" Defined:* The term "immediate family", as used in this section, means the spouse of the grantor and children of the grantor by blood or adoption. 35 A.G. Op. 70 (1974).

## 76-3-209. Exemption from surveying and platting requirements for lands acquired for state highways.

### Case Notes

*Agricultural-Use Only Covenant Running With the Land — Covenant Enforceable Against Subsequent Owners Who Had Notice of Covenant:* The Turners placed an agricultural-use only restrictive covenant on a 12.3-acre parcel of property, which lay within the city limits of Helena, in order to sever it from a 14.5-acre parcel and avoid subdivision review. A private residence was located on the retained parcel. After dividing the property, the Turners sold the retained parcel to another party and quit-claimed the remaining 12.3-acre parcel to the Hamptons. Greg Hampton had owned the parcel prior to its acquisition by the Turners, who had originally agreed to reconvey the parcel to Hampton under an agreement that stemmed from ongoing divorce proceedings between Hampton and his former wife. Hampton had previously sought to divide the property with a restrictive covenant in the same manner as the Turners, but Hampton's certificate of survey was rejected because Hampton was not the titled owner at the time. Shortly after the 12.3-acre parcel was quit-claimed to them, the Hamptons sought to have the county lift the covenant, but the Board of County Commissioners refused to revoke the covenant. It was undisputed that the parcel was never used for any agricultural purposes and that the parcel was in a mostly residential area coupled with undeveloped open space. On appeal, the Hamptons did not question the legality of the process by which the county chose not to lift the covenant, but rather questioned whether the covenant was one that ran with the land, thereby binding the subsequent owners of both the covenantor and covenantee. Despite the fact that Hampton claimed to be unaware of the covenant when it was quit-claimed, the District Court concluded that Hampton was well aware of the covenant and took the property subject to the covenant as would anyone else. A narrow interpretation of the agricultural-use covenant requires a covenantor and a covenantee, and the county does not satisfy that requirement; nevertheless, the Turners' estate in the retained land was benefited in that neither the Turners nor their subsequent grantee was required to undergo subdivision review. Thus, the District Court did not err in determining that the Turners placed a valid agricultural-use only covenant on the 12.3-acre parcel that ran with the land. The Hamptons' argument that no "transaction" occurred, because the conveyance should have been simultaneous with the placement of the covenant, did not comport with the Montana Subdivision and Platting Act, which requires county approval of the exemption prior to the sale and conveyance of any divided property. That the county, as a party to the covenant, may choose to enforce the agricultural-use restriction was a foreseeable event that the Hamptons were willing to risk for the sake of taking title to the parcel. No material facts remained in dispute as to whether the Hamptons had notice of the restrictive covenant, so the covenant was enforceable against them as a matter of law. Hampton v. Lewis & Clark County, 2001 MT 81, 305 M 103, 23 P3d 908 (2001).

*No Duty of County to Determine Whether Land Transaction Constituted Attempt to Evade Subdivision Act Review:* A county has no affirmative duty to analyze or investigate an exemption claimed under 76-3-207 beyond the duty to accept for review a certificate of survey or other evidence establishing the claimed exemption, nor must any defined threshold of evidence be met in order for the county to accept a claimed exemption. Hampton v. Lewis & Clark County, 2001 MT 81, 305 M 103, 23 P3d 908 (2001).

### 76-3-211. Agricultural covenant — change in use.

**Compiler's Comments**

*Effective Date:* This section is effective October 1, 2019.

## Part 3
## Land Transfers

**Part Administrative Rules**

ARM 24.183.1104 Uniform standards for certificates of survey.
ARM 24.183.1107 Uniform standards for final subdivision plats.

**Part Case Notes**

*Standing of Person in Zoning District to Bring Action Against Developer of Condominiums in Same District:* To establish standing to bring suit, a complaining party must clearly allege past, present, or threatened injury to a property right or a civil right that is distinguishable from an injury to the public generally. Thus, a property owner who lived in the same zoning district as a proposed condominium development and who would be directly affected by a subdivision review or the lack of a subdivision review had standing to challenge the development. Shults v. Liberty Cove, Inc., 2006 MT 247, 334 M 70, 146 P3d 710 (2006), following Fleenor v. Darby School District, 2006 MT 31, 331 M 124, 128 P3d 1048 (2006). Fleenor was overruled in Schoof v. Nesbit, 2014 MT 6, 373 Mont. 226, 316 P.3d 831, to the extent Fleenor requires a plaintiff in a right to know or right to participate case to allege an injury beyond failure to receive notice or to allege a personal stake in a particular governmental decision for purposes of establishing standing to pursue a claim.

**Part Attorney General's Opinions**

*Exemption of U.S. From Filing and Enforcement Provisions:* The filing and enforcement provisions of the Montana Subdivision and Platting Act are inapplicable to a conveyance by the federal government pursuant to 43 U.S.C. § 1716 and in which transaction the United States is the subdivider. 42 A.G. Op. 36 (1987).

*When Conveyance of Land Void:* Contracts to convey land made on or after July 1, 1973, in violation of the Montana Subdivision and Platting Act, are void. Deeds executed on or after July 1, 1973, are void if they convey land in violation of the Montana Subdivision and Platting Act. 35 A.G. Op. 65 (1974).

### 76-3-301. General restriction on transfer of title to subdivided lands.

**Compiler's Comments**

*2001 Amendment:* Chapter 340 in (1) at end of second sentence inserted "unless the plat is located in an area over which the state does not have jurisdiction"; and made minor changes in style. Amendment effective April 21, 2001.

**Case Notes**

*Contract Remedy Providing Transfer of Twenty-Acre Parcel of Land as Security for Contractual Obligations Violative of Subdivision Laws:* As part of a sale of real property, Canton pledged a 20-acre parcel to Riverview Homes II, Ltd. (Riverview), as security in the event that Canton breached his contractual obligation to complete a proposed subdivision and construct an artificial lake. Canton breached the contract, and Riverview sought to quiet title to the 20-acre parcel. The District Court agreed that Canton breached the contract, but held that the contract remedy violated subdivision laws. Riverview appealed, contending that the parcel was exempted from subdivision review as a division of land created to provide security for a lien under 76-3-201 and that the security provision was an enforceable construction lien because of Canton's contractual obligation to construct the lake. The Supreme Court noted that Riverview neither furnished services or materials to Canton for the lake construction nor satisfied any other requirement applicable to construction liens in Title 71, ch. 3, part 5, so the construction lien theory failed. If it was not a construction lien, it had to be considered a general lien under 71-3-101, which, pursuant to Reiter v. Reiter, 237 M 220, 772 P2d 314 (1989), can be claimed only as arising from dealings in particular trades or businesses in which the existence of a general lien has been recognized by judicial decisions or if a custom to that effect can be established by evidence. General liens are looked upon with disfavor, and the court refused to recognize a general lien for breach of a contract to provide equity in land in this case. The District Court's conclusion that the 20-acre parcel was not transferable under 76-3-302, and failed to qualify for an exemption under 76-3-201, was affirmed. Riverview Homes II, Ltd. v. Canton, 2001 MT 309, 307 M 517, 38 P3d 848 (2001).

*Failure to File Plat — Deed Invalid:* A warranty deed attempting to transfer 2 acres of a 12.63-acre tract was invalid because a subdivision plat was not filed before the transfer. The County Clerk and Recorder should not have recorded the deed. McDonald v. Jones, 258 M 211, 852 P2d 588, 50 St. Rep. 502 (1993). Following the ruling in this case, the District Court took judicial notice of the underlying case and granted summary judgment to Insured Titles, Inc., after determining that the exclusions of the insurance policy applied and that McDonald knowingly altered the legal description of the property, thus defeating coverage under the policy. The grant of summary judgment was affirmed in Insured Titles, Inc. v. McDonald, 275 M 111, 911 P2d 209, 53 St. Rep. 61 (1996).

*Improper Property Development — Right of Access:* Defendants developed a subdivision. Plaintiff, an adjoining landowner, sold parcels of his land to his brother and another party. The subdivision developers objected to plaintiff and his successors using the subdivision for access to their tracts. The parties could not agree on conditions of usage, and the developers attempted various methods of blocking plaintiffs' access through the subdivision. Plaintiffs sought damages from blocked access and a prescriptive easement. Defendant contended plaintiffs had intentionally violated state and local subdivision laws in the land transfers and that allowing them access would sanction the alleged illegal action. Defendant contended the trial court should not have excluded evidence of the alleged violation of subdivision laws. On appeal, the Supreme Court found nothing in Montana subdivision law which prevents an individual who has developed his property contrary to law from pursuing a claim against an adjoining subdivision for right of access. Public authorities must deal with any improprieties in development. The evidence was properly excluded as irrelevant. Smith v. Moran, 215 M 31, 693 P2d 1246, 42 St. Rep. 152 (1985).

## 76-3-302. Restrictions on recording instruments relating to land subject to surveying requirements.

### Compiler's Comments

*2001 Amendment:* Chapter 340 inserted (2)(a) providing that recording instrument restrictions do not apply to proposed transfer of parcel or tract in location over which state has no jurisdiction; and made minor changes in style. Amendment effective April 21, 2001.

*1987 Amendment:* At beginning of (1) inserted exception clause; inserted (2) restricting surveying requirements to parcels or tracts proposed for transfer that were created after July 1, 1973; inserted (3) establishing that documents showing that parcel or tract existed before July 1, 1973, do not constitute and may not be substituted for a legal description of the property; and made minor changes in grammar.

### Case Notes

*Contract Remedy Providing Transfer of Twenty-Acre Parcel of Land as Security for Contractual Obligations Violative of Subdivision Laws:* As part of a sale of real property, Canton pledged a 20-acre parcel to Riverview Homes II, Ltd. (Riverview), as security in the event that Canton breached his contractual obligation to complete a proposed subdivision and construct an artificial lake. Canton breached the contract, and Riverview sought to quiet title to the 20-acre parcel. The District Court agreed that Canton breached the contract, but held that the contract remedy violated subdivision laws. Riverview appealed, contending that the parcel was exempted from subdivision review as a division of land created to provide security for a lien under 76-3-201 and that the security provision was an enforceable construction lien because of Canton's contractual obligation to construct the lake. The Supreme Court noted that Riverview neither furnished services or materials to Canton for the lake construction nor satisfied any other requirement applicable to construction liens in Title 71, ch. 3, part 5, so the construction lien theory failed. If it was not a construction lien, it had to be considered a general lien under 71-3-101, which, pursuant to Reiter v. Reiter, 237 M 220, 772 P2d 314 (1989), can be claimed only as arising from dealings in particular trades or businesses in which the existence of a general lien has been recognized by judicial decisions or if a custom to that effect can be established by evidence. General liens are looked upon with disfavor, and the court refused to recognize a general lien for breach of a contract to provide equity in land in this case. The District Court's conclusion that the 20-acre parcel was not transferable under this section, and failed to qualify for an exemption under 76-3-201, was affirmed. Riverview Homes II, Ltd. v. Canton, 2001 MT 309, 307 M 517, 38 P3d 848 (2001).

*No Duty of Clerk and Recorder to Record Invalid Deed — Writ of Mandamus Improper:* Under 7-4-2617, a County Clerk and Recorder is obligated to record only an instrument, paper, or notice that is authorized by law to be recorded. Under this section, a County Clerk and Recorder has a mandatory duty not to accept and record an otherwise proper deed if it fails to comply with the applicable survey requirements. The District Court did not err in refusing to issue a writ of mandamus requiring recording of deeds when a landowner attempted to divide a large parcel of land into smaller parcels by executing a deed in which the landowner was both grantor and grantee, which is not authorized by law, and when the statutorily required plat was not filed. Rocky Mtn. Timberlands, Inc. v. Lund, 265 M 463, 877 P2d 1018, 51 St. Rep. 653 (1994).

*Failure to File Plat — Deed Invalid:* A warranty deed attempting to transfer 2 acres of a 12.63-acre tract was invalid because a subdivision plat was not filed before the transfer. The County Clerk and Recorder should not have recorded the deed. McDonald v. Jones, 258 M 211, 852 P2d 588, 50 St. Rep. 502 (1993). Following the ruling in this case, the District Court took judicial notice of the underlying case and granted summary judgment to Insured Titles, Inc., after determining that the exclusions of the insurance policy applied and that McDonald knowingly altered the legal description of the property, thus defeating coverage under the policy. The grant of summary judgment was affirmed in Insured Titles, Inc. v. McDonald, 275 M 111, 911 P2d 209, 53 St. Rep. 61 (1996).

*Agency Regulation Conflicting With Occasional Sale Exemption:* Court upheld issuance of a Writ of Mandate to compel the lifting of sanitary restrictions, the filing of a certificate of survey, and an award of relator's attorney fees because the Montana Subdivision and Platting Act (prior to 1977 amendment of 76-3-207) clearly and unambiguously exempts occasional sales in resubdivisions and state agency's regulations were in direct conflict with the Act and exceeded delegated authority. (See 1993 amendments to 76-3-103 and 76-3-207.) State ex rel. Swart v. Casne, 172 M 302, 564 P2d 983 (1977).

**Attorney General's Opinions**

*Survey Requirements for Remainder Created When Highway Right-of-Way Obtained by State:* A County Clerk and Recorder may not require a survey or plat for the recordation of an instrument transferring title to a remainder that was created when the state obtained property for a highway right-of-way. 44 A.G. Op. 25 (1992).

*Recording Prerequisites:* Transfers of land that do not involve "divisions of land" or "subdivisions", as defined by the Montana Subdivision and Platting Act, do not require a certificate of survey or a plat before being recorded by the Clerk and Recorder. 37 A.G. Op. 88 (1977). See also 44 A.G. Op. 25 (1992).

*Effect on Prior Contracts:* Montana Subdivision and Platting Act does not govern the recording of deeds prepared and executed under contracts for deed prior to July 1, 1973, but not presented for recording until after June 30, 1973. 35 A.G. Op. 55 (1973).

*Refusal to Record Deed:* A County Clerk and Recorder may not refuse to record a deed that purports to convey subdivided land for which no approved certified plat has been filed. 35 A.G. Op. 25 (1973). (Opinion rendered prior to 1974 amendment.)

## 76-3-303. Contract for deed permitted if buyer protected.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

*1985 Amendment:* Inserted (4) authorizing subdivider to enter into contracts to sell subdivision lots upon condition that County Treasurer has certified property taxes are not delinquent.

## 76-3-304. Effect of recording complying plat.

**Case Notes**

*District Court Incorrectly Determined Plain Language of Subdivision Covenant Unambiguous — Related Documents Constituting Instrument Not Reviewed — Negative Easement — Ambiguity Interpreted Against Drafter Not Dispositive — Disputed Facts Whether County Acted Arbitrarily or Capriciously — Doctrine of Impossibility or Impracticality Not Applicable — Attorney Fees Award Reversed.* Lewis & Clark County v. Wirth, 2022 MT 105, 409 Mont. 1, 510 P.3d 1206.

*Easement by Reservation — Creation by Reference — Location Description on Plat Sufficient to Establish Burden Imposed by Easement With Reasonable Certainty:* The Supreme Court held that an easement by reservation was created when the deed conveying title referred to the plat on file with the County Clerk and Recorder. While the plat did not provide a metes-and-bounds description of the easement's location, the court determined that the plat identified the dominant and servient tenements, the intended use or necessity for the easement, and a description of the easement's location sufficient to establish with reasonable certainty the course of the easement across the property. Yorlum Properties, Ltd. v. Lincoln County, 2013 MT 298, 372 Mont. 159, 311 P.3d 748.

*Building Restriction Line on Subdivision Plat Creating Negative Easement Precluding Building in Restricted Portion of Lot:* Defendant constructed a garage that was located on both sides of a building restriction line marked on a subdivision plat. Plaintiffs sought removal of the portion of the garage that crossed the building restriction line. Although defendant was aware of the building restriction line when purchasing the subdivision property, defendant contended that an easement was not created because the deed failed to have express language of the grantor's request to create an easement and because the deed did not identify the dominant and servient tenement or give the servient tenement knowledge of the building restriction line's use and necessity. The District Court found that defendant was aware of the building restriction by virtue of the recorded plat and a special exception to the title policy obtained upon purchase of the property, and defendant was ordered to remove the garage. Defendant appealed, but the Supreme Court affirmed. The description of the building restriction line on the subdivision plat clearly created a negative easement in plaintiffs' favor, restricting any building on a portion of defendant's lot, so the District Court did not err in prohibiting defendant from building in that area. Plaintiffs' easement was thus enforceable and removal of the garage was proper. Conway v. Miller, 2010 MT 103, 356 Mont. 231, 232 P.3d 390, following Halverson v. Turner, 268 Mont. 168, 885 P.2d 1285 (1994), and Pearson v. Virginia City Ranches Ass'n, 2000 MT 12, 298 Mont. 52, 993 P.2d 688, and distinguishing Blazer v. Wall, 2008 MT 145, 343 Mont. 173, 183 P.3d 84. See also Lewis & Clark County v. Wirth, 2022 MT 105, 409 Mont. 1, 510 P.3d 1206.

*No Reserved Easement to Off-Survey Property Absent Language in Deed Expressly Reserving Easement:* Blazer asserted that an easement was reserved across Wall's property that allowed access to Blazer's off-survey property. The District Court agreed and ordered Wall to remove encroachments in the easement. On appeal, the Supreme Court disagreed. An express easement arises when a property owner conveys property that includes language in the conveyance reserving the right to use some part of the transferred land as a right-of-way or when the instrument of conveyance to a recorded plat or certificate of survey adequately describes an easement. Additionally, an easement by reservation may be established only when the dominant and servient estates are split from single ownership, and express depiction of an easement on a referenced plat or certificate of survey is not sufficient, in and of itself, to create an easement for the benefit of a stranger to the deed. In this case, there was no express language in the transaction documents reserving an easement to an adjoining parcel or to Blazer's off-survey property, so no easement for Blazer was created. The District Court was reversed. Blazer v. Wall, 2008 MT 145, 343 M 173, 183 P3d 84 (2008), following Bache v. Owens, 267 M 279, 883 P2d 817 (1994), Halverson v. Turner, 268 M 168, 885 P2d 1285 (1994), Ruana v. Grigonis, 275 M 441, 913 P2d 1247 (1996), and Pearson v. Virginia City Ranches Ass'n, 2000 MT 12, 298 M 52, 993 P2d 688 (2000). See also Davis v. Hall, 2012 MT 125, 365 Mont. 216, 280 P.3d 261, in which the Supreme Court distinguished and followed Blazer, concluding that if a referenced plat or certificate of survey is the only document describing a purported easement then the document must stand on its own, but if a referenced plat or certificate of survey is used to confirm or amplify another document's description of a purported easement, the documents should be read together. And see Mary Ellen Duke Trust v. Lee Lou, LLC, 2023 MT 177, 413 Mont. 356, 535 P.3d 1133.

*Bridle Path Easement — Express Easement by Reservation Versus Implied Easement — Extrinsic Evidence Regarding Parties' Intent Inadmissible:* Purchasers in a subdivision had language in their deeds creating an express easement for a bridle path in the subdivision. The bridle path was never built, and over the years, the easement was obstructed by improvements on the lots of several subdivision residents. Eventually, the subdivision association attempted to extinguish the easement at a meeting of the board of directors. Some residents asked the District Court to establish the validity of the easement and to restrain obstruction of the easement, and their request was granted by partial summary judgment. On appeal, the Supreme Court noted the difference between an implied easement, which is a creature of equity dependent on the intent of the parties, and an express easement by reservation, which is a creature of the documents of conveyance and the record. An express easement by reservation arises when the purchaser's deed refers to the plat where the easement is clearly depicted and labeled. In this case, the intent of the parties to create a bridle path easement was manifested through the language in the deeds and the plat, so under 28-2-905, extrinsic evidence regarding the intent of the parties was inadmissible. Further, the subdivision association was given oversight of the easement, but not ownership of it, and so lacked authority to extinguish the easement. The lower court's finding that a valid bridle path easement existed was affirmed. Pearson v. Virginia City Ranches Ass'n, 2000 MT 12, 298 M 52, 993 P2d 688, 57 St. Rep. 65 (2000), following Missoula v. Mix, 123 M 365, 214 P2d 212 (1950), Bache v. Owens, 267 M 279, 883 P2d 817 (1994), Halverson v. Turner, 268

M 168, 885 P2d 1285 (1994), and Tungsten Holdings, Inc. v. Parker, 282 M 387, 938 P2d 641, 54 St. Rep. 399 (1997), and distinguishing White v. Landerdahl, 191 M 554, 625 P2d 1145, 38 St. Rep. 412 (1981).

*Conveyance Referencing Certificate of Survey Creates Express Easement Running With Land:* Dahlia Halverson recorded a certificate of survey (COS) showing a 30-foot easement for a road upon her property in favor of adjoining property. Later, she conveyed the property subject to the easement by quitclaim deed to Shirley Turner and included a land description and a reference to the previously recorded COS. Her successor in interest claimed that the Turner property was subject to the easement originally created in the COS. Relying upon Benson v. Pyfer, 240 M 175, 783 P2d 923 (1989), and Bache v. Owens, 267 M 279, 883 P2d 817, 51 St. Rep. 1001 (1994), the Supreme Court held that the reference in the quitclaim deed to the previously filed COS that noted the creation of the easement was sufficient to create in the Turner property an express easement running with the land that was not personal to Dahlia Halverson and was therefore available to her successor in interest. Halverson v. Turner, 268 M 168, 885 P2d 1285, 51 St. Rep. 1233 (1994), followed in Ruana v. Grigonis, 275 M 441, 913 P2d 1247, 53 St. Rep. 216 (1996), and Pearson v. Virginia City Ranches Ass'n, 2000 MT 12, 298 M 52, 993 P2d 688, 57 St. Rep. 65 (2000). Ruana was followed in Reichle v. Anderson, 284 M 384, 943 P2d 1324, 54 St. Rep. 930 (1997). See also Bache v. Owens, 280 M 106, 929 P2d 217, 53 St. Rep. 1320 (1996), and Yorlum Properties, Ltd. v. Lincoln County, 2013 MT 298, 372 Mont. 159, 311 P.3d 748.

*No Implied Warranty of Habitability or Use Found:* The plaintiffs, a condominium owners' association and its individual members, sued Big Sky of Montana Realty, Inc., the successor in interest of Big Sky of Montana, Inc., for breach of implied warranties in failing to originally construct and later repair construction defects in fireplaces in the Deer Lodge Condominiums at Big Sky, Montana, in accordance with applicable fire and building codes. The plaintiffs based their claim of implied warranty on case law that found an implied warranty of habitability and on cases that held that subdivision plats create an implied covenant between developers and subsequent purchasers to use space in the manner designated in the plat. The District Court granted the defendants' motion for summary judgment, dismissing Big Sky of Montana Realty, Inc. The Supreme Court held that the District Court correctly found that no implied warranties existed. Ass'n of Unit Owners of Deer Lodge Condominium v. Big Sky of Mont., Inc., 245 M 64, 798 P2d 1018, 47 St. Rep. 1814 (1990).

*Conclusionary Statements of Reliance on Plat Provisions Not Enough to Avoid Summary Judgment:* The plaintiffs alleged that the provisions contained in the recorded plat constituted misrepresentations upon which they relied and entitled them to rescission of the contract. The defendants were granted summary judgment on the basis that the plaintiffs' statements were only conclusionary and did not allege sufficient facts to avoid summary judgment. Benson v. Pyfer, 240 M 175, 783 P2d 923, 46 St. Rep. 2033 (1989).

*Use of Plats to Induce Purchasers:* In order to sell lots, a subdivider prepared and recorded subdivision plat maps that designated common areas and roadways. The purchase and sale contracts did not state who would construct roads or common areas. The issue of whether purchasers of lots have any legally enforceable right to have roads constructed depends not on their designation in the plats but on the subdividers use of the plats in inducing purchasers. The instruments in question do not comprise a promise, express or implied, to construct roads. The purchasers did acquire an easement for the designated use. The case was remanded to determine factual issues relating to the use of the plats in inducing purchasers. Majers v. Shining Mtns., 219 M 366, 711 P2d 1375, 43 St. Rep. 16 (1986).

**Law Review Articles**

Blazer v. Wall: The Restriction of the Easement by Reservation Doctrine, Warhank, 71 Mont. L. Rev. 183 (2010).

## 76-3-305. Vacation of plats — utility easements.

**Compiler's Comments**

*1997 Amendment:* Chapter 42 in (1), in first sentence, substituted "provided in this part" for "provided in this section". Amendment effective March 12, 1997.

*1995 Amendment:* Chapter 100 in second sentence of (1), after "vacation", inserted "the governing body or the district court, as provided in 7-5-2502, shall determine to which properties" and after "portions" deleted "to the center thereof", inserted third sentence that read: "The governing body or the district court, as provided in 7-5-2502, shall take into consideration the previous platting; the manner in which the right-of-way was originally dedicated, granted, or conveyed; the reasons stated in the petition requesting the vacation; the parties requesting the vacation; and any agreements between the adjacent property owners regarding the use of the vacated area", and at beginning of last sentence inserted "The title to the streets and alleys of the vacated portions may revert" and before "the owners" inserted "one or more of"; and made minor changes in style.

**Case Notes**

*Boundary With and to Side of Street — Fee to Center of Street:* A boundary to and with the side of a street carries the fee to the center of the street unless a contrary intent appears from the deed. Herreid v. Hauck, 254 M 496, 839 P2d 571, 49 St. Rep. 884 (1992), followed in Knutson v. Schroeder, 2008 MT 139, 343 M 81, 183 P3d 881 (2008).

**76-3-306. Covenants run with the land.**

**Case Notes**

*Admissibility and Jury Instructions Related to Unrecorded Subdivision Covenants — Validity of Unrecorded Instrument Between Persons With Notice:* At issue in a subdivision dispute were unrecorded covenants prohibiting commercial activity in the subdivision. The District Court allowed the unrecorded instruments into evidence and instructed the jury that the instruments were valid between the parties who had notice of them. On appeal, the Supreme Court found no error either in admission of the covenants into evidence or in the jury instruction. Witnesses testified that copies of the unrecorded instruments had been given to both parties, so the documents were clearly relevant and admissible, and because both parties were notified of the restrictive covenants, an instruction regarding the validity of the instruments was appropriate under 70-21-102. Rice v. C.I. Lanning, 2004 MT 237, 322 M 487, 97 P3d 580 (2004).

*Agricultural-Use Only Covenant Running With the Land — Covenant Enforceable Against Subsequent Owners Who Had Notice of Covenant:* The Turners placed an agricultural-use only restrictive covenant on a 12.3-acre parcel of property, which lay within the city limits of Helena, in order to sever it from a 14.5-acre parcel and avoid subdivision review. A private residence was located on the retained parcel. After dividing the property, the Turners sold the retained parcel to another party and quit-claimed the remaining 12.3-acre parcel to the Hamptons. Greg Hampton had owned the parcel prior to its acquisition by the Turners, who had originally agreed to reconvey the parcel to Hampton under an agreement that stemmed from ongoing divorce proceedings between Hampton and his former wife. Hampton had previously sought to divide the property with a restrictive covenant in the same manner as the Turners, but Hampton's certificate of survey was rejected because Hampton was not the titled owner at the time. Shortly after the 12.3-acre parcel was quit-claimed to them, the Hamptons sought to have the county lift the covenant, but the Board of County Commissioners refused to revoke the covenant. It was undisputed that the parcel was never used for any agricultural purposes and that the parcel was in a mostly residential area coupled with undeveloped open space. On appeal, the Hamptons did not question the legality of the process by which the county chose not to lift the covenant, but rather questioned whether the covenant was one that ran with the land, thereby binding the subsequent owners of both the covenantor and covenantee. Despite the fact that Hampton claimed to be unaware of the covenant when it was quit-claimed, the District Court concluded that Hampton was well aware of the covenant and took the property subject to the covenant as would anyone else. A narrow interpretation of the agricultural-use covenant requires a covenantor and a covenantee, and the county does not satisfy that requirement; nevertheless, the Turners' estate in the retained land was benefited in that neither the Turners nor their subsequent grantee was required to undergo subdivision review. Thus, the District Court did not err in determining that the Turners placed a valid agricultural-use only covenant on the 12.3-acre parcel that ran with the land. The Hamptons' argument that no "transaction" occurred, because the conveyance should have been simultaneous with the placement of the covenant, did not comport with the Montana Subdivision and Platting Act, which requires county approval of the exemption prior to the sale and conveyance of any divided property. That the county, as a party to the covenant, may choose to enforce the agricultural-use restriction was a foreseeable event that the Hamptons were willing to risk for the sake of taking title to the parcel. No material facts remained in dispute as to whether the Hamptons had notice of the restrictive covenant, so the covenant was enforceable against them as a matter of law. Hampton v. Lewis & Clark County, 2001 MT 81, 305 M 103, 23 P3d 908 (2001).

*No Duty of County to Determine Whether Land Transaction Constituted Attempt to Evade Subdivision Act Review:* A county has no affirmative duty to analyze or investigate an exemption claimed under 76-3-207 beyond the duty to accept for review a certificate of survey or other evidence establishing the claimed exemption, nor must any defined threshold of evidence be met in order for the county to accept a claimed exemption. Hampton v. Lewis & Clark County, 2001 MT 81, 305 M 103, 23 P3d 908 (2001).

*Use of Plats to Induce Purchasers:* In order to sell lots, a subdivider prepared and recorded subdivision plat maps that designated common areas and roadways. The purchase and sale contracts did not state who would construct roads or common areas. The issue of whether purchasers of lots have any legally enforceable right to have roads constructed depends not on their designation in the plats but on the subdividers use of the plats in inducing purchasers. The instruments in question do not comprise a promise, express or implied, to construct roads. The purchasers did acquire an easement for the designated use. The case was remanded to determine factual issues relating to the use of the plats in inducing purchasers. Majers v. Shining Mtns., 219 M 366, 711 P2d 1375, 43 St. Rep. 16 (1986), distinguished in Scherpenseel v. Bitney, 263 M 68, 865 P2d 1145, 50 St. Rep. 1709 (1993).

### 76-3-307. Donations or grants to public considered a grant to donee.

**Case Notes**

*Subdivision Plat Map Supported Public Right-of-Way to River:* The District Court correctly determined that the subdivision plat donating a right-of-way from Rio Vista Drive to the banks of the Bitterroot River and the Missoula County Commissioners' acceptance of that right-of-way constituted an instrument of conveyance or deed of a right-of-way to Missoula County to hold the conveyance in trust for the public. The metes and bounds plots approximately corresponded to the low-water mark of the otherwise nonuniform edge of the meandering river. Aside from the express references to specific metes and bounds, nothing in the subdivision plat map conveyance instrument indicated any intent of the original owner to strip herself or the public of access to the river along the Rio Vista alley right-of-way. Callsen v. Missoula County, 2020 MT 176, 400 Mont. 383, 467 P.3d 580.

## Part 4
## Survey Requirements

**Part Administrative Rules**

ARM 24.183.1104 Uniform standards for certificates of survey.
ARM 24.183.1107 Uniform standards for final subdivision plats.

**Part Attorney General's Opinions**

*Violation of Statute — Contracts and Deeds Voidable:* The vendor of subdivided land violated the Montana Subdivision and Platting Act by filing a certificate of survey under Title 76, ch. 3, part 4, for divisions of land other than a subdivision, rather than filing an approved subdivision plat under the requirements of Title 76, ch. 3, part 6. The vendor obtained the approval of the certificate of survey from the Board of County Commissioners prior to filing the certificate, but the Board had no statutory authority to give approval. It is the opinion of the Attorney General that deeds and contracts which convey land in violation of the Montana Subdivision and Platting Act but with the unauthorized approval of the Board of County Commissioners are voidable. 38 A.G. Op. 106 (1980).

### 76-3-401. Survey requirements for lands other than subdivisions.

**Compiler's Comments**

*1993 Amendment:* Chapter 136 inserted second sentence requiring surveys to comply with 76-3-406. Amendment effective March 19, 1993.

**Case Notes**

*Improper Version of Subdivision Law Applied to Survey Exemption Question — Remand:* The parents divided a parcel of land on Flathead Lake into two parcels and transferred one parcel to their daughter and her husband in 1973. The parents' adjoining parcel was transferred to other family members and ultimately transferred to plaintiff. Plaintiff sought to adjudicate the boundary between the properties. The District Court apparently applied the 2003 subdivision and platting law and found that the property division qualified for a family exemption and would not be considered as a subdivision under 76-3-207, but the court was unclear about the surveying criteria that it applied to the property division, apparently applying the subdivision law after finding that the subdivision law did not apply. The Supreme Court held that the District Court order was flawed because of the internal inconsistencies and because the District Court applied the 2003 law when it should have applied the law in effect when the property division was made in 1973. The case was therefore remanded for the District Court to determine whether additional factfinding or evidence was necessary in order to establish the proper survey criteria and resolve the boundary issue in accordance with the 1973 law. Karlson v. Rosich, 2006 MT 290, 334 M 370, 147 P3d 196 (2006).

*Aliquot Parts — Location in More Than One Government Lot:* When the plaintiffs tried to convey land purchased from the defendants to a third party, the county refused to record the deed based on an unpublished 1981 Attorney General's opinion which had concluded that this section required that the 1/32 or larger aliquot parts of a United States government section or lot be contained in the same section or lot. The plaintiffs sued to rescind the contract for deed. A majority of the Supreme Court held that the requirement of this section can be satisfied even if the aliquot parts are located in more than one government section or lot; however, the court affirmed summary judgment for plaintiffs because it found the parcel in question, being 22½ acres, was not divisible as an aliquot part of any government sections or lots. (See 1993 amendments to 76-3-103 and 76-3-207.) McCarthy v. Timberland Resources, Inc., 219 M 278, 712 P2d 1292, 42 St. Rep. 2016 (1985).

*County Directed to Accept and Record Deeds on Certain Parcels — No Survey Necessary on Resale:* In a case in which the size of the parcels was 20 acres or more, the notice of purchaser's interest for the parcel was accepted and recorded, and the parcel could be described with reference to U.S. government sections, the county was directed to accept and record deeds for the parcels in question. Since the description of the land had not changed since it was originally divided and quit claimed and since the quit claim deeds were duly recorded, a survey of those parcels on resale was not necessary in order for the resale deed to be recorded. (See 1993 amendments to 76-3-103 and 76-3-207.) Timberland Resources, Inc. v. Vaught, 227 M 247, 738 P2d 1277, 44 St. Rep. 1054 (1987), following McCarthy v. Timberland Resources, Inc., 219 M 278, 712 P2d 1292, 42 St. Rep. 2016 (1985).

*Agency Regulation Conflicting With Occasional Sale Exemption:* Court upheld issuance of a Writ of Mandate to compel the lifting of sanitary restrictions, the filing of a certificate of survey, and an award of relator's attorney fees because the Montana Subdivision and Platting Act (prior to 1977 amendment of 76-3-207) clearly and unambiguously exempts occasional sales in resubdivisions and state agency's regulations were in direct conflict with the Act and exceeded delegated authority. (See 1993 amendments to 76-3-103 and 76-3-207.) State ex rel. Swart v. Casne, 172 M 302, 564 P2d 983 (1977).

**Attorney General's Opinions**

*Survey Requirements:* When a grantor proposes to transfer a quarter-section block of property (160 acres) that has within its boundaries two smaller parcels (10 and 15 acres in size) that the grantor does not own, a survey is not required. The two smaller tracts, being already created, are not a "division of land" requiring a survey under this section. A survey is required only when the transfer of title involves division of a tract of property. In such a situation, a grantor is not barred from using a quitclaim deed transferring the entire block, including the tracts the grantor does not own, but that action is inadvisable and subject to potential liability. 42 A.G. Op. 121 (1988).

*Recording Prerequisites:* Transfers of land that do not involve "divisions of land" or "subdivisions", as defined by the Montana Subdivision and Platting Act, do not require a certificate of survey or a plat before being recorded by the Clerk and Recorder. 37 A.G. Op. 88 (1977). See also 44 A.G. Op. 25 (1992).

### 76-3-402. Survey and platting requirements for subdivided lands.

**Compiler's Comments**

*1993 Amendment:* Chapter 136 near middle of (1), after "chapter", inserted "including the requirements of 76-3-406"; and made minor changes in style. Amendment effective March 19, 1993.

**Case Notes**

*Improper Version of Subdivision Law Applied to Survey Exemption Question — Remand:* The parents divided a parcel of land on Flathead Lake into two parcels and transferred one parcel to their daughter and her husband in 1973. The parents' adjoining parcel was transferred to other family members and ultimately transferred to plaintiff. Plaintiff sought to adjudicate the boundary between the properties. The District Court apparently applied the 2003 subdivision and platting law and found that the property division qualified for a family exemption and would not be considered as a subdivision under 76-3-207, but the court was unclear about the surveying criteria that it applied to the property division, apparently applying the subdivision law after finding that the subdivision law did not apply. The Supreme Court held that the District Court order was flawed because of the internal inconsistencies and because the District Court applied the 2003 law when it should have applied the law in effect when the property division was made in 1973. The case was therefore remanded for the District Court to determine whether additional factfinding or evidence was necessary in order to establish the proper survey criteria and resolve the boundary issue in accordance with the 1973 law. Karlson v. Rosich, 2006 MT 290, 334 M 370, 147 P3d 196 (2006).

*Use of Original Survey for Reference — Proper Determination of Tract Boundary:* A dispute arose in a quiet title action based on subdivision surveys that differed from the original government survey. When surveyors use corner sections and lines to base measurements and plot tracts, it is essential that they properly identify and authenticate the original monument. Original corners established by a government survey, if those corners can be found, or places where they were originally established, if those places can be definitely determined, are conclusive without regard to whether they were located correctly or not and must remain the true corners or monuments by which to determine the boundaries. The footsteps of the original surveyor should be followed, so far as discoverable on the ground by monuments, and it is immaterial if the lines run by the original surveyor are incorrect. Olson v. Jude, 2003 MT 186, 316 M 438, 73 P3d 809 (2003). See also Vaught v. McClymond, 116 M 542, 155 P2d 612 (1945), and Helehan v. Ueland, 223 M 228, 725 P2d 1192 (1986).

*Agency Regulation Conflicting With Occasional Sale Exemption:* Court upheld issuance of a Writ of Mandate to compel the lifting of sanitary restrictions, the filing of a certificate of survey, and an award of relator's attorney fees because the Montana Subdivision and Platting Act (prior to 1977 amendment of 76-3-207) clearly and unambiguously exempts occasional sales in resubdivisions and state agency's regulations were in direct conflict with the Act and exceeded delegated authority. (See 1993 amendments to 76-3-103 and 76-3-207.) State ex rel. Swart v. Casne, 172 M 302, 564 P2d 983 (1977).

## 76-3-403. Monumentation.

### Compiler's Comments

*2003 Amendment:* Chapter 190 at beginning of (1) substituted "board of professional engineers and professional land surveyors" for "department of labor and industry". Amendment effective April 1, 2003.

*2001 Amendment:* Chapter 483 in (1) near beginning after "department of" substituted "labor and industry" for "commerce"; and made minor changes in style. Amendment effective July 1, 2001.

*1981 Amendment:* Substituted "department of commerce" for "department of community affairs" in (1).

*Transfer of Function:* Section 6, Ch. 274, L. 1981, provided in part: "(1) The department of community affairs is abolished.

(2) The following functions of the department of community affairs are transferred to the department of commerce: . . .

(f) prescribing standards for monumentation under 76-3-403; . . ."

### Administrative Rules

ARM 24.183.1002 Remonumentation and rehabilitation of public land survey corners and monuments.

ARM 24.183.1101 Uniform standards for monumentation.

### Case Notes

*Effect of County Fee Requirement:* Madison County ordinance requiring that final subdivision plats and certificates of survey be reviewed for errors and omissions by examining land surveyor and requiring a fee to be paid to examining land surveyor did not offend monumentation requirements of statutory sections. State ex rel. Swart v. Molitor, 190 M 515, 621 P2d 1100 (1981).

*Agency Regulation Conflicting With Occasional Sale Exemption:* Court upheld issuance of a Writ of Mandate to compel the lifting of sanitary restrictions, the filing of a certificate of survey, and an award of relator's attorney fees because the Montana Subdivision and Platting Act (prior to 1977 amendment of 76-3-207) clearly and unambiguously exempts occasional sales in resubdivisions and state agency's regulations were in direct conflict with the Act and exceeded delegated authority. (See 1993 amendments to 76-3-103 and 76-3-207.) State ex rel. Swart v. Casne, 172 M 302, 564 P2d 983 (1977).

### 76-3-404. Certificate of survey.

**Compiler's Comments**

*2003 Amendment:* Chapter 549 in (1) at beginning inserted exception clause; and made minor changes in style. Amendment effective October 1, 2003.

**Case Notes**

*Certificate of Survey Filed Before Monuments Set Not Properly Filed Within Meaning of Subdivision Act:* Stanchfield Cattle Company sought to subdivide land by dividing it into 20-acre parcels and having it surveyed. After completion of the survey, the surveyor had the certificate of survey filed, with a note on the face of the certificate stating that the monuments had not been set because of winter conditions but would be set before July 1. NFC, which held a right of first refusal on the property, sued to prevent the transfer of any property to prospective buyers, claiming that the certificate of survey had not been filed in accordance with the Montana Subdivision and Platting Act. The Supreme Court reversed the District Court decision, holding that despite whatever practices might be common among surveyors, subsection (3) of this section and an administrative rule of the Department of Commerce (now Department of Labor and Industry), ARM 8.94.3002 (renumbered 24.183.1104), require that the monuments be set at the time that the certificate of survey is filed. The Supreme Court noted that it could not change the requirements of the Act and the Department rule. NFC Partners v. Stanchfield Cattle Co., 274 M 46, 905 P2d 1106, 52 St. Rep. 1115 (1995).

*Mandamus to Compel Filing:* Where a document had as its purpose the establishment of boundaries and the description of property for a deed on a single parcel containing an area greater than the amount regulated by the Montana Subdivision and Platting Act, and the document contained no representation of a subdivision, the document was a "certificate of survey" and the Clerk and Recorder had a legal duty under this section to accept the document for filing since it contained no evidence to bring it within the definition of a subdivision. State ex rel. Swart v. Stucky, 167 M 171, 536 P2d 762 (1975).

### 76-3-405. Administration of oaths by registered land surveyor.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 76-3-406. Surveys affecting irrigation districts — additional survey requirements.

**Compiler's Comments**

*Effective Date:* Section 6, Ch. 136, L. 1993, provided: "[This act] is effective on passage and approval." Approved March 19, 1993.

### 76-3-411. Board to prescribe standards.

**Compiler's Comments**

*Effective Date:* This section is effective October 1, 2009.

## Part 5
## Local Regulations

**Part Case Notes**

*City Ordinance Requiring Developer Surcharge — Valid Exercise of Self-Governing Power:* A city ordinance imposing a 5% surcharge on developers of raw land prior to creation of a special improvement district was a valid exercise of the city's self-governing powers. Diefenderfer v. Billings, 223 M 487, 726 P2d 1362, 43 St. Rep. 1934 (1986).

*Agency Regulation Conflicting With Occasional Sale Exemption:* Court upheld issuance of a Writ of Mandate to compel the lifting of sanitary restrictions, the filing of a certificate of survey, and an award of relator's attorney fees because the Montana Subdivision and Platting Act (prior to 1977 amendment of 76-3-207) clearly and unambiguously exempts occasional sales in resubdivisions and state agency's regulations were in direct conflict with the Act and exceeded delegated authority. (See 1993 amendments to 76-3-103 and 76-3-207.) State ex rel. Swart v. Casne, 172 M 302, 564 P2d 983 (1977).

**Part Attorney General's Opinions**

*Authority of Self-Governing Local Government to Enforce Master Plan (now Growth Policy):* A local government unit with self-governing powers may not refuse to file a certificate of survey because the involved parcel encompasses less than 40, but equal to or more than 20, acres even if its master plan (now growth policy) prohibits divisions of land of such size. A local government that has adopted a master plan (now growth policy) to regulate future land-use planning and zoning may condition issuance of permits for the construction, alteration, or enlargement of structures upon compliance with such plan. 42 A.G. Op. 16 (1987).

*Size Parcel Prohibited by Master Plan (now Growth Policy) — Certificate Filing Required — Conditional Issuance of Permit:* A local government unit with self-governing powers may not refuse to file a certificate of survey simply because the parcel encompasses less than 40 but equal to or greater than 20 acres, even if its master plan (now growth policy) prohibits divisions of land of such size. However, the local government may condition issuance of permits for construction, alteration, or enlargement of structures upon compliance with the master plan (now growth policy). 42 A.G. Op. 16 (1987).

*Suitability for Access — Landowner May Declare Unsuitability:* If a landowner elects on his application to accept a written determination that access and easements are not suitable for the purposes of providing services to the divided parcels, the local governing body may attach this notation to the instrument of transference prior to the recordation and forego any review of access suitability. 41 A.G. Op. 43 (1986).

*Suitability for Access Review Mandatory:* In divisions of land consisting exclusively of parcels 20 acres or larger, the landowner must apply to the local governing body for a determination of whether appropriate access and easements are properly provided. 41 A.G. Op. 43 (1986).

*State Agency Subject to Local Review in Creation of Recreational Vehicle Camping Area:* The term "subdivision" is defined in 76-3-103 to include the provision of multiple space for recreational camping vehicles. The Department of Fish, Wildlife, and Parks argued that, as a state agency, it was exempt from the review requirement. Because exemptions are provided for some state activities but not for activities to provide multiple space for recreational camping vehicles on state land, the clear implication is that the state is to stand on the same footing as a private person in this matter. It was noted that there is a trend toward abandoning the traditional view that activities of the state may be exercised free of local control. The Department is subject to local subdivision review to the extent that it creates an area which will provide multiple space for recreational camping vehicles. 39 A.G. Op. 14 (1981).

*Minor Subdivisions Not Exempt From Dedication:* Minor subdivisions are not exempted from the requirements regarding dedicating land to the public for parks and playgrounds or alternative requirements provided therefor by law. 37 A.G. Op. 1 (1977).

## 76-3-501. Local subdivision regulations.

### Compiler's Comments

*2021 Amendment:* Chapter 319 inserted (2) concerning actions that are not specifically prohibited in the conditions of subdivision approval; inserted (3) concerning historical interpretation and enforcement of conditions of subdivision approval; and made minor changes in style. Amendment effective April 30, 2021.

*2007 Amendment:* Chapter 443 in (9) near middle after "hazard" inserted "including but not limited to fire and wildland fire"; and made minor changes in style. Amendment effective May 8, 2007.

*Applicability:* Section 8, Ch. 443, L. 2007, provided that this section applies on or after October 1, 2009.

*2005 Amendment:* Chapter 298 in introductory clause at beginning deleted "Before July 1, 1974"; in (9) near beginning after "environmental degradation and" deleted "the avoidance of"; deleted former (2) that read: "(2) Review and approval or disapproval of a subdivision under this chapter may occur only under those regulations in effect at the time an application for approval of a preliminary plat or for an extension under 76-3-610 is submitted to the governing body"; and made minor changes in style. Amendment effective April 19, 2005.

*Applicability:* Section 19(1), Ch. 298, L. 2005, provided: "(1) [This act] applies to subdivision applications submitted on or after [the effective date of this act]." Effective April 19, 2005.

*1995 Amendment:* Chapter 471 in (1), near middle after "drainage", inserted "subject to the provisions of 76-3-511"; and made minor changes in style. Amendment effective April 14, 1995.

*Applicability:* Section 22(3), Ch. 471, L. 1995, provided: "(3) [This act] does not apply to the establishment of fees or public participation requirements."

*1985 Amendment:* Inserted (2) authorizing review of approval or disapproval of subdivision only under regulations in effect at time of application for approval or extension of preliminary plat.

*Statement of Intent:* The statement of intent attached to Ch. 378, L. 1985, provided: "It is the intent of the legislature that a subdivision be reviewed under the rules in effect at the time an application for approval of the subdivision is submitted. Neither a local governing body (under the provisions of the Montana Subdivision and Platting Act) nor the department of health and environmental sciences [now department of environmental quality] (under Title 76, chapter 4, part 1) may modify its subdivision rules and apply the modified rules to a subdivision submitted for review when previously existing rules were in effect."

**Case Notes**

*City Council Denial of Subdivision Exemption Not Violative of Constitutional Protections:* The Missoula City Council denied plaintiffs' applications for exemptions from subdivision requirements, and plaintiffs appealed on grounds that denial of the applications constituted violations of constitutional rights of equal protection and public participation, was a taking, and was a tortious violation of the city council's statutory duties. The District Court granted summary judgment for the city on all the claims and plaintiffs appealed, but the Supreme Court affirmed. The equal protection argument was merely a bald assertion that was largely unclear and poorly supported, failing to demonstrate a discriminatory purpose, and was properly dismissed on summary judgment. The takings claim failed because plaintiffs never possessed a right to obtain an exemption, but instead only lost the opportunity to obtain an exemption, and the discretion to grant or deny the exemption was properly exercised by the city council. Plaintiffs raised the public participation claim in District Court but failed to discuss the issue in briefs on appeal, so the Supreme Court declined to consider the issue. The claim of a tortious violation of the city council's statutory duties also failed as a cognizable negligence claim because plaintiffs failed to prove that the council's actions damaged plaintiffs. Roe v. Missoula, 2009 MT 417, 354 M 1, 221 P3d 1200 (2009). See also Gudmundsen v. State ex rel. Mont. St. Hosp. Warm Springs, 2009 MT 56, 349 M 297, 203 P3d 813 (2009).

*Failure of Subdivision Exemption Application to Meet Lot Aggregation or Boundary Line Relocation Exemption — Denial of Application Affirmed:* Plaintiffs, seeking to relocate the boundary line of their two city lots in order to create a vacant lot that could be sold, applied for a subdivision exemption. The city council denied the exemption and plaintiffs appealed, but the Supreme Court examined city regulations and affirmed. The city council concluded that the application failed to meet the lot aggregation exemption because it was essentially a boundary line relocation and not a lot aggregation, and the application failed to meet the boundary line relocation exemption because city regulations prohibited the creation of a new parcel transferable to anyone other than an adjoining property owner. The Supreme Court noted that plaintiffs questioned the process used by the city council to unilaterally review the applications, but the court held that process did not harm plaintiffs because the application suggested an intention to improperly evade subdivision review. The application would have been forwarded to the city council in any event, so it was not necessary to consider whether the application actually qualified for an exemption. The District Court was affirmed. Roe v. Missoula, 2009 MT 417, 354 M 1, 221 P3d 1200 (2009).

*Failure of Environmental Assessment to Provide Statutorily Required Summary of Subdivision Impact — Approval of Preliminary Plat Unlawful:* Plaintiffs asserted that the Board of County Commissioners erred in approving a preliminary plat for a subdivision in rural Sanders County. The District Court granted judgment for the Board and the developer. On appeal, the Supreme Court reversed. The environmental assessment prepared in support of the subdivision was inadequate in explaining how the subdivision would impact water resources and water management such as wastewater and runoff, roads and traffic, and essential public services such as fire and police services. Because the environmental assessment was inadequate under plain statutory language, the Board's approval of the preliminary plat was unlawful for failure to comply with relevant statutes. The case was remanded for entry of judgment in favor of plaintiffs. Citizens for Responsible Dev. v. Bd. of County Comm'rs, 2009 MT 182, 351 M 40, 208 P3d 876 (2009).

*Authority of Water and Sewer Association to Ban Private Wells Within Subdivision:* A private, nonprofit water and sewer association was created to regulate the use of water and the handling and disposition of sewage within a subdivision. A drought forced the temporary shutdown of the association's water system and the institution of watering restrictions in order to preserve sufficient pressure and capacity in the water system to meet subdivision residents' demands for drinking water, household use, and fire suppression activities. Defendants decided to explore the possibility of drilling a private well for lawn and garden purposes. The association board subsequently decided to ban private wells in the subdivision for all purposes. Nevertheless, defendants drilled an untreated well solely for lawn and garden use. The association then demanded that defendants abandon their well, and when defendants refused, the association sought a declaratory judgment that the rule prohibiting private wells was valid and enforceable and requested the District Court to require defendants to abandon their well. Defendants denied that the association had the authority to burden private property interests or to require removal of the well. The District Court concluded that the rule was valid, granted summary judgment for the association, and ordered removal of defendants' well. On appeal, the Supreme Court affirmed. The rule was reasonably related to the association's obligation to preserve the health, safety, and financial viability of its water system and was valid and legal. The fact that the rule affected a well that was not directly owned by the association did not affect the validity of the rule because, as members of the association, defendants were bound by association rules intended to protect the public water system. The possibility that defendants' untreated well could be attached to the subdivision water system posed a cross-contamination threat to the system, and the well also posed a threat of depletion of the aquifer that the association depended upon in part for its public water supply, so abandonment of the well was warranted. Eastgate Village Water & Sewer Ass'n v. Davis, 2008 MT 141, 343 M 108, 183 P3d 873 (2008), following Appeal of Two Crow Ranch, Inc., 159 M 16, 494 P2d 915 (1972).

*Retroactive Application of Ordinances to Application for Plat Approval:* A provision of this section stating that review and approval or disapproval of a subdivision may occur only under regulations in effect at the time of an application for preliminary plat approval expressly precluded the retroactive application of the city's development code to the developer's application for approval. (See 2005 amendment and amendment to 76-3-604.) The District Court properly ruled that the code could not be retroactively applied to the application and excluded evidence of the code in the developer's suit for attaching conditions to the preliminary approval. Kiely Constr. v. Red Lodge, 2002 MT 241, 312 M 52, 57 P3d 836 (2002).

*Local Governing Body Failure to Follow Local Regulations on Criteria for Approval of Subdivision:* This section requires the local governing body to review and approve or disapprove a proposed subdivision under the local regulations in effect at the time that an application for approval of a preliminary plat is submitted to the local governing body. (See 2005 amendment and amendment to 76-3-604.) The governing body may not ignore its own local regulations and apply only the criteria that 76-3-608 requires to be considered. In this case, the local regulations contained the five criteria provided in 76-3-608 but, in addition, still contained three criteria that had been amended out of that section. The local governing body conditionally approved a subdivision without considering those three criteria. This chapter's mandate that a local governing body assert local control and develop its own subdivision regulations, as well as other provisions of this chapter, clearly contemplates that the local government entity is free to promulgate regulations, in addition to those in this chapter, that do not necessarily conform exactly to this chapter, so long as the regulations do not conflict with this chapter. This chapter establishes minimum requirements that the local governing body must follow. The additional three criteria in the local governing body's regulations do not conflict with this chapter, and findings on those criteria were mandated. In addition, the local governing body failed to follow its local regulation stating that findings on the criteria that the local regulation required to be applied must show that the subdivision will be in the public interest. The District Court therefore properly set aside the local governing body's conditional approval of the subdivision. Burnt Fork Citizens Coalition v. Bd. of County Comm'rs of Ravalli County, 287 M 43, 951 P2d 1020, 54 St. Rep. 1490 (1997).

*Local Board of Health Not Considered Governing Body Despite Interlocal Agreement:* Despite the fact that a county board of health was created by interlocal agreement, the District Court erred in concluding that a local board of health is considered a governing body by definition under 76-3-103. The Montana Subdivision and Platting Act does not, under 76-3-504 and this section, authorize local boards of health to adopt and enforce regulations governing sanitation in subdivisions, regardless of size. The authority of a local board of health to regulate subdivisions derives from 50-2-116, not from the Montana Subdivision and Platting Act. Skinner Enterprises, Inc. v. Lewis & Clark County Bd. of Health, 286 M 256, 950 P2d 733, 54 St. Rep. 1398 (1997).

*No Mandatory Application of Wastewater Treatment Regulation by Local Board of Health:* Under this section, review and approval or disapproval of a subdivision under the Montana Subdivision and Platting Act may occur only under regulations in effect at the time that an application is submitted to the governing body. (See 2005 amendment and amendment to 76-3-604.) The Lewis and Clark County Commission approved the Green Acres subdivision in July 1990, at which time the Lewis and Clark County Board of Health's onsite wastewater treatment regulations mandated shallow standard treatment systems, rather than the present regulation requiring intermittent sand filters. Skinner Enterprises, Inc., argued that the 1990 regulation should be applied pursuant to this section. However, local boards of health derive authority to regulate subdivisions from 50-2-116, not from the Montana Subdivision and Platting Act. Therefore, the local board's own onsite wastewater treatment regulations did not obligate the local board to apply the 1990 regulation. Further, 50-2-130 allows local boards of health to promulgate regulations that are more stringent than comparable state regulations, notwithstanding the provisions of 7-1-113 prohibiting a local government from exercising any power inconsistent with state law or administrative regulations. The facts regarding whether shallow-capped drainfields or intermittent sand filters are considered more stringent were not the subject of the present appeal. The discretionary authority of the local board of health to regulate subdivision sanitation by requiring intermittent sand filters was affirmed. Skinner Enterprises, Inc. v. Lewis & Clark County Bd. of Health, 286 M 256, 950 P2d 733, 54 St. Rep. 1398 (1997).

*Review, Not Regulatory, Function Applicable to Local Board of Health Control of Minor Subdivision:* Section 50-2-106, when read in conjunction with 76-4-104, does not authorize a local board of health to regulate sanitation in minor subdivisions containing five or fewer parcels. By its plain language, 76-4-104 delegates to local boards of health the power to review select subdivisions but not the power to promulgate regulations. As a reviewing authority, the board's function is limited to reviewing the proposed water supply, sewage, and solid waste disposal facilities and advising the Department of Environmental Quality of its recommendation for approval or disapproval of the subdivision. However, 50-2-116 explicitly authorizes a local board of health to regulate sewage control and disposal that is not regulated by the Montana Subdivision and Platting Act. The Act limits state sanitation regulation to subdivisions containing parcels of fewer than 20 acres each and precludes regulation of subdivisions in which each parcel of land contains more than 20 acres. Thus, the regulation of sanitation in subdivisions containing parcels of more than 20 acres each is clearly the responsibility of local boards of health. Nevertheless, 76-4-122 requires both state and local approval before filing a subdivision plat with the County Clerk and Recorder, and to hold that approval by the local board of health is a ministerial, nondiscretionary act would render 76-4-122 inoperative. Giving effect to the purpose of all the applicable statutes and examining the legislative history of 50-2-116, the Supreme Court held that the 1991 enactment of 50-2-116(1)(i) revealed a legislative intent to expand, rather than diminish, the authority of local boards of health to regulate subdivision sanitation. Thus, local boards of health have discretionary statutory authority to regulate all subdivisions, regardless of size, notwithstanding the state's authority to regulate certain subdivisions under the Montana Subdivision and Platting Act. Skinner Enterprises, Inc. v. Lewis & Clark County Bd. of Health, 286 M 256, 950 P2d 733, 54 St. Rep. 1398 (1997).

*Local Government Regulations — Rebuttable Presumption Permissible:* County subdivision regulations that contained a rebuttable presumption of evasion did not violate the due process rights of appellant. Because exemptions of statutes pertaining to health, safety, and welfare of the public should be narrowly construed, a party claiming the exemption should have the burden of proving entitlement to the exemption. State ex rel. Dreher v. Fuller, 257 M 445, 849 P2d 1045, 50 St. Rep. 349 (1993).

*Local Government Regulations — Retroactive Use of Prior Valid Conveyances:* When plain language of local regulations does not have retroactive application, it is not improper for local government officials to examine the prior history of the developers and tract in question in order to make an informed decision regarding whether an applicant is evading the Montana Subdivision and Platting Act. State ex rel. Dreher v. Fuller, 257 M 445, 849 P2d 1045, 50 St. Rep. 349 (1993).

*Subdivision and Platting Act Constitutional — Permissible Delegation of Legislative Authority:* Plaintiff challenged the constitutionality of the Montana Subdivision and Platting Act on the grounds that the statutory preamble to the Act's exemptions amounted to an unconstitutional delegation or usurpation of legislative authority on the basis that the Act contains insufficient guidelines. The Supreme Court distinguished this case from cases relating to a legislative grant of rulemaking authority to administrative agencies based on differences in nature between agencies and local governments. The delegation of authority by the Legislature was not impermissible, and rules adopted by the county pursuant to the Act are constitutional when the rules are not inconsistent with or contradictory to the Act and when they give notice to the property owner as to what the county will look at in making a determination. State ex rel. Dreher v. Fuller, 257 M 445, 849 P2d 1045, 50 St. Rep. 349 (1993).

*No Writ of Mandamus — Refusal to Record Deeds in Violation of County Subdivision Law:* In an action to compel county officers to accept for recording a deed and certificate of survey, the trial court properly denied a Writ of Mandamus. The county officers' refusal was based on a belief that appellant was attempting to evade county subdivision regulations. When the act sought to be compelled is discretionary, as in this case, a Writ of Mandamus will be issued only if the failure to act is such an abuse of discretion that it amounts to no exercise of discretion at all. The evidence in this case indicates no abuse of discretion. Withers v. Beaverhead County, 218 M 447, 710 P2d 1339, 42 St. Rep. 1730 (1985), distinguished in State ex rel. Leach v. Visser, 234 M 438, 767 P2d 858, 45 St. Rep. 2035 (1988).

**Attorney General's Opinions**

*Local Government Required to Adopt Subdivision Water Supply and Sewage and Solid Waste Disposal That Conform to State Regulations:* Unless a local governing body makes specific findings to support the conclusion that more stringent rules are required to protect public health, a local governing body must adopt subdivision regulations for water supply and sewage and solid waste disposal that are as stringent as the state standards adopted by the Department of Environmental Quality under Title 76, ch. 4, part 1. The local government may incorporate the state regulations by reference, but the actual method of adoption is up to the discretion of the local government. 49 A.G. Op. 7 (2001).

*State Agency Subject to Local Review in Creation of Recreational Vehicle Camping Area:* The term "subdivision" is defined in 76-3-103 to include the provision of multiple space for recreational camping vehicles. The Department of Fish, Wildlife, and Parks argued that, as a state agency, it was exempt from the review requirement. Because exemptions are provided for some state activities but not for activities to provide multiple space for recreational camping vehicles on state land, the clear implication is that the state is to stand on the same footing as a private person in this matter. It was noted that there is a trend toward abandoning the traditional view that activities of the state may be exercised free of local control. The Department is subject to local subdivision review to the extent that it creates an area which will provide multiple space for recreational camping vehicles. 39 A.G. Op. 14 (1981).

*Local Sanitary Regulations:* County Commissioners may adopt reasonably stricter sanitation regulations for subdivisions than those adopted by the Department of Health and Environmental Sciences (now Department of Environmental Quality). 35 A.G. Op. 39 (1973).

## 76-3-503. Hearing on proposed regulations.

**Compiler's Comments**

*2001 Amendment:* Chapter 348 inserted reference to 76-3-509; and made minor changes in style. Amendment effective October 1, 2001.

*Preamble:* The preamble attached to Ch. 348, L. 2001, provided: "WHEREAS, agricultural land is increasingly being taken out of production for development and becoming unavailable for production of food; and

WHEREAS, farmers and ranchers are often forced to sell their land to generate sufficient income to retire; and

WHEREAS, cluster development can facilitate the preservation of Montana's unique landscape; and

WHEREAS, cluster development can reduce local government costs for infrastructure and provision of services by concentrating building sites on smaller lots so that services and utilities can be concentrated in a smaller area; and

WHEREAS, the Montana Department of Commerce is charged with providing technical assistance and information related to community development; and

WHEREAS, local governments need mechanisms to encourage development approaches that minimize costs to local citizens and that promote effective and efficient provision of public services."

## 76-3-504. Subdivision regulations — contents.

**Compiler's Comments**

*2021 Amendment:* Chapter 319 in (1) in middle of introductory clause after "must" inserted "comply with the requirements provided for in 76-3-501 and". Amendment effective April 30, 2021.

*2013 Amendments — Composite Section:* Chapter 109 in (1)(q)(v) after "submitted" deleted "as provided in 76-3-604"; and deleted former (3) that read: "(3) The governing body may establish deadlines for submittal of subdivision applications." Amendment effective March 28, 2013.

Chapter 379 inserted (1)(s) regarding multiple spaces for recreational camping vehicles or mobile homes; and made minor changes in style. Amendment effective September 1, 2013.

*Preamble:* The preamble attached to Ch. 379, L. 2013, provided: "WHEREAS, The Montana Subdivision and Platting Act provides for the local review of proposed subdivisions; and

WHEREAS, Title 76, chapter 3, part 2, provides miscellaneous exemptions from subdivision review for certain divisions of land and conveyances; and

WHEREAS, sections 76-3-202, 76-3-204, and 76-3-208, MCA, address the sale, lease, or rent or other conveyance of one or more parts of a building, structure, or other improvement; and

WHEREAS, section 76-3-204, MCA, provides that the sale, lease, rent, or other conveyance of one or more parts of a building, structure, or other improvement is not subject to subdivision review; and

WHEREAS, this exemption has been interpreted to exempt only one or more parts of a single building, structure, or improvement on a tract of record from subdivision review; and

WHEREAS, a strict interpretation of section 76-3-204, MCA, places an undue burden of undergoing full subdivision review on property owners who seek to lease or rent certain buildings; and

WHEREAS, it is the intent of the Legislature to provide an alternative process to subdivision review for the creation of buildings for lease or rent on tracts of land."

*Saving Clause:* Section 16, Ch. 379, L. 2013, was a saving clause.

*Severability:* Section 4, Ch. 109, L. 2013, was a severability clause.

Section 17, Ch. 379, L. 2013, was a severability clause.

*Applicability:* Section 6, Ch. 109, L. 2013, provided: "[This act] applies to subdivision applications submitted on or after July 1, 2013." Effective March 28, 2013.

Section 19, Ch. 379, L. 2013, provided: "[This act] applies to buildings created for lease or rent on a single tract on or after [the effective date of this act]." Effective September 1, 2013.

*2009 Amendment:* Chapter 446 in (1)(b) in exception clause deleted "76-3-210" and inserted "76-3-616"; in (1)(q)(i) and (1)(q)(iv) before "agent" inserted "authorized"; inserted (1)(r) requiring written decision to be provided within 30 days; and made minor changes in style. Amendment effective May 5, 2009.

*Applicability:* Section 25(1), Ch. 446, L. 2009, provided: "(1) [Sections 13, 20, and 22] [76-3-504, 76-3-620, and 76-3-625], concerning adoption of regulations and time references in the regulations, apply upon adoption of regulations under [section 13] [76-3-504] or on May 1, 2010, whichever occurs first."

*2007 Amendments — Composite Section:* Chapter 317 in (1)(q)(i) at beginning substituted "requires" for "allows". Amendment effective April 27, 2007.

Chapter 443 in (1)(e) at end of second sentence after "techniques" inserted "or other mitigation measures authorized under 76-3-608(4) and (5)" and inserted third sentence providing that approved construction techniques or other mitigation measures may not include building regulations as defined in 50-60-101 other than those identified by the department of labor and industry as provided in 50-60-901; and made minor changes in style. Amendment effective May 8, 2007.

*Applicability:* Section 8, Ch. 443, L. 2007, provided that this section applies on or after October 1, 2009.

*2005 Amendments — Composite Section:* Chapter 298 inserted (1)(a) requiring that regulations contain list of material included in subdivision application; in (1)(c) at end substituted "applications and amended applications" for "plats"; in (1)(g)(iii) near middle after "solid waste disposal that" deleted "at a minimum"; in (1)(g)(iv) inserted "public"; in (1)(i) in first sentence near beginning substituted "subdivision applications" for "preliminary plats" and near middle inserted "identified during the preapplication consultation conducted pursuant to subsection (1)(q) or those" and near beginning of second sentence inserted "public" and in three places substituted reference to application for "plat"; in (1)(m) in four places before "utility" inserted "public"; inserted (1)(n) through (1)(q) regarding regulations concerning information presented at hearings, exemptions evading requirements of chapter, and preapplication process; inserted (3) regarding deadlines for submittal of subdivision applications; and made minor changes in style. Amendment effective April 19, 2005.

Chapter 302 in (1)(g)(iii) after "that" deleted "at a minimum"; in (1)(g)(iii)(A) at end inserted language concerning subdivisions that create parcels of less than 20 acres; inserted (1)(g)(iii)(B) concerning standards for subdivisions that create parcels of 20 acres or more and less than 160 acres; and made minor changes in style. Amendment effective October 1, 2005.

*Applicability:* Section 19, Ch. 298, L. 2005, provided: "(1) [This act] applies to subdivision applications submitted on or after [the effective date of this act]. [Effective April 19, 2005.]

(2) [Section 3], amending 76-3-504 and concerning adoption of regulations, and references to that section apply upon adoption of regulations under that section or on October 1, 2006, whichever occurs first."

*2003 Amendment:* Chapter 599 deleted former (1)(l) that read: "(l) if the governing body has adopted a growth policy pursuant to chapter 1 of this title, be made in accordance with the goals and objectives established in the growth policy that are within the scope of 76-3-501 within 1 year of adoption of the growth policy"; and made minor changes in style. Amendment effective May 9, 2003.

*2001 Amendments — Composite Section:* Chapter 348 in (1)(a) inserted reference to 76-3-509; inserted (2) authorizing regulations adopted to include provisions consistent with promotion of cluster development; and made minor changes in style. Amendment effective October 1, 2001.

Chapter 527 inserted (1)(l) requiring subdivision regulations to be made in accordance with the goals and objectives in growth policy within 1 year of adoption of policy by a governing body. Amendment effective October 1, 2001.

Chapter 564 inserted (1)(i) requiring a subdivider, for parcels with lot sizes averaging less than 5 acres, to reserve and sever appropriation water rights and surface water rights and establish a landowner's water use agreement; in (1)(j) at beginning of first sentence inserted exception clause and at end after "subdivision lots" inserted "are a sufficient distance from the centerline of the ditch to allow for construction, repair, maintenance, and inspection of the ditch; and prohibit the placement of structures or the planting of vegetation other than grass within the ditch easement without the written permission of the ditch owner"; inserted (1)(m) requiring the subdivider to describe, dimension, and show utility easements in the subdivision on the final plat; and made minor changes in style. Amendment effective October 1, 2001.

Style changes were slightly different in the chapters. In each case, the codifier chose appropriate text.

*Preamble:* The preamble attached to Ch. 348, L. 2001, provided: "WHEREAS, agricultural land is increasingly being taken out of production for development and becoming unavailable for production of food; and

WHEREAS, farmers and ranchers are often forced to sell their land to generate sufficient income to retire; and

WHEREAS, cluster development can facilitate the preservation of Montana's unique landscape; and

WHEREAS, cluster development can reduce local government costs for infrastructure and provision of services by concentrating building sites on smaller lots so that services and utilities can be concentrated in a smaller area; and

WHEREAS, the Montana Department of Commerce is charged with providing technical assistance and information related to community development; and

WHEREAS, local governments need mechanisms to encourage development approaches that minimize costs to local citizens and that promote effective and efficient provision of public services."

*Preamble:* The preamble attached to Ch. 527, L. 2001, provided: "WHEREAS, section 76-1-606, MCA, allows local governments to require subdivision plats to conform to the provisions of adopted growth policies; and

WHEREAS, section 76-3-604, MCA, has been interpreted to allow local governments to deny or condition the approval of subdivision plats based on the growth policy; and

WHEREAS, many adopted growth policies contain ambiguous and subjective provisions that cannot be applied to subdivisions in an objective manner; and

WHEREAS, it is inconsistent with accepted precepts of planning to authorize a local government to enforce a growth policy without properly adopted land use controls; and

WHEREAS, the Legislature intends to clarify that growth policies should be implemented through the proper adoption of land use controls; and

WHEREAS, a statutory procedure is in place that allows local governments to implement growth policies through properly adopted land use controls; and

WHEREAS, this land use control adoption procedure incorporates the due process and other constitutional protections that are not included under section 76-1-606, MCA."

*Transition — Applicability:* Section 5, Ch. 527, L. 2001, provided: "[This act] applies to jurisdictions that adopted a growth policy pursuant to Title 76, chapter 1, before October 1, 2001, beginning October 1, 2002."

*1999 Amendments — Composite Section:* Chapter 201 inserted (9) requiring subdivider to establish ditch easements and providing exceptions; inserted (10) requiring subdivider to file and record ditch easements and providing exceptions; and made minor changes in style. Amendment effective October 1, 1999.

Chapter 582 at beginning of (1) inserted exception clause; and made minor changes in style. Amendment effective October 1, 1999.

*Saving Clause:* Section 35, Ch. 582, L. 1999, was a saving clause.

*Transition:* Section 36, Ch. 582, L. 1999, provided: "A governing body that adopts a master plan pursuant to Title 76, chapter 1, before October 1, 1999, may adopt zoning regulations that are consistent with the master plan pursuant to Title 76, chapter 2, part 2 or 3, until October 1, 2001."

*1995 Amendments:* Chapter 418 in (6)(c) substituted "department of environmental quality" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 471 in (6)(c), at beginning, inserted "subject to the provisions of 76-3-511"; and made minor changes in style. Amendment effective April 14, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*Applicability:* Section 22(3), Ch. 471, L. 1995, provided: "(3) [This act] does not apply to the establishment of fees or public participation requirements."

*1981 Amendments — Composite Section:* Chapter 236 deleted all of the language and replaced it with an introduction and (1) through (8) describing minimum requirements for subdivision regulations (see 1981 Session Law for text). The prior language read: "(1) Not later than December 31, 1973, the department of community affairs, through its division of planning, shall, in conformance with the Montana Administrative Procedure Act, prescribe reasonable minimum requirements for subdivision regulations adopted pursuant to this chapter.

(2) The minimum requirements shall include detailed criteria for the content of the environmental assessment required by this chapter. In prescribing the minimum contents of the subdivision regulations, the department of community affairs, through its division of planning, shall require the submission by the subdivider to the governing body of an environmental assessment.

(3) The department shall provide for the review of preliminary plats by those agencies of state and local government and affected public utilities having a substantial interest in a proposed subdivision. Such agency or utility review shall not delay the governing body's action on the plat beyond the time limit specified herein, and the failure of any agency to complete a review of a plat shall not be a basis for rejection of the plat by the governing body."

Chapter 274 substituted "department of commerce" for "department of community affairs, through its division of planning" in (1) and (2).

In preparing the composite of Ch. 236 and Ch. 274, which both amended 76-3-504, the Code Commissioner did not include the amendatory language in Chapter 274 pertaining to the transfer of functions of the department of community affairs to the department of commerce. The reason for this is that Ch. 236 entirely deleted the subsections containing these functions and instead established minimum subdivision regulation requirements for local governments.

**Case Notes**

*Failure of Environmental Assessment to Provide Statutorily Required Summary of Subdivision Impact — Approval of Preliminary Plat Unlawful:* Plaintiffs asserted that the Board of County Commissioners erred in approving a preliminary plat for a subdivision in rural Sanders County. The District Court granted judgment for the Board and the developer. On appeal, the Supreme Court reversed. The environmental assessment prepared in support of the subdivision was inadequate in explaining how the subdivision would impact water resources and water management such as wastewater and runoff, roads and traffic, and essential public services such as fire and police services. Because the environmental assessment was inadequate under plain statutory language, the Board's approval of the preliminary plat was unlawful for failure to comply with relevant statutes. The case was remanded for entry of judgment in favor of plaintiffs. Citizens for Responsible Dev. v. Bd. of County Comm'rs, 2009 MT 182, 351 M 40, 208 P3d 876 (2009).

*Proper Determination of Legal Access for Subdivision Parcels:* Plaintiffs asserted that language in a declaration of a subdivision easement permitting all subdivision owners to use subdivision roads should limit access only to owners of lots that existed at the time that the declaration was executed. The District Court disagreed, and based on the clear and unambiguous language of the declaration, the Supreme Court concurred. Although not all of the subdivision parcels were established at the time that the declaration was executed, the declaration was clear that use of the roads extended to all lot owners, including the parcels yet to be divided. The Board of

County Commissioners did not act arbitrarily in finding that legal access existed for the entire subdivision. Fielder v. Bd. of County Comm'rs, 2007 MT 118, 337 M 256, 162 P3d 67 (2007).

*Local Board of Health Not Considered Governing Body Despite Interlocal Agreement:* Despite the fact that a county board of health was created by interlocal agreement, the District Court erred in concluding that a local board of health is considered a governing body by definition under 76-3-103. The Montana Subdivision and Platting Act does not, under 76-3-501 and this section, authorize local boards of health to adopt and enforce regulations governing sanitation in subdivisions, regardless of size. The authority of a local board of health to regulate subdivisions derives from 50-2-116, not from the Montana Subdivision and Platting Act. Skinner Enterprises, Inc. v. Lewis & Clark County Bd. of Health, 286 M 256, 950 P2d 733, 54 St. Rep. 1398 (1997).

*Review, Not Regulatory, Function Applicable to Local Board of Health Control of Minor Subdivision:* Section 50-2-106, when read in conjunction with 76-4-104, does not authorize a local board of health to regulate sanitation in minor subdivisions containing five or fewer parcels. By its plain language, 76-4-104 delegates to local boards of health the power to review select subdivisions but not the power to promulgate regulations. As a reviewing authority, the board's function is limited to reviewing the proposed water supply, sewage, and solid waste disposal facilities and advising the Department of Environmental Quality of its recommendation for approval or disapproval of the subdivision. However, 50-2-116 explicitly authorizes a local board of health to regulate sewage control and disposal that is not regulated by the Montana Subdivision and Platting Act. The Act limits state sanitation regulation to subdivisions containing parcels of fewer than 20 acres each and precludes regulation of subdivisions in which each parcel of land contains more than 20 acres. Thus, the regulation of sanitation in subdivisions containing parcels of more than 20 acres each is clearly the responsibility of local boards of health. Nevertheless, 76-4-122 requires both state and local approval before filing a subdivision plat with the County Clerk and Recorder, and to hold that approval by the local board of health is a ministerial, nondiscretionary act would render 76-4-122 inoperative. Giving effect to the purpose of all the applicable statutes and examining the legislative history of 50-2-116, the Supreme Court held that the 1991 enactment of 50-2-116(1)(i) revealed a legislative intent to expand, rather than diminish, the authority of local boards of health to regulate subdivision sanitation. Thus, local boards of health have discretionary statutory authority to regulate all subdivisions, regardless of size, notwithstanding the state's authority to regulate certain subdivisions under the Montana Subdivision and Platting Act. Skinner Enterprises, Inc. v. Lewis & Clark County Bd. of Health, 286 M 256, 950 P2d 733, 54 St. Rep. 1398 (1997).

*Public Hearing on Minor Subdivision:* Unless local regulations require a public hearing on minor subdivision, as provided by 76-3-505 (now repealed), no such hearing is necessary or required, prior to summary approval. Young v. Stillwater County Comm'rs, 177 M 488, 582 P2d 353 (1978).

**Attorney General's Opinions**

*Compliance Review of Local Subdivision Rules Required at Preliminary Plat Stage:* The review of a proposed subdivision for compliance with local subdivision regulations must occur at the preliminary plat stage. Once a preliminary plat is approved, additional conditions for compliance may not be imposed, so compliance review at the final plat stage would render review meaningless. 49 A.G. Op. 7 (2001).

*Local Government Required to Adopt Subdivision Water Supply and Sewage and Solid Waste Disposal That Conform to State Regulations:* Unless a local governing body makes specific findings to support the conclusion that more stringent rules are required to protect public health, a local governing body must adopt subdivision regulations for water supply and sewage and solid waste disposal that are as stringent as the state standards adopted by the Department of Environmental Quality under Title 76, ch. 4, part 1. The local government may incorporate the state regulations by reference, but the actual method of adoption is up to the discretion of the local government. 49 A.G. Op. 7 (2001).

*Exemption of U.S. From Filing and Enforcement Provisions:* The filing and enforcement provisions of the Montana Subdivision and Platting Act are inapplicable to a conveyance by the federal government pursuant to 43 U.S.C. § 1716 and in which transaction the United States is the subdivider. 42 A.G. Op. 36 (1987).

### 76-3-506. Provision for granting variances.

**Compiler's Comments**

*2009 Amendment:* Chapter 446 in (1) inserted "after a public hearing on the variance request before the governing body or its designated agent or agency"; inserted (3) exempting minor subdivision from hearing requirement; and made minor changes in style. Amendment effective May 5, 2009.

### 76-3-507. Provision for security requirements to ensure construction of public improvements.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 5, Ch. 353, L. 2023. Amendment effective May 2, 2023.

*2009 Amendment:* Chapter 446 in (1) in exception clause inserted reference to subsection (4) and before "subdivision" inserted "proposed"; in (2)(a) in last sentence after "bond" inserted "or security"; inserted (4) authorizing requirement of percentage of improvements before allowing bonding or other security; and made minor changes in style. Amendment effective May 5, 2009.

*1997 Amendment:* Chapter 503 in (2)(a), in first sentence near beginning, inserted "the governing body shall at the subdivider's option allow"; and made minor changes in style. Amendment effective May 1, 1997.

*Severability:* Section 4, Ch. 503, L. 1997, was a severability clause.

*1995 Amendment:* Chapter 468 inserted (1) concerning completion of required improvements; at beginning of first sentence of (2)(a) deleted "Local regulations may provide that" and after "final plat" substituted "the subdivider shall provide or cause to be provided" for "the governing body shall require" and inserted second sentence concerning reduction of bond requirements; inserted (2)(b) concerning incremental payment or guarantee plan; inserted (3) concerning legislative immunity; and made minor changes in style.

*1995 Statement of Intent:* The statement of intent attached to Ch. 468, L. 1995, provided: "It is the intent of the legislature that the department of commerce, local government assistance division, update its model subdivision rules to minimize the fiscal impacts to local governments in implementing this legislation."

*Applicability:* Section 13, Ch. 468, L. 1995, provided: "Funds in a park fund that exceed $10,000 as of [the effective date of this act] [October 1, 1995] must be used for park land acquisition and initial development. Funds in a park fund up to $10,000 as of [the effective date of this act] [October 1, 1995] may be used for park maintenance in accordance with a formally adopted park plan."

### 76-3-509. Local option cluster development regulations and exemptions authorized.

**Compiler's Comments**

*2011 Amendment:* Chapter 137 in (2)(c) inserted last sentence concerning identification and recording reference for land protected as open space and deleted former last sentence that read: "The regulations must require that open space be preserved through an irrevocable conservation easement, granted in perpetuity, as provided for in Title 76, chapter 6, prohibiting further division of the parcel." Amendment effective July 1, 2011.

*Preamble:* The preamble attached to Ch. 348, L. 2001, provided: "WHEREAS, agricultural land is increasingly being taken out of production for development and becoming unavailable for production of food; and

WHEREAS, farmers and ranchers are often forced to sell their land to generate sufficient income to retire; and

WHEREAS, cluster development can facilitate the preservation of Montana's unique landscape; and

WHEREAS, cluster development can reduce local government costs for infrastructure and provision of services by concentrating building sites on smaller lots so that services and utilities can be concentrated in a smaller area; and

WHEREAS, the Montana Department of Commerce is charged with providing technical assistance and information related to community development; and

WHEREAS, local governments need mechanisms to encourage development approaches that minimize costs to local citizens and that promote effective and efficient provision of public services."

*Effective Date:* Section 11(1), Ch. 348, L. 2001, provided: "(1) Except as provided in subsection (2), [this act] is effective October 1, 2001."

### 76-3-510. Payment for extension of capital facilities.

**Compiler's Comments**

*2009 Amendments — Composite Section:* Chapter 405 inserted (2) regarding fees and costs; and made minor changes in style. Amendment effective April 28, 2009.

Chapter 446 inserted (2) regarding fees and costs; and made minor changes in style. Amendment effective May 5, 2009.

*Preamble:* The preamble attached to Ch. 405, L. 2009, provided: "WHEREAS, the Montana Subdivision and Platting Act (the Act) is designed to balance the rights of landowners with public health, safety, and general welfare; and

WHEREAS, if the Act is not clear and predictable, neither landowners nor the public health, safety, and general welfare can be effectively protected; and

WHEREAS, land use regulations should be designed to permit and promote economic growth in the state; and

WHEREAS, certain provisions of the Act have proven over time to be unclear and to promote unpredictability in the process; and

WHEREAS, it is believed that these modifications will promote clarity, efficiency, predictability, and increased public participation in the process."

*1995 Statement of Intent:* The statement of intent attached to Ch. 468, L. 1995, provided: "It is the intent of the legislature that the department of commerce, local government assistance division, update its model subdivision rules to minimize the fiscal impacts to local governments in implementing this legislation."

*Applicability:* Section 13, Ch. 468, L. 1995, provided: "Funds in a park fund that exceed $10,000 as of [the effective date of this act] [October 1, 1995] must be used for park land acquisition and initial development. Funds in a park fund up to $10,000 as of [the effective date of this act] [October 1, 1995] may be used for park maintenance in accordance with a formally adopted park plan."

**Case Notes**

*Provision Made for Water and Sewer Mains — City Annexation Plan in Substantial Statutory Compliance:* Plaintiff was one of 277 property owners who contended that a plan for the extension of services into areas annexed by the city of Whitefish did not comply with annexation statutes. The Supreme Court examined the plan and concluded that: (1) the statement required by 7-2-4731 regarding extension of municipal services was included; (2) provision for future development in conformance with 7-2-4732 was made; (3) the plan included a financing method conforming with 7-2-4732 and this section; (4) tax burden statements conforming to 7-2-4732 and voting methodology statements conforming to 7-2-4733 were included; (5) the plan contained a long-range plan as required in 7-2-4732; (6) a timetable required by 7-2-4732 was included; and (7) the plan included maps of general land use, the city's present and proposed boundaries, and present and proposed streets and water mains, and a statement regarding other boundaries was included in conformance with 7-2-4731. The District Court's conclusion that the plan for the extension of services met statutory requirements was affirmed. Gregg v. Whitefish City Council, 2004 MT 262, 323 M 109, 99 P3d 151 (2004).

### 76-3-511. Local regulations no more stringent than state regulations or guidelines.

**Compiler's Comments**

*2009 Amendment:* Chapter 2 in (1) near middle of first sentence and in (2) near beginning of introductory clause substituted "76-3-504(1)(g)(iii)" for "76-3-504(1)(f)(iii)". Amendment effective October 1, 2009.

*2005 Amendment:* Chapter 302 throughout section substituted "regulation" for "rule". Amendment effective October 1, 2005.

*1997 Amendment:* Chapter 42 at beginning of first sentence of (1) deleted "After April 14, 1995"; in (1), in first sentence, and in (2), near beginning, substituted "76-3-504(6)(c)" for "76-3-504(5)(c)"; and made minor changes in style. Amendment effective March 12, 1997.

*Preamble:* The preamble attached to Ch. 471, L. 1995, provided: "WHEREAS, the federal government frequently regulates areas that are also subject to state regulation; and

WHEREAS, differing state and federal policy goals and unique state prerogatives frequently result in different levels of regulation, different standards, and different requirements being imposed by state and federal programs covering the same subject matter; and

WHEREAS, Montana must simultaneously move toward reducing redundant and unnecessary regulation that dulls the state's competitive advantage while being ever vigilant in the protection of the public's health, safety, and welfare; and

WHEREAS, Montana's administrative agencies should consider applicable federal standards when adopting, readopting, or amending rules with analogous federal counterparts; and

WHEREAS, Montana's administrative agencies should analyze whether analogous federal standards sufficiently protect the health, safety, and welfare of Montana's citizens; and

WHEREAS, as part of the formal rulemaking process, the public should be advised of the agencies' conclusions about whether analogous federal standards sufficiently protect the health, safety, and welfare of Montana citizens."

*1995 Statement of Intent:* The statement of intent attached to Ch. 471, L. 1995, provided: "A statement of intent is required for this bill in order to provide guidance to the board of health and environmental sciences [now board of environmental review], the department of health and environmental sciences [now department of environmental quality], and local units of government in complying with [this act].

The legislature intends that in addition to all requirements imposed by existing law and rules, the board or the department include as part of the initial publication and all subsequent publications of a rule a written finding if the rule in question contains any standards or requirements that exceed the standards or requirements imposed by comparable federal law.

If the rules are more stringent than comparable federal law, the written finding must include but is not limited to a discussion of the policy reasons and an analysis that supports the board's or department's decision that the proposed state standards or requirements protect public health or the environment of the state and that the state standards or requirements to be imposed can mitigate harm to the public health or the environment and are achievable under current technology. The department is not required to show that the federal regulation is inadequate to protect public health. The written finding must also include information from the hearing record regarding the costs to the regulated community directly attributable to the proposed state standard or requirement."

*Effective Date:* Section 23, Ch. 471, L. 1995, provided that this section is effective on passage and approval. Approved April 14, 1995.

*Applicability:* Section 22(2) and (3), Ch. 471, L. 1995, provided: "(2) [Sections 4 and 5] [50-2-130 and 76-3-511] apply to local units of government when they attempt to regulate the control and disposal of sewage from private and public buildings.

(3) [This act] does not apply to the establishment of fees or public participation requirements."

**Attorney General's Opinions**

*Local Government Required to Adopt Subdivision Water Supply and Sewage and Solid Waste Disposal That Conform to State Regulations:* Unless a local governing body makes specific findings to support the conclusion that more stringent rules (now regulations) are required to protect public health, a local governing body must adopt subdivision regulations for water supply and sewage and solid waste disposal that are as stringent as the state standards adopted by the Department of Environmental Quality under Title 76, ch. 4, part 1. The local government may incorporate the state regulations by reference, but the actual method of adoption is up to the discretion of the local government. 49 A.G. Op. 7 (2001).

### 76-3-514. Housing fees and dedication of real property prohibited.

**Compiler's Comments**

*Effective Date:* Section 7, Ch. 249, L. 2021, provided: "[This act] is effective on passage and approval." Approved April 19, 2021.

## Part 6
## Local Review Procedure

**Part Case Notes**

*No Writ of Mandate — Appropriation of In-Lieu Funds:* When the County Commission appropriated in-lieu park funds to a project not specifically authorized in the county outdoor recreation and open space plan, a Writ of Mandate did not lie because the appropriation of the in-lieu funds is a discretionary act. Burgess v. Gallatin County Comm'n, 215 M 503, 698 P2d 862, 42 St. Rep. 585 (1985).

*Writ of Certiorari Not Available — Appropriation of In-Lieu Funds:* When the County Commission appropriated in-lieu park funds to a project not specifically authorized in the county outdoor recreation and open space plan, a Writ of Certiorari did not lie because the Commission, in appropriating money, was acting in a legislative, not judicial, capacity. There is no action more clearly legislative than that of appropriation of public funds. Burgess v. Gallatin County Comm'n, 215 M 503, 698 P2d 862, 42 St. Rep. 585 (1985).

*"Dedication":* An action was filed to quiet title to a county road that had been established as a public road in 1909. The certificate of dedication of the 1909 plat stated that the streets therein were "granted and dedicated to the use of the public forever". In 1944, pursuant to section 1635, R.C.M. 1935, a petition for county road closure was filed. That same year the petition was granted by the County Commissioners. After 1944, neither the plaintiffs nor their predecessors in interest paid any taxes on the roadway and no portion of the roadway was fenced into the lands now belonging to the plaintiffs until 1980. The court quieted title in the plaintiffs, ruling that the 1909 plat dedication was the equivalent of a right-of-way deed under which the public acquired only the right-of-way and the incidents necessary to its enjoyment and that upon abandonment the fee in the street reverted to the abutting landowners, with each abutting landowner taking fee from the edge of his property to the center of the street. Bailey v. Ravalli Co., 201 M 138, 653 P2d 139, 39 St. Rep. 2010 (1982), followed in Herreid v. Hauck, 254 M 496, 839 P2d 571, 49 St. Rep. 884 (1992).

*Regulatory Powers Regarding Subdivision Control:* The 1973 Montana Subdivision and Platting Act vests control of subdivisions in local government units. The Department of Health and Environmental Sciences (now Department of Environmental Quality) has no regulatory functions regarding subdivisions outside water supply, sewage, and solid waste disposal. Mont. Wilderness Ass'n v. Bd. of Health & Environmental Sciences, 171 M 477, 559 P2d 1157 (1976).

**Part Attorney General's Opinions**

*Use of Cash Donations to Fund Restroom Construction on Daly Mansion Grounds:* The Marcus Daly Mansion is a significant historical and architectural resource preserved for the future enjoyment of visitors and, as such, is considered a park, notwithstanding the fact that the property is owned by a state agency. The provision of facilities not previously in existence, as part of a long-term plan to improve the park, falls within the definition of "initial development" as used in 76-3-606 (now repealed). Therefore, cash donations received by Ravalli County in lieu of park land dedication may be used by the County Park Board to fund restroom construction on the mansion grounds. 44 A.G. Op. 13 (1991).

*Exemption of U.S. From Filing and Enforcement Provisions:* The filing and enforcement provisions of the Montana Subdivision and Platting Act are inapplicable to a conveyance by the federal government pursuant to 43 U.S.C. § 1716 and in which transaction the United States is the subdivider. 42 A.G. Op. 36 (1987).

*Authority of Self-Governing Local Government to Enforce Master Plan (now Growth Policy):* A local government unit with self-governing powers may not refuse to file a certificate of survey because the involved parcel encompasses less than 40, but equal to or more than 20, acres even if its master plan (now growth policy) prohibits divisions of land of such size. A local government that has adopted a master plan (now growth policy) to regulate future land-use planning and zoning may condition issuance of permits for the construction, alteration, or enlargement of structures upon compliance with such plan. 42 A.G. Op. 16 (1987).

*Dedication of Lands Within Municipality to Use of Public Forever — Municipal Election Required for Sale:* Park dedication language in a subdivision plat located within a municipality dedicating certain lands "to the use of the public forever" creates a trust for a specific purpose. Under the terms of 7-8-4201, a municipal election must be held before the city can dispose of the property. 41 A.G. Op. 42 (1986).

*Park Board Partly Funded by County General Fund:* The funding for the county park board's obligations is derived from the county general fund as well as from other specific sources as enumerated by 7-16-2324, 7-16-2328, and 76-3-606 (now repealed). Since a specific separate tax levy is not authorized for the park fund, additional money must be appropriated from the county general fund authorized by 7-6-2501 if the revenue from sources other than taxation is insufficient to meet the necessary expenditures. 40 A.G. Op. 49 (1984).

*Restriction on Use of Revenues Received From Sale of Park Lands and Donations:* Revenues raised from sale of park lands and from cash donations in lieu of dedication of land for park purposes pursuant to 7-16-2324 and 76-3-606 (now repealed) are restricted in use to the purposes of purchase of additional lands or the initial development of parks and playgrounds. While these revenues are part of the park fund, they should be separated from unrestricted park fund revenues. 40 A.G. Op. 49 (1984).

*Violation of Statute — Contracts and Deeds Voidable:* The vendor of subdivided land violated the Montana Subdivision and Platting Act by filing a certificate of survey under Title 76, ch. 3, part 4, for divisions of land other than a subdivision, rather than filing an approved subdivision plat under the requirements of Title 76, ch. 3, part 6. The vendor obtained the approval of the certificate of survey from the Board of County Commissioners prior to filing the certificate, but the Board had no statutory authority to give approval. It is the opinion of the Attorney General that deeds and contracts which convey land in violation of the Montana Subdivision and Platting Act but with the unauthorized approval of the Board of County Commissioners are voidable. 38 A.G. Op. 106 (1980).

*Unwritten Blanket Policy Invalid:* A local governing body's unwritten blanket policy or practice of accepting cash donations in lieu of public park and playground dedication with respect to subdivisions of five or fewer parcels is invalid. Minor subdivisions may be exempted from public park and playground dedication requirements only on a case-by-case basis and only if they meet one of the criteria for exemption under 76-3-606(2) (now repealed). A cash donation under such provision must be based upon the fair market value of the unimproved, unsubdivided land that is to be subdivided. Fair market value is the amount a willing buyer would pay and a willing seller would accept for the land when neither is under duress. 37 A.G. Op. 169 (1978).

*Meaning of "Exclusive of All Other Dedications":* The phrase "exclusive of all other dedications" in 76-3-606 (now repealed) includes only dedications for purposes other than public parks and playgrounds. 37 A.G. Op. 38 (1977).

*Minor Subdivisions Not Exempt From Dedication:* Minor subdivisions are not exempted from the requirements regarding dedicating land to the public for parks and playgrounds or alternative requirements provided therefor by law. (See 76-3-621(3).) 37 A.G. Op. 1 (1977).

## 76-3-601. Submission of application and preliminary plat for review — water and sanitation information required.

### Compiler's Comments

*2013 Amendment:* Chapter 109 in (1) at beginning deleted "Subject to the submittal deadlines established as provided in 76-3-504(3)"; and made minor changes in style. Amendment effective March 28, 2013.

*Severability:* Section 4, Ch. 109, L. 2013, was a severability clause.

*Applicability:* Section 6, Ch. 109, L. 2013, provided: "[This act] applies to subdivision applications submitted on or after July 1, 2013." Effective March 28, 2013.

*2005 Amendments — Composite Section:* Chapter 298 in (1) in first sentence at beginning substituted "Subject to the submittal deadlines established as provided in 76-3-504(3)" for exception clause that read: "Except when a plat is eligible for summary review pursuant to 76-3-505" and near end inserted "subdivision application, including the"; in (2)(a) near middle inserted "application and"; in (2)(b) in first sentence near middle and in second sentence after "body shall submit the" inserted "application and" and in third sentence after "governing body shall provide" substituted "a summary of the information contained in the application and" for "an informational copy of the"; in (2)(c) near middle substituted "application and preliminary plat" for "proposed plat"; and made minor changes in style. Amendment effective April 19, 2005.

Chapter 302 in (1) at end of second sentence inserted language concerning preliminary water and sanitation information. Amendment effective October 1, 2005.

*Applicability:* Section 19(1), Ch. 298, L. 2005, provided: "(1) [This act] applies to subdivision applications submitted on or after [the effective date of this act]." Effective April 19, 2005.

*2001 Amendment:* Chapter 7 in (1) near beginning of first sentence substituted "summary review" for "expedited review". Amendment effective October 1, 2001.

*1999 Amendment:* Chapter 582 in first sentence in (1) substituted "expedited review pursuant to 76-3-505" for "summary approval"; and made minor changes in style. Amendment effective October 1, 1999.

*Saving Clause:* Section 35, Ch. 582, L. 1999, was a saving clause.

*Transition:* Section 36, Ch. 582, L. 1999, provided: "A governing body that adopts a master plan pursuant to Title 76, chapter 1, before October 1, 1999, may adopt zoning regulations that are consistent with the master plan pursuant to Title 76, chapter 2, part 2 or 3, until October 1, 2001."

*1995 Amendment:* Chapter 506 in (2)(b) inserted third sentence regarding a county governing body providing an informational copy of a preliminary subdivision plat to school district trustees; and made minor changes in style. Amendment effective April 15, 1995.

*1981 Amendment:* Inserted (2)(d) requiring municipality to coordinate whenever possible subdivision review and annexation procedures to minimize duplication of hearings, reports, and other requirements when subdivision is proposed for annexation to municipality.

*Interim Study Committee Bill:* Chapter 89, L. 1981 (SB 35), was introduced at the request of the interim Study Committee on Annexation Laws. See committee report, Legislative Council, 1980.

*Severability Clause:* Section 4, Ch. 498, L. 1975, was a severability clause.

**Case Notes**

*Authority of Board of County Commissioners to Approve Subdivisions Within Three-Mile Area Outside Corporate Limits:* The city of Bozeman sought a reversal of 43 A.G. Op. 26 (1989), in which the Attorney General held that the Board of County Commissioners has final authority to approve subdivisions that are within the 3-mile area immediately outside the corporate limits of the city when the city has a commission-manager form of government. Bozeman asserted that 76-2-312 was not a limitation on the authority of commission-manager governments but rather an acknowledgement by the Legislature that such municipal governments already had extraterritorial subdivision authority under 7-3-4444 and that 76-2-312 exempted cities with a commission-manager form of government from procedural requirements that other forms of municipal government have to follow in order to exercise their extraterritorial subdivision authority. However, 7-3-4444 does not refer to the city commission, but instead clearly provides that the authority granted is to the city director of public services to ensure that the involved plat complies with platting regulations. If the plat complies, the director must approve it. The District Court properly found that 76-2-312 took away the extraterritorial subdivision authority over subdivisions that Bozeman, as a commission-manager form of government, would otherwise have had under 76-2-310 and 76-2-311. Bozeman v. Racicot, 253 M 204, 832 P2d 767, 49 St. Rep. 435 (1992).

*Public Hearing on Minor Subdivision:* Unless local regulations require a public hearing on minor subdivision, as provided by 76-3-505 (now repealed), no such hearing is necessary or required, prior to summary approval. Young v. Stillwater County Comm'rs, 177 M 488, 582 P2d 353 (1978).

*Application:* A certificate of survey is not subject to review under this section. State ex rel. Swart v. Stucky, 167 M 171, 536 P2d 762 (1975).

**Attorney General's Opinions**

*Compliance Review of Local Subdivision Rules Required at Preliminary Plat Stage:* The review of a proposed subdivision for compliance with local subdivision regulations must occur at the preliminary plat stage. Once a preliminary plat is approved, additional conditions for compliance may not be imposed, so compliance review at the final plat stage would render review meaningless. 49 A.G. Op. 7 (2001).

*Condominiums Not Exempt From Provisions of Subdivision and Platting Act:* Condominiums are subdivisions that are not exempted under 76-3-204 (now repealed) from the provisions of the Montana Subdivision and Platting Act. 45 A.G. Op. 12 (1993).

*Authority of County Commissioners to Approve Subdivisions Under Commission-Manager Government:* The Board of County Commissioners has final authority to approve subdivisions that are within the 3-mile area immediately outside the corporate limits of the city when the city has a commission-manager form of government. 43 A.G. Op. 26 (1989).

*Tract of Four-Plexes Considered a Subdivision:* A developer's construction of 48 four-plexes, to be used as rental occupancy buildings, on a tract of land owned by the developer is a "subdivision" subject to local review under the Montana Subdivision and Platting Act. Each dwelling unit constitutes a parcel and will be segregated from the larger tract by transference of possession. Since the units will be newly constructed, the exemption in 76-3-204 (now repealed) does not apply. 40 A.G. Op. 57 (1984). (Opinion rendered prior to 1985 amendment of 76-3-204, now repealed.)

*State Agency Subject to Local Review in Creation of Recreational Vehicle Camping Area:* The term "subdivision" is defined in 76-3-103 to include the provision of multiple space for recreational camping vehicles. The Department of Fish, Wildlife, and Parks argued that, as a state agency, it was exempt from the review requirement. Because exemptions are provided for some state activities but not for activities to provide multiple space for recreational camping vehicles on state land, the clear implication is that the state is to stand on the same footing as a private person in this matter. It was noted that there is a trend toward abandoning the traditional view that activities of the state may be exercised free of local control. The Department is subject to local subdivision review to the extent that it creates an area which will provide multiple space for recreational camping vehicles. 39 A.G. Op. 14 (1981).

**76-3-602. Fees.**

**Compiler's Comments**

*2005 Amendment:* Chapter 298 at end substituted "subdivision applications" for "subdivision plats". Amendment effective April 19, 2005.

*Applicability:* Section 19(1), Ch. 298, L. 2005, provided: "(1) [This act] applies to subdivision applications submitted on or after [the effective date of this act]." Effective April 19, 2005.

**Case Notes**

*Certificate of Survey:* A certificate of survey was not subject to a reviewing fee. State ex rel. Swart v. Stucky, 167 M 171, 536 P2d 762 (1975).

## 76-3-603. Contents of environmental assessment.

**Compiler's Comments**

*2017 Amendment:* Chapter 362 inserted (2) distinguishing between an environmental assessment and an environmental review and concerning applicable standards of review; and made minor changes in style. Amendment effective October 1, 2017.

*2005 Amendment:* Chapter 298 in introductory clause near end substituted "subdivision application" for "preliminary plat"; and in (2) near beginning after "76-3-609" deleted "(3)". Amendment effective April 19, 2005.

*Applicability:* Section 19(1), Ch. 298, L. 2005, provided: "(1) [This act] applies to subdivision applications submitted on or after [the effective date of this act]." Effective April 19, 2005.

*1995 Amendment:* Chapter 468 inserted (1) concerning major subdivision; substituted (1)(b) concerning summary of probable impacts for former text that read: "maps and tables showing soil types in the several parts of the proposed subdivision and their suitability for any proposed developments in those several parts"; in (1)(d), after "information", inserted "related to the applicable regulatory criteria adopted under 76-3-501"; inserted (2) concerning minor subdivision; and made minor changes in style.

*1995 Statement of Intent:* The statement of intent attached to Ch. 468, L. 1995, provided: "It is the intent of the legislature that the department of commerce, local government assistance division, update its model subdivision rules to minimize the fiscal impacts to local governments in implementing this legislation."

*Applicability:* Section 13, Ch. 468, L. 1995, provided: "Funds in a park fund that exceed $10,000 as of [the effective date of this act] [October 1, 1995] must be used for park land acquisition and initial development. Funds in a park fund up to $10,000 as of [the effective date of this act] [October 1, 1995] may be used for park maintenance in accordance with a formally adopted park plan."

*1981 Amendment:* Substituted "governing body" for "department through its division of planning" at the end of (4).

**Case Notes**

*Preliminary Subdivision Plat Properly Voided for Failure to Provide Available Ground Water Information and to Consider Surface Pollution Impacts:* The District Court held that the Helena City Commission improperly granted a subdivision plat and voided the preliminary plat. The developer challenged the decision, but the Supreme Court affirmed. The District Court concluded that an environmental assessment of the subdivision proposal was adequate regarding a base flood elevation survey, the requirement of a hydraulic analysis, and the soil liquefaction issue but that the assessment was inadequate regarding issues related to probable impacts arising from surface pollution entering ground water and an adjacent creek and failed to contain available ground water information. The District Court also correctly concluded that a paucity of information on ground water prevented the Commission from taking the required hard look at those impacts pursuant to Clark Fork Coalition v. Dept. of Environmental Quality, 2008 MT 407, 347 M 197, 197 P3d 482 (2008), so the Commission's decision to approve the preliminary plat without an assessment of the impact of surface pollution on ground water and on the nearby creek was arbitrary and capricious. Aspen Trails Ranch, LLC v. Simmons, 2010 MT 79, 356 Mont. 41, 230 P.3d 808, distinguished in Richards v. Missoula County, 2012 MT 236, 366 Mont. 416, 288 P.3d 175, concerning reliance on extraneous evidence not contained in the administrative record.

*Failure of Environmental Assessment to Provide Statutorily Required Summary of Subdivision Impact — Approval of Preliminary Plat Unlawful:* Plaintiffs asserted that the Board of County Commissioners erred in approving a preliminary plat for a subdivision in rural Sanders County. The District Court granted judgment for the Board and the developer. On appeal, the Supreme Court reversed. The environmental assessment prepared in support of the subdivision was inadequate in explaining how the subdivision would impact water resources and water management such as wastewater and runoff, roads and traffic, and essential public services such as fire and police services. Because the environmental assessment was inadequate under plain statutory language, the Board's approval of the preliminary plat was unlawful for failure to comply with relevant statutes. The case was remanded for entry of judgment in favor of plaintiffs. Citizens for Responsible Dev. v. Bd. of County Comm'rs, 2009 MT 182, 351 M 40, 208 P3d 876 (2009).

**Law Review Articles**

The Role of Fish and Wildlife Evidence in Local Land Use Regulation, Mudd, Dunning, & Hayes, 30 Pub. Land & Resources L. Rev. 107 (2009).

## 76-3-604. Review of subdivision application — review for required elements and sufficiency of information.

**Compiler's Comments**

*2021 Amendment:* Chapter 319 inserted (10) concerning governing body review of governing documents of a subdivision. Amendment effective April 30, 2021.

*Preamble:* The preamble attached to Ch. 221, L. 2015, provided: "WHEREAS, the Legislature, consistent with its constitutional duties, adopted the Montana Water Use Act in 1973, which recognizes existing water rights and provides for the orderly administration of new water right permits while protecting senior water right users; and

WHEREAS, the Legislature recognizes that a permit to appropriate water is not necessary in all circumstances and has created certain exceptions to the permit requirement; and

WHEREAS, the Legislature has provided that a permit is not required for an appropriation that is 35 gallons a minute or less and does not exceed 10 acre-feet a year unless the appropriation is determined to be a combined appropriation; and

WHEREAS, since 1993 the Department of Natural Resources and Conservation has defined the term "combined appropriation" as an appropriation of water from the same source aquifer by two or more ground water developments that are physically manifold into the same system; and

WHEREAS, water users in the state have relied upon the department's definition of "combined appropriation" for more than 20 years; and

WHEREAS, on October 17, 2014, the Montana First Judicial District Court in Clark Fork Coalition v. Tubbs, Cause No. BDV-2010-874, invalidated the Department's combined appropriation definition as being inconsistent with the Water Use Act; and

WHEREAS, substantial financial investment was made by persons on the basis of the 1993 definition of "combined appropriation" prior to the District Court's October 17, 2014, order; and

WHEREAS, the District Court ordered that the Department's rule defining "combined appropriation", in effect from 1987 to 1993, be reinstated; and

WHEREAS, it is the intent of the Legislature to ensure that the Department's 1993 definition of combined appropriation applies to all projects, developments, or subdivisions in existence or for which an application for review was pending on or before the District Court's October 17, 2014, ruling."

*Wells Exempt From Permitting — Definition of Combined Appropriation — Retroactive Applicability:* Section 1, Ch. 221, L. 2015, provided: "For purposes of implementing the provisions of 85-2-306, the department of natural resources and conservation's definition of combined appropriation as an appropriation of water from the same source aquifer by two or more ground water developments that are physically manifold into the same system applies retroactively to any project, development, or subdivision in existence on or before October 17, 2014, and to any pending project, development, or subdivision for which the application and required fees were received by the department of environmental quality in accordance with 76-4-125 or by the local reviewing authority in accordance with 76-3-604(1)(a) on or before October 17, 2014."

*2013 Amendment:* Chapter 109 inserted (1)(a) concerning receipt on date of delivery; in (1)(b) after "receipt of a subdivision application" deleted "submitted in accordance with any deadlines established pursuant to 76-3-504(3) and receipt of the review fee submitted as provided in 76-3-602"; and made minor changes in style. Amendment effective March 28, 2013.

*Severability:* Section 4, Ch. 109, L. 2013, was a severability clause.

*Applicability:* Section 6, Ch. 109, L. 2013, provided: "[This act] applies to subdivision applications submitted on or after July 1, 2013." Effective March 28, 2013.

*2009 Amendment:* Chapter 405 in (4) near middle of introductory clause following "60 working days" inserted "or 80 working days if the proposed subdivision contains 50 or more lots"; inserted (5) providing a penalty; and made minor changes in style. Amendment effective April 28, 2009.

*Preamble:* The preamble attached to Ch. 405, L. 2009, provided: "WHEREAS, the Montana Subdivision and Platting Act (the Act) is designed to balance the rights of landowners with public health, safety, and general welfare; and

WHEREAS, if the Act is not clear and predictable, neither landowners nor the public health, safety, and general welfare can be effectively protected; and

WHEREAS, land use regulations should be designed to permit and promote economic growth in the state; and

WHEREAS, certain provisions of the Act have proven over time to be unclear and to promote unpredictability in the process; and

WHEREAS, it is believed that these modifications will promote clarity, efficiency, predictability, and increased public participation in the process."

*2005 Amendments — Composite Section:* Chapter 298 substituted text regarding sufficiency of information in application and review of application for former text that read: "(1) The governing body or its designated agent or agency shall review the preliminary plat to determine whether it conforms to the provisions of this chapter and to rules prescribed or adopted pursuant to this chapter.

(2) The governing body shall approve, conditionally approve, or disapprove the preliminary plat within 60 working days of its presentation unless the subdivider consents to an extension of the review period.

(3) If the governing body disapproves or conditionally approves the preliminary plat, it shall forward one copy of the plat to the subdivider accompanied by a letter over the appropriate signature stating the reason for disapproval or enumerating the conditions that must be met to ensure approval of the final plat." Amendment effective April 19, 2005.

Chapter 302 inserted (6) concerning public comment regarding information presented pursuant to 76-3-622; and inserted (7) concerning approval by department of environmental quality and condition of approval on adequate water source. Amendment effective October 1, 2005.

*Applicability:* Section 19(1), Ch. 298, L. 2005, provided: "(1) [This act] applies to subdivision applications submitted on or after [the effective date of this act]." Effective April 19, 2005.

*2001 Amendment:* Chapter 527 in (1) after "conforms" deleted "to the local growth policy if one has been adopted pursuant to chapter 1"; and made minor changes in style. Amendment effective October 1, 2001.

*Preamble:* The preamble attached to Ch. 527, L. 2001, provided: "WHEREAS, section 76-1-606, MCA, allows local governments to require subdivision plats to conform to the provisions of adopted growth policies; and

WHEREAS, section 76-3-604, MCA, has been interpreted to allow local governments to deny or condition the approval of subdivision plats based on the growth policy; and

WHEREAS, many adopted growth policies contain ambiguous and subjective provisions that cannot be applied to subdivisions in an objective manner; and

WHEREAS, it is inconsistent with accepted precepts of planning to authorize a local government to enforce a growth policy without properly adopted land use controls; and

WHEREAS, the Legislature intends to clarify that growth policies should be implemented through the proper adoption of land use controls; and

WHEREAS, a statutory procedure is in place that allows local governments to implement growth policies through properly adopted land use controls; and

WHEREAS, this land use control adoption procedure incorporates the due process and other constitutional protections that are not included under section 76-1-606, MCA."

*Transition — Applicability:* Section 5, Ch. 527, L. 2001, provided: "[This act] applies to jurisdictions that adopted a growth policy pursuant to Title 76, chapter 1, before October 1, 2001, beginning October 1, 2002."

*1999 Amendments — Composite Section:* Chapter 236 in (2) substituted "within 60 working days" for "within 60 days"; and made minor changes in style. Amendment effective April 5, 1999.

Chapter 582 throughout section substituted reference to disapprove for reference to reject; in (1) substituted "growth policy" for "master plan"; and made minor changes in style. Amendment effective October 1, 1999.

*Applicability:* Section 4, Ch. 236, L. 1999, provided: "[This act] does not apply to subdivision proposals submitted to a governing body prior to [the effective date of this act]." Effective April 5, 1999.

*Saving Clause:* Section 35, Ch. 582, L. 1999, was a saving clause.

*Transition:* Section 36, Ch. 582, L. 1999, provided: "A governing body that adopts a master plan pursuant to Title 76, chapter 1, before October 1, 1999, may adopt zoning regulations that are consistent with the master plan pursuant to Title 76, chapter 2, part 2 or 3, until October 1, 2001."

**Case Notes**

*Subdivision Application Not Arbitrary, Capricious, or Unlawful — Denial of Application Affirmed:* Granite County denied plaintiffs' subdivision application on the basis that there were significant and unmitigable adverse impacts to agriculture, local schools, traffic, and the public health and safety. Plaintiffs appealed. The Supreme Court considered the potential impacts of each of the factors and affirmed. The county's decision to deny the application was not arbitrary, capricious, or unlawful, and the District Court properly affirmed the application denial. Hansen v. Granite County, 2010 MT 107, 356 Mont. 269, 232 P.3d 409.

*Failure of Environmental Assessment to Provide Statutorily Required Summary of Subdivision Impact — Approval of Preliminary Plat Unlawful:* Plaintiffs asserted that the Board of County Commissioners erred in approving a preliminary plat for a subdivision in rural Sanders County. The District Court granted judgment for the Board and the developer. On appeal, the Supreme Court reversed. The environmental assessment prepared in support of the subdivision was inadequate in explaining how the subdivision would impact water resources and water management such as wastewater and runoff, roads and traffic, and essential public services such as fire and police services. Because the environmental assessment was inadequate under plain statutory language, the Board's approval of the preliminary plat was unlawful for failure to comply with relevant statutes. The case was remanded for entry of judgment in favor of plaintiffs. Citizens for Responsible Dev. v. Bd. of County Comm'rs, 2009 MT 182, 351 M 40, 208 P3d 876 (2009).

*No Error in Approval of Preliminary Plat Prior to Water and Sanitation Review and Approval of Final Plat:* Plaintiffs contended that state approval of water and sanitation issues was required before a local government may approve a preliminary plat. The District Court disagreed, and the Supreme Court affirmed. In this case, in accordance with regulations and normal practice in the course of preliminary plat review, the Board of County Commissioners approved a preliminary plat with several conditions, including state approval of water and sanitation systems, and final plat approval was contingent on satisfaction of those conditions. Thus, the District Court correctly determined that the preliminary plat review stage did not end with approval of the preliminary plat, but only after the developer satisfied the mitigating conditions imposed on the preliminary plat approval. Fielder v. Bd. of County Comm'rs, 2007 MT 118, 337 M 256, 162 P3d 67 (2007). See also 49 A.G. Op. 7 (2001).

*Standard of Review — Denial of Preliminary Subdivision Application Not Arbitrary, Capricious, or Unlawful:* A preliminary subdivision application is subject to the review of the governing body to determine whether the plat conforms to the master growth plan (now growth policy) adopted for the area and the plat's effect on the public health, safety, and welfare. The standard of review applied as to whether the review was conducted correctly is whether the record establishes that the governing body acted arbitrarily, capriciously, or unlawfully. Here, the record established that the Ennis Town Council heard evidence that a proposed recreational vehicle park did not conform to the goals of the Ennis comprehensive plan (now growth policy) and that the proposed park posed a threat to the health, safety, and welfare of the townspeople of Ennis. The decision to deny the preliminary subdivision application was not arbitrary, capricious, or unlawful and was properly affirmed. Madison River R.V. Ltd. v. Ennis, 2000 MT 15, 298 M 91, 994 P2d 1098, 57 St. Rep. 84 (2000). See also N. Fork Preservation Ass'n v. Dept. of State Lands, 238 M 451, 778 P2d 862 (1989).

*Extension Within Reasonable Time of Expiration of Period:* In October 1981, the Flathead County Commissioners gave preliminary 1-year approval to a subdivision plat. In December 1982, the developer requested an extension to the preliminary approval. On January 14, 1983, the Commissioners approved the extension. Plaintiff filed a complaint alleging 76-3-610 precluded the Commissioners from granting an extension to the preliminary approval after the original time period had run. The District Court dismissed the action. Plaintiff appealed, contending that the phrase "At the end of" in the statute meant by or before the period in question expires and not after the expiration. The Supreme Court held that the plain meaning of the statute was evident in the language used. The statute permits County Commissioners to grant an extension to a preliminary plat approval within a reasonable time of the expiration of that period. Oldenburg v. Flathead County, 208 M 128, 676 P2d 778, 41 St. Rep. 217 (1984).

*Standing to Compel Review of Subdivision:* Where petitioner, an engineering group seeking a Writ of Mandamus ordering County Commissioners to act on five minor subdivisions, had no legal interest in any of the land subject to this action, it has no standing to bring an action. State ex rel. Professional Consultants, Inc. v. Bd. of County Comm'rs, 181 M 177, 592 P2d 945, 36 St. Rep. 613 (1979). (Dissent by Chief Justice Haswell.)

**Attorney General's Opinions**

*Compliance Review of Local Subdivision Rules Required at Preliminary Plat Stage:* The review of a proposed subdivision for compliance with local subdivision regulations must occur at the preliminary plat (now preliminary subdivision application) stage. Once a preliminary plat is approved, additional conditions for compliance may not be imposed, so compliance review at the final plat stage would render review meaningless. (See 2005 amendment.) 49 A.G. Op. 7 (2001).

*No Delegation of Approval or Rejection of Plat to Planning Board or Staff:* While this section allows for review of a preliminary plat (now preliminary subdivision application) by a governing body or its designated agent or agency, the approval, conditional approval, or rejection of the preliminary plat must be an action of the governing body itself and may not be delegated by a county commission to a planning board or to an administrative officer on the planning board staff. 41 A.G. Op. 64 (1986).

## 76-3-605. Hearing on subdivision application.

**Compiler's Comments**

*2007 Amendment:* Chapter 455 in (1) near beginning after "76-3-609" inserted "and 76-3-616". Amendment effective May 8, 2007.

*2005 Amendment:* Chapter 298 in (1) at beginning substituted text regarding requirement for public hearing for former text that read: "Except as provided in 76-3-505, the governing body or its authorized agent or agency shall hold a public hearing on the preliminary plat", near end after "whether the" substituted "subdivision application" for "plat", and substituted "denied" for "disapproved"; in (2) near end substituted "subdivision application" for "preliminary plat"; in (3) in second sentence near beginning inserted "whose property is immediately adjoining the land included in the preliminary plat" and after "land included in the" inserted "preliminary"; and in (4) in first sentence at end substituted "denial of the proposed subdivision" for "disapproval of the plat" and in second sentence near end inserted "working". Amendment effective April 19, 2005.

*Applicability:* Section 19(1), Ch. 298, L. 2005, provided: "(1) [This act] applies to subdivision applications submitted on or after [the effective date of this act]." Effective April 19, 2005.

*1999 Amendment:* Chapter 582 at beginning of (1) inserted exception clause and after "assessment" inserted "if required"; and made minor changes in style. Amendment effective October 1, 1999.

*Saving Clause:* Section 35, Ch. 582, L. 1999, was a saving clause.

*Transition:* Section 36, Ch. 582, L. 1999, provided: "A governing body that adopts a master plan pursuant to Title 76, chapter 1, before October 1, 1999, may adopt zoning regulations that are consistent with the master plan pursuant to Title 76, chapter 2, part 2 or 3, until October 1, 2001."

*1983 Amendment:* In (3), after "owner of record" inserted "and each purchaser under contract for deed of property".

*1981 Amendment:* Inserted (2) requiring municipality to hold joint hearings whenever possible on preliminary plat and annexation when subdivision is proposed for annexation to municipality.

*Interim Study Committee Bill:* Chapter 89, L. 1981 (SB 35), was introduced at the request of the interim Study Committee on Annexation Laws. See committee report, Legislative Council, 1980.

**Case Notes**

*Subdivision Application Not Arbitrary, Capricious, or Unlawful — Denial of Application Affirmed:* Granite County denied plaintiffs' subdivision application on the basis that there were significant and unmitigable adverse impacts to agriculture, local schools, traffic, and the public health and safety. Plaintiffs appealed. The Supreme Court considered the potential impacts of each of the factors and affirmed. The county's decision to deny the application was not arbitrary, capricious, or unlawful, and the District Court properly affirmed the application denial. Hansen v. Granite County, 2010 MT 107, 356 Mont. 269, 232 P.3d 409.

*Standard of Review — Denial of Preliminary Subdivision Application Not Arbitrary, Capricious, or Unlawful:* A preliminary subdivision application is subject to the review of the governing body to determine whether the plat conforms to the master growth plan (now growth policy) adopted for the area and the plat's effect on the public health, safety, and welfare. The standard of review applied as to whether the review was conducted correctly is whether the record establishes that the governing body acted arbitrarily, capriciously, or unlawfully. Here, the record established that the Ennis Town Council heard evidence that a proposed recreational vehicle park did not conform to the goals of the Ennis comprehensive plan (now growth policy) and that the proposed park posed a threat to the health, safety, and welfare of the townspeople of

Ennis. The decision to deny the preliminary subdivision application was not arbitrary, capricious, or unlawful and was properly affirmed. Madison River R.V. Ltd. v. Ennis, 2000 MT 15, 298 M 91, 994 P2d 1098, 57 St. Rep. 84 (2000). See also N. Fork Preservation Ass'n v. Dept. of State Lands, 238 M 451, 778 P2d 862 (1989).

## 76-3-608. Criteria for local government review.

**Compiler's Comments**

*2021 Amendments — Composite Section:* Chapter 275 in (3)(a) at end inserted "excluding any consideration of whether the proposed subdivision will result in a loss of agricultural soils"; in (4) at end of first sentence inserted "but may not require a set-aside of land or monetary contribution for the loss of agricultural soils"; and made minor changes in style. Amendment effective April 22, 2021.

Chapter 319 in (3)(a) in middle substituted "the specific, documentable, and clearly defined impact" for "the impact"; in (4) at beginning of last sentence inserted "Pursuant to 76-3-620"; in (5)(a) near end substituted "impacts of a proposed development may be deemed unmitigable" for "unmitigated impacts of a proposed development may be unacceptable"; in (5)(b) near middle inserted "and consistent with 76-3-620"; and made minor changes in style. Amendment effective April 30, 2021.

*Applicability:* Section 4, Ch. 275, L. 2021, provided: "[This act] applies to subdivision applications submitted on or after July 1, 2021."

*Severability:* Section 2, Ch. 275, L. 2021, was a severability clause.

*2017 Amendment:* Chapter 362 inserted (10) concerning findings of fact by the governing body. Amendment effective October 1, 2017.

*2013 Amendments — Composite Section:* Chapter 112 inserted (9) concerning federal or state comments or opinions. Amendment effective March 28, 2013.

Chapter 195 inserted (8) concerning approval of a subdivision and encroachments onto adjoining private property. Amendment effective October 1, 2013.

*Severability:* Section 2, Ch. 112, L. 2013, was a severability clause.

*Applicability:* Section 4, Ch. 112, L. 2013, provided: "[This act] applies to subdivision applications submitted on or after July 1, 2013."

*Saving Clause:* Section 5, Ch. 195, L. 2013, was a saving clause.

*2011 Amendment:* Chapter 409 in (1) at end inserted "or based solely on parcels within the subdivision having been designated as wildland-urban interface parcels under 76-13-145". Amendment effective October 1, 2011.

*2009 Amendments — Composite Section:* Chapter 406 inserted (7) prohibiting a governing body from requiring a waiver of right to protest a special improvement district or rural improvement district as a condition of subdivision approval. Amendment effective October 1, 2009.

Chapter 446 in (3)(c) after "easements" inserted "within and to the proposed subdivision"; deleted former (6) that read: "(6) The governing body may exempt proposed subdivisions that are entirely within the boundaries of designated geographic areas from the review criteria in subsection (3)(a) if all of the following requirements have been met:

(a) the governing body has adopted a growth policy pursuant to chapter 1 that:

(i) addresses the criteria in subsection (3)(a);

(ii) evaluates the impact of development on the criteria in subsection (3)(a);

(iii) describes zoning regulations that will be implemented to address the criteria in subsection (3)(a); and

(iv) identifies one or more geographic areas where the governing body intends to authorize an exemption from review of the criteria in subsection (3)(a); and

(b) the governing body has adopted zoning regulations pursuant to chapter 2, part 2 or 3, that:

(i) apply to the entire area subject to the exemption; and

(ii) address the criteria in subsection (3)(a), as described in the growth policy"; and made minor changes in style. Amendment effective May 5, 2009.

*2007 Amendment:* Chapter 455 in (3)(a) near middle after "76-3-609(2) or (4)" inserted "or 76-3-616"; and made minor changes in style. Amendment effective May 8, 2007.

*2005 Amendments — Composite Section:* Chapter 298 in (1) in first sentence near beginning after "conditionally disapprove" substituted "deny a proposed subdivision" for "disapprove a subdivision", after "is whether the" inserted "subdivision application", and near end and near middle of second sentence before "subdivision" inserted "proposed"; in (3)(a) near middle after "as provided in" substituted "76-3-509 or in 76-3-609(2) or (4), the impact on agriculture" for

"76-3-505 and 76-3-509, the effect on agriculture"; in (3)(d), in (4) in first sentence, and in (5)(a) before "subdivision" inserted "proposed"; in (5)(a) at end substituted "subdivision" for "plat"; deleted former (6) that read: "(6) (a) When a minor subdivision is proposed in an area where a growth policy has been adopted pursuant to chapter 1 and the proposed subdivision will comply with the growth policy, the subdivision is exempt from the review criteria contained in subsection (3)(a) but is subject to applicable zoning regulations.

(b) In order for a growth policy to serve as the basis for the exemption provided by this subsection (6), the growth policy must meet the requirements of 76-1-601"; in (6) in introductory clause near beginning after "may exempt" inserted "proposed"; in (6)(a)(ii) substituted "the impact of development" for "the effect of subdivision"; and made minor changes in style. Amendment effective April 19, 2005.

Chapter 302 inserted (7) concerning conditional approval or denial as a result of water and sanitation information. Amendment effective October 1, 2005.

*Applicability:* Section 19(1), Ch. 298, L. 2005, provided: "(1) [This act] applies to subdivision applications submitted on or after [the effective date of this act]." Effective April 19, 2005.

*2001 Amendment:* Chapter 348 in (3)(a) inserted reference to 76-3-509; and made minor changes in style. Amendment effective October 1, 2001.

*Preamble:* The preamble attached to Ch. 348, L. 2001, provided: "WHEREAS, agricultural land is increasingly being taken out of production for development and becoming unavailable for production of food; and

WHEREAS, farmers and ranchers are often forced to sell their land to generate sufficient income to retire; and

WHEREAS, cluster development can facilitate the preservation of Montana's unique landscape; and

WHEREAS, cluster development can reduce local government costs for infrastructure and provision of services by concentrating building sites on smaller lots so that services and utilities can be concentrated in a smaller area; and

WHEREAS, the Montana Department of Commerce is charged with providing technical assistance and information related to community development; and

WHEREAS, local governments need mechanisms to encourage development approaches that minimize costs to local citizens and that promote effective and efficient provision of public services."

*1999 Amendment:* Chapter 582 throughout section substituted "growth policy" for "master plan" or "plan"; in (3)(a) inserted exception clause; at end of (6)(b) substituted "meet the requirements of 76-1-601" for former language that read: "(i) housing, transportation, and land use elements sufficient for the governing body to protect public health, safety, and welfare; and

(ii) a discussion of physical constraints on development that exist within the area encompassed by the proposed subdivision"; inserted (7) authorizing governing body to exempt subdivisions entirely within designated geographic boundaries from review criteria and outlining criteria for exemption; and made minor changes in style. Amendment effective October 1, 1999.

*Saving Clause:* Section 35, Ch. 582, L. 1999, was a saving clause.

*Transition:* Section 36, Ch. 582, L. 1999, provided: "A governing body that adopts a master plan pursuant to Title 76, chapter 1, before October 1, 1999, may adopt zoning regulations that are consistent with the master plan pursuant to Title 76, chapter 2, part 2 or 3, until October 1, 2001."

*1995 Amendment:* Chapter 468 in (1) inserted second sentence concerning impacts on educational services; in (3)(a) inserted "agricultural water user facilities"; inserted (4) concerning design to minimize potentially significant adverse impacts; inserted (5) concerning not unreasonably restricting development and consultation with subdivider; and inserted (6) exempting certain minor subdivisions from review criteria.

*1995 Statement of Intent:* The statement of intent attached to Ch. 468, L. 1995, provided: "It is the intent of the legislature that the department of commerce, local government assistance division, update its model subdivision rules to minimize the fiscal impacts to local governments in implementing this legislation."

*Applicability:* Section 13, Ch. 468, L. 1995, provided: "Funds in a park fund that exceed $10,000 as of [the effective date of this act] [October 1, 1995] must be used for park land acquisition and initial development. Funds in a park fund up to $10,000 as of [the effective date of this act] [October 1, 1995] may be used for park maintenance in accordance with a formally adopted park plan."

*1993 Amendment:* Chapter 272 in (1), before "environmental assessment", inserted "applicable" and at end substituted "meets the requirements of this chapter" for "would be in the public interest. The governing body shall disapprove any subdivision which it finds not to be in the public interest"; in (2), at beginning, deleted "To determine whether the proposed subdivision would be in the public interest" and at end substituted reference to the criteria in subsection (3) for specific criteria relating to the basis of the need for the subdivision, public opinion, and effects on agriculture, local services, taxes, the environment, wildlife and its habitat, and public health and safety; inserted (3) stating criteria that a subdivision proposal must be reviewed for; and made minor changes in style. Amendment effective April 6, 1993.

*Applicability:* Section 7(2), Ch. 272, L. 1993, provided that this section "applies to all subdivision applications filed after September 30, 1993".

**Case Notes**

*District Court Incorrectly Determined Plain Language of Subdivision Covenant Unambiguous — Related Documents Constituting Instrument Not Reviewed — Negative Easement — Ambiguity Interpreted Against Drafter Not Dispositive — Disputed Facts Whether County Acted Arbitrarily or Capriciously — Doctrine of Impossibility or Impracticality Not Applicable — Attorney Fees Award Reversed.* Lewis & Clark County v. Wirth, 2022 MT 105, 409 Mont. 1, 510 P.3d 1206.

*Final Approval Granted Despite Failure to Meet Conditions of Plat Approval — No Impact on Validity of Title:* In a dispute involving the creation of an easement, the county argued that the underlying transfer of title to the plaintiff from the owner who subdivided the property was invalid because the county's Board of Commissioners (Board) approved the subdivision but the conditions of that approval were never met. The Supreme Court disagreed and found that the plaintiff held proper title. Although not all of the conditions of final plat approval were met, the Board reviewed and granted final approval, which was within the Board's authority under the Montana Subdivision and Platting Act (Act). Likewise, the defendant landowners argued that because no access agreement had ever been reached between them and the owner who subdivided the property as required by the Board, the owner lacked title to convey to the plaintiff. The court disagreed and held that because the defendant landowners failed to pursue the remedies provided for in the Act or to appeal the Board's final plat approval, they had established no basis for the conclusion that the owner lacked title. Yorlum Properties, Ltd. v. Lincoln County, 2013 MT 298, 372 Mont. 159, 311 P.3d 748.

*Failure to Consult With Subdivider Not Error When Plat Application Denied — Plain Meaning Rule:* When the Gallatin County Board of County Commissioners denied an application for approval of a subdivision, it was not error for the Board to refuse to consult with the subdivider regarding mitigation. Under the language of 76-3-608, and in accordance with the plain meaning rule of interpreting statutes, consultation with the subdivider is required only when mitigation is required. MM&I, LLC v. Bd. of County Comm'rs, 2010 MT 274, 358 Mont. 420, 246 P.3d 1029.

*Preliminary Subdivision Plat Properly Voided for Failure to Provide Available Ground Water Information and to Consider Surface Pollution Impacts:* The District Court held that the Helena City Commission improperly granted a subdivision plat and voided the preliminary plat. The developer challenged the decision, but the Supreme Court affirmed. The District Court concluded that an environmental assessment of the subdivision proposal was adequate regarding a base flood elevation survey, the requirement of a hydraulic analysis, and the soil liquefaction issue but that the assessment was inadequate regarding issues related to probable impacts arising from surface pollution entering ground water and an adjacent creek and failed to contain available ground water information. The District Court also correctly concluded that a paucity of information on ground water prevented the Commission from taking the required hard look at those impacts pursuant to Clark Fork Coalition v. Dept. of Environmental Quality, 2008 MT 407, 347 M 197, 197 P3d 482 (2008), so the Commission's decision to approve the preliminary plat without an assessment of the impact of surface pollution on ground water and on the nearby creek was arbitrary and capricious. Aspen Trails Ranch, LLC v. Simmons, 2010 MT 79, 356 Mont. 41, 230 P.3d 808.

*Failure of Environmental Assessment to Provide Statutorily Required Summary of Subdivision Impact — Approval of Preliminary Plat Unlawful:* Plaintiffs asserted that the Board of County Commissioners erred in approving a preliminary plat for a subdivision in rural Sanders County. The District Court granted judgment for the Board and the developer. On appeal, the Supreme Court reversed. The environmental assessment prepared in support of the subdivision was inadequate in explaining how the subdivision would impact water resources and water management such as wastewater and runoff, roads and traffic, and essential public services such as fire and police services. Because the environmental assessment was inadequate under plain statutory language, the Board's approval of the preliminary plat was unlawful for failure to comply with relevant statutes. The case was remanded for entry of judgment in favor of plaintiffs. Citizens for Responsible Dev. v. Bd. of County Comm'rs, 2009 MT 182, 351 M 40, 208 P3d 876 (2009).

*No Error in Approval of Preliminary Plat Prior to Water and Sanitation Review and Approval of Final Plat:* Plaintiffs contended that state approval of water and sanitation issues was required before a local government may approve a preliminary plat. The District Court disagreed, and the Supreme Court affirmed. In this case, in accordance with regulations and normal practice in the course of preliminary plat review, the Board of County Commissioners approved a preliminary plat with several conditions, including state approval of water and sanitation systems, and final plat approval was contingent on satisfaction of those conditions. Thus, the District Court correctly determined that the preliminary plat review stage did not end with approval of the preliminary plat, but only after the developer satisfied the mitigating conditions imposed on the preliminary plat approval. Fielder v. Bd. of County Comm'rs, 2007 MT 118, 337 M 256, 162 P3d 67 (2007). See also 49 A.G. Op. 7 (2001).

*Prevailing on State Claim but Not on Federal Section 1983 Claim — No Attorney Fees Under Federal Law Rule for Section 1983 Claim:* The city approved a preliminary subdivision application, subject to 26 conditions imposed by the city, and the developer sued the city for imposing the conditions. Although the developer prevailed on its claims under state law, it did not prevail on its federal section 1983 claim that the city acted arbitrarily and capriciously in imposing conditions when the city conditionally approved the preliminary subdivision application. Therefore, the developer was not entitled to attorney fees under the rule that a prevailing section 1983 plaintiff should ordinarily recover attorney fees unless special circumstances would render an award unjust. Kiely Constr. v. Red Lodge, 2002 MT 241, 312 M 52, 57 P3d 836 (2002).

*Right to Be Free From Unreasonable Restriction on Development — Not Sufficient Protected Property Interest to Support Federal Section 1983 Claim:* This section's provision that when reviewing a subdivision and requiring mitigation, a governing body may not unreasonably restrict a landowner's ability to develop land did not give the developer a protected property interest sufficient to support a claim under 42 U.S.C. 1983 that the city acted arbitrarily and capriciously in imposing conditions when the city conditionally approved the preliminary plat application. This section imposes restrictions upon a landowner's ability to develop land; it does not establish a right to develop the land. Kiely Constr. v. Red Lodge, 2002 MT 241, 312 M 52, 57 P3d 836 (2002).

*Local Governing Body Failure to Follow Local Regulations on Criteria for Approval of Subdivision:* Section 76-3-501 requires the local governing body to review and approve or disapprove a proposed subdivision under the local regulations in effect at the time that an application for approval of a preliminary plat is submitted to the local governing body. (See 2005 amendments to 76-3-501 and 76-3-604.) The governing body may not ignore its own local regulations and apply only the criteria that this section requires to be considered. In this case, the local regulations contained the five criteria provided in this section but, in addition, still contained three criteria that had been amended out of that section. The local governing body conditionally approved a subdivision without considering those three criteria. This chapter's mandate that a local governing body assert local control and develop its own subdivision regulations, as well as other provisions of this chapter, clearly contemplates that the local government entity is free to promulgate regulations, in addition to those in this chapter, that do not necessarily conform exactly to this chapter, so long as the regulations do not conflict with this chapter. This chapter establishes minimum requirements that the local governing body must follow. The additional three criteria in the local governing body's regulations do not conflict with this chapter, and findings on those criteria were mandated. In addition, the local governing body failed to follow its local regulation stating that findings on the criteria that the local regulation required to be applied must show that the subdivision will be in the public interest. The District Court therefore properly set aside the local governing body's conditional approval of the subdivision. Burnt Fork Citizens Coalition v. Bd. of County Comm'rs of Ravalli County, 287 M 43, 951 P2d 1020, 54 St. Rep. 1490 (1997).

*Stand-Alone Local Vicinity Plan Violative of Master Plan (now Growth Policy) — Local Vicinity Plan as Amendment to or Partial Repeal of Master Plan (now Growth Policy) Improper:* It was improper for a county to adopt a local vicinity plan (LVP) that regulated development in a specific area of the county when the LVP violated the mandate of the county master plan (now growth policy) authorizing an LVP only to the extent that it was consistent with the master plan (now growth policy). An LVP may not stand alone as the preeminent plan for a particular area when the LVP is inconsistent with the county master plan (now growth policy), nor may an LVP be adopted as an amendment to or revision or repeal of the master plan (now growth policy) in a manner that subordinates the goals and objectives of the master plan (now growth policy) as the preeminent county planning device. Ash Grove Cement Co. v. Jefferson County, 283 M 486, 943 P2d 85, 54 St. Rep. 756 (1997).

*Consistency Between Comprehensive Plan (now Growth Policy), Zoning Ordinances, and Other Planning Documents — Validity of Development Approvals:* Zoning ordinances and other planning documents adopted after adoption of a comprehensive (master) plan (now growth policy) must be consistent with the comprehensive plan (now growth policy) and with each other, and when all three were inconsistent with each other, the zoning commission exceeded its jurisdiction and authority when it approved a planned unit development. It was unsatisfactory to base the decision to approve the development on planning documents that were inherently inconsistent and unreliable. Bridger Canyon Property Owners' Ass'n, Inc. v. Planning & Zoning Comm'n, 270 M 160, 890 P2d 1268, 52 St. Rep. 125 (1995), followed in Ash Grove Cement Co. v. Jefferson County, 283 M 486, 943 P2d 85, 54 St. Rep. 756 (1997), and N. 93 Neighbors, Inc. v. Flathead County Bd. of County Comm'rs, 2006 MT 132, 332 M 327, 137 P3d 557 (2006).

*Denial of Application Not Abuse of Discretion:* The County Commissioners denied an application for further development of a subdivision until existing drainage problems were remedied by the developer. The Supreme Court held that the Commissioners' decision was based on sufficient evidence that further development could constitute a threat to the public's health and was not an abuse of discretion. Christianson v. Gasvoda, 242 M 212, 789 P2d 1234, 47 St. Rep. 696 (1990). See also MM&I, LLC v. Bd. of County Comm'rs, 2010 MT 274, 358 Mont. 420, 246 P.3d 1029, followed in Richards v. Missoula County, 2012 MT 236, 366 Mont. 416, 288 P.3d 175.

*Public Interest Finding — Application:* The public interest finding mandated by this section applies to "minor" subdivisions which qualify for review under 76-3-609. (See 1993 amendments.) State ex rel. Florence-Carlton School District v. Bd. of County Comm'rs, 180 M 285, 590 P2d 602 (1978).

**Attorney General's Opinions**

*Compliance Review of Local Subdivision Rules Required at Preliminary Plat Stage:* The review of a proposed subdivision for compliance with local subdivision regulations must occur at the preliminary plat (now preliminary subdivision application) stage. Once a preliminary plat is approved, additional conditions for compliance may not be imposed, so compliance review at the final plat stage would render review meaningless. 49 A.G. Op. 7 (2001).

**Law Review Articles**

The Role of Fish and Wildlife Evidence in Local Land Use Regulation, Mudd, Dunning, & Hayes, 30 Pub. Land & Resources L. Rev. 107 (2009).

## 76-3-609. Review procedure for minor subdivisions — determination of sufficiency of application — governing body to adopt regulations.

**Compiler's Comments**

*2023 Amendments — Composite Section:* Section 1, Ch. 331, L. 2023, in (2) near middle substituted "October 1, 2003" for "July 1, 1973". Amendment effective October 1, 2023.

Section 1, Ch. 340, L. 2023, in (1) at beginning inserted exception clause; inserted (6) concerning the requirements of an administrative minor subdivision that can use the administrative process; inserted (7) concerning the administrative process; inserted (8) concerning a subdivision administrator's decision; inserted (9) providing definition of administrative minor subdivision; and made minor changes in style. Amendment effective October 1, 2023.

*2009 Amendment:* Chapter 446 deleted former (2)(d)(ii) that read: "(ii) the requirement to hold a hearing on the subdivision application pursuant to 76-3-605"; inserted (2)(e) prohibiting hearing for first minor subdivision from tract of record; in (2)(f)(i) inserted exception clause; and made minor changes in style. Amendment effective May 5, 2009.

*2007 Amendment:* Chapter 455 in (3) near beginning in exception clause inserted "76-3-616 and"; and made minor changes in style. Amendment effective May 8, 2007.

*2005 Amendment:* Chapter 298 substituted text regarding sufficient information for and requirements for review of first minor subdivision for former text that read: "Subdivisions containing five or fewer parcels in which proper access to all lots is provided and in which there is not any land to be dedicated to the public for parks or playgrounds are to be reviewed as follows:

(1) The governing body shall approve, conditionally approve, or disapprove the first minor subdivision from a tract of record within 35 working days of the submission of the application.

(2) The governing body shall state in writing the conditions that must be met if the subdivision is conditionally approved or what local regulations would not be met by the subdivision if it disapproves the subdivision.

(3) The requirements for holding a public hearing and preparing an environmental assessment do not apply to the first minor subdivision created from a tract of record.

(4) Subsequent subdivisions from a tract of record must be reviewed under 76-3-505 and regulations adopted pursuant to that section." Amendment effective April 19, 2005.

*Applicability:* Section 19(1), Ch. 298, L. 2005, provided: "(1) [This act] applies to subdivision applications submitted on or after [the effective date of this act]." Effective April 19, 2005.

*1999 Amendment:* Chapter 236 in (1) substituted "within 35 working days" for "within 35 days"; and made minor changes in style. Amendment effective April 5, 1999.

*Applicability:* Section 4, Ch. 236, L. 1999, provided: "[This act] does not apply to subdivision proposals submitted to a governing body prior to [the effective date of this act]." Effective April 5, 1999.

*1995 Amendment:* Chapter 468 in (1) and (3) substituted "minor subdivision" for "such subdivision"; and made minor changes in style.

*1995 Statement of Intent:* The statement of intent attached to Ch. 468, L. 1995, provided: "It is the intent of the legislature that the department of commerce, local government assistance division, update its model subdivision rules to minimize the fiscal impacts to local governments in implementing this legislation."

*Applicability:* Section 13, Ch. 468, L. 1995, provided: "Funds in a park fund that exceed $10,000 as of [the effective date of this act] [October 1, 1995] must be used for park land acquisition and initial development. Funds in a park fund up to $10,000 as of [the effective date of this act] [October 1, 1995] may be used for park maintenance in accordance with a formally adopted park plan."

*1987 Amendment:* Deleted former (2) that read: "(2) (a) For divisions of land consisting exclusively of parcels 20 acres and larger, the governing body shall review the division of land within 35 days of the submission of an application for review. The governing body's review must be limited to a written determination that appropriate access and easements are properly provided. The review shall provide either:

(i) that the access and easements are suitable for the purposes of providing appropriate services to the land; or

(ii) that the access and easements are not suitable for the purposes of providing appropriate services to the land, in which case the county, the school district or districts, and other authorities and districts in which the land is located will not provide services that involve use of the unsuitable access and easements. Such services include:

(A) fire protection;
(B) school busing;
(C) ambulance;
(D) snow removal; and
(E) similar services as determined by the governing body.

(b) The governing body shall deliver a copy of the determination of the review to the county clerk and recorder to be reflected on the certificate of survey or deed of conveyance of the land that was subject to review.

(c) The governing body may, upon application by a landowner, redetermine the suitability of access and easements. If the governing body determines that there has been a material change regarding access or easements and the change provides for suitable access and easements for services, it may determine that such land is now suitable as provided in subsection (2)(a)(i) and shall deliver a copy of such determination to the county clerk and recorder to be reflected on the certificate of survey or deed of conveyance.

(d) Requirements for holding a public hearing, preparing an environmental assessment, and finding that the division of land is in the public interest do not apply."

*1985 Amendment:* Inserted (2) (see 1987 amendment note for text).

**Case Notes**

*Standing for Mandamus:* Petitioner, an engineering survey group seeking a Writ of Mandamus to compel County Commissioners to act on five minor subdivisions, has no stated legal interest in any of the subdivisions. Some form of ownership in the land is necessary to impart standing to bring a mandamus action. State ex rel. Professional Consultants, Inc. v. Bd. of County Comm'rs, 181 M 177, 592 P2d 945, 36 St. Rep. 613 (1979).

*Public Interest Finding — Application:* The public interest finding mandated by 76-3-608 applies to "minor" subdivisions which qualify for review under this section. State ex rel. Florence-Carlton School District v. Bd. of County Comm'rs, 180 M 285, 590 P2d 602 (1978).

**Attorney General's Opinions**

*Original Property Boundary Established by United States Government Survey — Parcels Not Exempt From Subdivision and Platting Act:* The sole fact that a parcel of land was described by references to boundaries established by a United States government survey does not exempt the parcel from the requirements of the Montana Subdivision and Platting Act. Federal survey laws that were adopted to facilitate the conveyance of land in the public domain into private ownership are distinct from Montana subdivision laws that generally regulate divisions of land and conveyances of property among private landowners. Therefore, a property owner may not convey, without complying with Montana subdivision laws, component aliquot parts of sections and government lots that are described and identified in a deed on file with a County Clerk and Recorder and that are less than 160 acres in size. 47 A.G. Op. 10 (1997), clarifying 38 A.G. Op. 66 (1980).

*Size Parcel Prohibited by Master Plan (now Growth Policy) — Certificate Filing Required — Conditional Issuance of Permit:* A local government unit with self-governing powers may not refuse to file a certificate of survey simply because the parcel encompasses less than 40 but equal to or greater than 20 acres, even if its master plan (now growth policy) prohibits divisions of land of such size. However, the local government may condition issuance of permits for construction, alteration, or enlargement of structures upon compliance with the master plan (now growth policy). 42 A.G. Op. 16 (1987).

*Effect of Nonsuitability Determination on Services — Taxation:* A nonsuitability determination with respect to access prohibits any political subdivision from providing those services specified by the governing body as inappropriate. In appropriate circumstances, the governing body may include certain services provided by sheriff's or police departments as "similar services" which will not be provided to a parcel of land with a nonsuitability determination. The owner of real property affected by a nonsuitability determination is not relieved of his obligation to tender all taxes required of property owners, including those which support governmental services he is prohibited from receiving by the nonsuitability determination. 41 A.G. Op. 86 (1986).

*Nonsuitability Determination — Provision of Services — Tax Obligations:* The provisions of this section relating to nonsuitability determinations (deleted, sec. 2, Ch. 256, L. 1987), with respect to an access or easement, prohibited any political subdivision from providing those services specified by the governing body as inappropriate and included, under appropriate circumstances, certain services provided by Sheriff's or police departments. An owner of real property affected by a nonsuitability determination was not relieved of his obligation to pay all taxes otherwise required of property owners, including taxes that supported governmental services prohibited by the determination. 41 A.G. Op. 86 (1986).

*Suitability for Access — Landowner May Declare Unsuitability:* If a landowner elects on his application to accept a written determination that access and easements are not suitable for the purposes of providing services to the divided parcels, the local governing body may attach this notation to the instrument of transference prior to the recordation and forego any review of access suitability. 41 A.G. Op. 43 (1986).

*Suitability for Access Review Mandatory:* In divisions of land consisting exclusively of parcels 20 acres or larger, the landowner must apply to the local governing body for a determination of whether appropriate access and easements are properly provided. 41 A.G. Op. 43 (1986).

## 76-3-610. Effect of approval of application and preliminary plat.

**Compiler's Comments**

*2011 Amendment:* Chapter 252 in (1) near end of third sentence substituted "a mutually agreed-upon period of time" for "no more than 1 calendar year, except that the governing body may extend its approval for a period of more than 1 year if that approval period is included as a specific condition of a written agreement between the governing body and the subdivider, according to 76-3-507" and inserted fourth and fifth sentences regarding written extensions. Amendment effective October 1, 2011.

*Applicability:* Section 2, Ch. 252, L. 2011, provided: "[This act] applies to subdivision applications and preliminary plats approved prior to [the effective date of this act] and to those approved on or after [the effective date of this act]." Effective October 1, 2011.

*2009 Amendment:* Chapter 446 in (2) at beginning inserted exception clause; and made minor changes in style. Amendment effective May 5, 2009.

*2005 Amendment:* Chapter 298 in (1) in first sentence near beginning inserted "application and"; in (2) near beginning inserted "application and"; and made minor changes in style. Amendment effective April 19, 2005.

*Applicability:* Section 19(1), Ch. 298, L. 2005, provided: "(1) [This act] applies to subdivision applications submitted on or after [the effective date of this act]." Effective April 19, 2005.

*1983 Amendment:* In (1), changed the period of effectiveness of approval of a preliminary plat from not more than 1 calendar year to not more than 3 calendar years or less than 1 calendar year.

*1981 Amendment:* Added the exception for approval extension at the end of (1) following "for no more than 1 calendar year"; added "the original or extended approval period as provided in subsection (1)" at the end of (2).

**Case Notes**

*No Error in Approval of Preliminary Plat Prior to Water and Sanitation Review and Approval of Final Plat:* Plaintiffs contended that state approval of water and sanitation issues was required before a local government may approve a preliminary plat. The District Court disagreed, and the Supreme Court affirmed. In this case, in accordance with regulations and normal practice in the course of preliminary plat review, the Board of County Commissioners approved a preliminary plat with several conditions, including state approval of water and sanitation systems, and final plat approval was contingent on satisfaction of those conditions. Thus, the District Court correctly determined that the preliminary plat review stage did not end with approval of the preliminary plat, but only after the developer satisfied the mitigating conditions imposed on the preliminary plat approval. Fielder v. Bd. of County Comm'rs, 2007 MT 118, 337 M 256, 162 P3d 67 (2007). See also 49 A.G. Op. 7 (2001).

*Failure to Submit Application for Final Plat Approval and Meet Conditions Imposed on Preliminary Application for Plat Approval — No Protected Property Interest Supporting Federal Section 1983 Claim:* Because the developer had not applied for final plat approval and had not met all the conditions imposed upon the preliminary plat approval, it did not have a protected property interest sufficient to support a claim under 42 U.S.C. 1983 that the city acted arbitrarily and capriciously in imposing conditions when the city conditionally approved the preliminary plat application. Kiely Constr. v. Red Lodge, 2002 MT 241, 312 M 52, 57 P3d 836 (2002).

*Prevailing on State Claim but Not on Federal Section 1983 Claim — No Attorney Fees Under Federal Law Rule for Section 1983 Claim:* The city approved a preliminary subdivision application, subject to 26 conditions imposed by the city, and the developer sued the city for imposing the conditions. Although the developer prevailed on its claims under state law, it did not prevail on its federal section 1983 claim that the city acted arbitrarily and capriciously in imposing conditions when the city conditionally approved the preliminary subdivision application. Therefore, the developer was not entitled to attorney fees under the rule that a prevailing section 1983 plaintiff should ordinarily recover attorney fees unless special circumstances would render an award unjust. Kiely Constr. v. Red Lodge, 2002 MT 241, 312 M 52, 57 P3d 836 (2002).

*Shared Well Agreement Valid Despite Subdivision Requirement for Individual Wells When Approved by State and County Regulators:* Despite conditions in the subdivision certificate that called for individual water wells on each tract, the predecessors in interest to the Williamses and the Schwagers entered a shared water well agreement that endured between the tract owners for about 20 years. The subdivision certificate was approved by both the state and county. A disagreement arose between the Williamses and the Schwagers regarding use of the shared well, and the Williamses sought to enjoin the Schwagers from interfering with the well. The Schwagers responded that the well was in violation of the subdivision certificate and that the shared water well agreement was thus void. The District Court concluded that the agreement was valid and enforceable, and granted the Williamses' injunction. The Schwagers appealed, but the Supreme Court affirmed. The agreement was not void ab initio because the subdivision certificate was approved as required prior to installation of the water system, nor was the agreement illegal per se, because a county health department official testified that the parties could still obtain approval for a shared well, which was encouraged by the county in cases in which sufficient water existed, despite the requirement in the subdivision certificate that called for individual water systems. Further, the Schwagers could not attempt to benefit from repudiating the contract after previously accepting the benefits of the agreement in the form of water fees from the Williamses, and the District Court did not err in enforcing the agreement. Williams v. Schwager, 2002 MT 107, 309 M 455, 47 P3d 839 (2002).

*Extension Within Reasonable Time of Expiration of Period:* In October 1981, the Flathead County Commissioners gave preliminary 1-year approval to a subdivision plat. In December

1982, the developer requested an extension to the preliminary approval. On January 14, 1983, the Commissioners approved the extension. Plaintiff filed a complaint alleging 76-3-610 precluded the Commissioners from granting an extension to the preliminary approval after the original time period had run. The District Court dismissed the action. Plaintiff appealed, contending that the phrase "At the end of" in the statute meant by or before the period in question expires and not after the expiration. The Supreme Court held that the plain meaning of the statute was evident in the language used. The statute permits County Commissioners to grant an extension to a preliminary plat approval within a reasonable time of the expiration of that period. Oldenburg v. Flathead County, 208 M 128, 676 P2d 778, 41 St. Rep. 217 (1984).

## 76-3-611. Review of final plat.

### Compiler's Comments

*2017 Amendment:* Chapter 251 in (1) near beginning inserted "or the agent or agency designated by the governing body" and substituted "final plat, and the governing body shall approve" for "final subdivision plat and shall approve"; in (2)(a) near beginning after "may require that final" deleted "subdivision"; inserted (3) regarding the submission of a final plat; inserted (4) requiring a governing body to review a sufficient final plat within 20 days; inserted (5) regarding a mutual extension of review periods; and made minor changes in style. Amendment effective October 1, 2017.

*1995 Amendment:* Chapter 293 in (1)(b), after "taxes", inserted "and special assessments"; and made minor changes in style.

*1981 Amendment:* Added (1)(b) requiring governing body to approve final subdivision plat only when County Treasurer has certified no property taxes are delinquent.

### Case Notes

*No Error in Approval of Preliminary Plat Prior to Water and Sanitation Review and Approval of Final Plat:* Plaintiffs contended that state approval of water and sanitation issues was required before a local government may approve a preliminary plat. The District Court disagreed, and the Supreme Court affirmed. In this case, in accordance with regulations and normal practice in the course of preliminary plat review, the Board of County Commissioners approved a preliminary plat with several conditions, including state approval of water and sanitation systems, and final plat approval was contingent on satisfaction of those conditions. Thus, the District Court correctly determined that the preliminary plat review stage did not end with approval of the preliminary plat, but only after the developer satisfied the mitigating conditions imposed on the preliminary plat approval. Fielder v. Bd. of County Comm'rs, 2007 MT 118, 337 M 256, 162 P3d 67 (2007). See also 49 A.G. Op. 7 (2001).

*Failure to Submit Application for Final Plat Approval and Meet Conditions Imposed on Preliminary Application for Plat Approval — No Protected Property Interest Supporting Federal Section 1983 Claim:* Because the developer had not applied for final plat approval and had not met all the conditions imposed upon the preliminary plat approval, it did not have a protected property interest sufficient to support a claim under 42 U.S.C. 1983 that the city acted arbitrarily and capriciously in imposing conditions when the city conditionally approved the preliminary plat application. Kiely Constr. v. Red Lodge, 2002 MT 241, 312 M 52, 57 P3d 836 (2002).

*Prevailing on State Claim but Not on Federal Section 1983 Claim — No Attorney Fees Under Federal Law Rule for Section 1983 Claim:* The city approved a preliminary application for plat approval, subject to 26 conditions imposed by the city, and the developer sued the city for imposing the conditions. Although the developer prevailed on its claims under state law, it did not prevail on its federal section 1983 claim that the city acted arbitrarily and capriciously in imposing conditions when the city conditionally approved the preliminary plat application. Therefore, the developer was not entitled to attorney fees under the rule that a prevailing section 1983 plaintiff should ordinarily recover attorney fees unless special circumstances would render an award unjust. Kiely Constr. v. Red Lodge, 2002 MT 241, 312 M 52, 57 P3d 836 (2002).

*Examining Surveyor's Fee — County With Charter Government:* A county with a charter form of local government is not prohibited from establishing a fee for the examination of a plat or certificate of survey by the examining surveyor if the standards of the review are not inconsistent with this section under 7-1-113, because this section is silent in regard to fees and a charter form of government under Art. XI, sec. 6, Mont. Const., and 7-1-103 may exercise any power not expressly prohibited. State ex rel. Swart v. Molitor, 190 M 515, 621 P2d 1100, 38 St. Rep. 71 (1981).

**Attorney General's Opinions**

*Subdivision Remainders:* The Department of Health and Environmental Sciences (now Department of Environmental Quality) may require that plats show the remainder of land less than 20 acres left after the segregation of subdivided parcels and has authority to review such remainders under Title 76, ch. 4, part 1. 37 A.G. Op. 74 (1977).

## 76-3-612. Subdivision guarantee required for review process.

**Compiler's Comments**

*2021 Amendment:* Chapter 210 in (1) near beginning substituted "a subdivision guarantee issued by an authorized title insurer or its title insurance producer" for "a certificate of a title abstracter"; in (2) near beginning substituted "the subdivision guarantee for the land" for "the abstract or certificate of title of the land"; and inserted (3) providing a definition of subdivision guarantee. Amendment effective October 1, 2021.

*1981 Amendment:* Deleted "licensed" before "title abstracter" in (1).

**Attorney General's Opinions**

*Title Insurance Insufficient to Satisfy Certificate of Title Requirement:* A title insurance policy does not satisfy the certificate of title requirement of 76-3-612. The purpose of the certificate of title requirement is to inform the governing body of the status of the title. Title insurance is inadequate for this purpose since it does not purport to detail the status of the title but merely constitutes an agreement to defend title if defects should be alleged in the future. 38 A.G. Op. 48 (1979).

*Section Impliedly Amended — Effect of Sunsetting of Board of Abstracters:* The sunsetting of the Board of Abstracters does not relieve a subdivider of his duty to provide a certificate of title. However, by allowing the Board to "sunset", the Legislature impliedly amended this section, removing the requirement that the certificate be prepared by a "licensed" title abstracter (the term "licensed" was removed by express amendment in 1981). 38 A.G. Op. 48 (1979).

*Licensed Abstracter Certificate Not Required Unless Dedication:* Abstract examination and certificate from licensed abstracter are not required when lands outside city are surveyed and certificate of survey or plot is prepared for one or more tracts with no dedication for streets, alleys, playgrounds, or other purposes ("licensed" deleted by 1981 amendment). 35 A.G. Op. 35 (1973).

## 76-3-614. Correction of recorded plat.

**Case Notes**

*Affected Landowners May Challenge Retracement Survey Results*: A governing body may undertake a retracement survey under this section, but the results of the retracement survey must be made in accordance with applicable legal rules and surveying standards. The results of a retracement survey are not immune from challenge by a landowner whose rights are affected by the survey. Wohl v. Missoula, 2013 MT 46, 369 Mont. 108, 300 P.3d 1119.

## 76-3-615. Subsequent hearings — consideration of new information — requirements for regulations.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 1, Ch. 171, L. 2023. Amendment effective October 1, 2023.

*Effective Date:* Section 18, Ch. 298, L. 2005, provided that this section is effective on passage and approval. Approved April 19, 2005.

*Applicability:* Section 19(1), Ch. 298, L. 2005, provided: "(1) [This act] applies to subdivision applications submitted on or after [the effective date of this act]." Effective April 19, 2005.

## 76-3-616. Exemption for certain subdivisions.

**Compiler's Comments**

*Effective Date:* Section 9, Ch. 455, L. 2007, provided: "[This act] is effective on passage and approval." Approved May 8, 2007.

## 76-3-617. Phased development — application requirements — hearing required.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 2, Ch. 171, L. 2023. Amendment effective October 1, 2023.

*Applicability:* Section 4, Ch. 171, L. 2023, provided: "[Section 2] [76-3-617] applies to subdivision applications that are approved on or after October 1, 2023."

*Effective Date:* Section 6, Ch. 363, L. 2017, provided: "[This act] is effective on passage and approval." Approved May 8, 2017.

*Applicability:* Section 7, Ch. 363, L. 2017, provided: "[This act] applies to phased development applications submitted on or after [the effective date of this act]." Effective May 8, 2017.

### **76-3-620. Review requirements — written statement.**

**Compiler's Comments**

*2021 Amendment:* Chapter 319 in (1)(d) at end substituted "the decision and explains how they apply to the basis of the decision" for "the decision to deny or impose conditions and explains how they apply to the decision to deny or impose conditions"; in (1)(e) in middle after "making" substituted "the decision" for "its decision to deny or impose conditions"; in (1)(f) at beginning substituted "identifies" for "provides"; inserted (2) requiring a governing body that conditionally approves a proposed subdivision to identify specific purposes or objectives for each condition required for subdivision approval; and made minor changes in style. Amendment effective April 30, 2021.

*2009 Amendment:* Chapter 446 in introductory clause near middle after "shall" inserted "in accordance with the time limit established in 76-3-504(1)(r)"; and made minor changes in style. Amendment effective May 5, 2009.

*Applicability:* Section 25(1), Ch. 446, L. 2009, provided: "(1) [Sections 13, 20, and 22] [76-3-504, 76-3-620, and 76-3-625], concerning adoption of regulations and time references in the regulations, apply upon adoption of regulations under [section 13] [76-3-504] or on May 1, 2010, whichever occurs first."

*2005 Amendment:* Chapter 298 substituted text regarding content of written statement provided by governing body for former text that read: "In addition to the requirements of 76-3-604 and 76-3-609, a governing body may not deny or condition a subdivision approval under this part unless it provides a written statement to the applicant detailing the circumstances of the subdivision denial or condition imposition. The statement must include:

(1) the reason for the denial or condition imposition;

(2) the evidence that justifies the denial or condition imposition; and

(3) information regarding the appeal process for the denial or condition imposition." Amendment effective April 19, 2005.

*Applicability:* Section 19(1), Ch. 298, L. 2005, provided: "(1) [This act] applies to subdivision applications submitted on or after [the effective date of this act]." Effective April 19, 2005.

**Case Notes**

*Complaint in Possession of Clerk of Court Within Thirty Days of Approval of Preliminary Subdivision Plat Considered Timely Despite Filing After Thirty Days:* An aggrieved party may appeal the approval of a preliminary subdivision plat to the District Court within 30 days of the date when a governing body conditionally approves the plat. Sanders County Commissioners approved a preliminary plat on March 30, so a timely appeal was required on or before April 29, 2004. Plaintiffs' attorney delivered a complaint to UPS in Missoula on April 28 for overnight delivery. UPS tracking information showed that the complaint was delivered to the Sanders County Clerk of the District Court on April 29, but the clerk did not stamp the complaint as filed until May 3. Defendant asserted that the complaint was filed after the 30-day appeal period, and the District Court agreed but addressed the merits nevertheless. On appeal, the Supreme Court held that because the undisputed evidence showed that the clerk received the complaint on April 29, the appeal was timely regardless of the date that the complaint was stamped as filed. Fielder v. Bd. of County Comm'rs, 2007 MT 118, 337 M 256, 162 P3d 67 (2007). See also Cintron v. Union Pac. RR Co., 813 F2d 917 (9th Cir. 1987), and Sheviakov v. I.N.S., 237 F3d 1144 (9th Cir. 2001).

*City Council Minutes and Testimony of Its Members Inadmissible to Show Cause for Denial of Subdivision Approval:* Because the City Council violated this section by failing to issue a written statement of the reasons and evidence for denying a subdivision approval, it could not use the minutes of its meeting on the subject and the testimony of its members to explain the denial. (See 2005 amendment.) The minutes were not the equivalent of a written statement and evidence of them was properly excluded by the District Court. The testimony of the City Council members constituted after-the-fact opinions that were not properly part of the record. Kiely Constr. v. Red Lodge, 2002 MT 241, 312 M 52, 57 P3d 836 (2002).

*Showing of Irrevocably Closed Mind as Proof of Prejudice by Administrative Decisionmaker:* Madison River R.V. Ltd. (RV) sought to build a recreational vehicle park in Ennis. Prior to a hearing before the Ennis Town Council, RV requested in writing that one of the council members recuse himself, based on his alleged bias against the project. The request was denied without objection by the other council members, and RV's application for the park was also denied. On appeal, RV contended that the council member's participation in the council's deliberations was error, citing the principle that one who makes decisions in a judicial or quasi-judicial capacity must be free from bias. However, no authority was cited that the principle applies to elected members of a city council. Pursuant to Fed. Trade Comm'n v. Cement Institute, 333 US 683, 92 L Ed 1010, 68 S Ct 793 (1948), in order to prevail on a claim of prejudice or bias against an administrative decisionmaker, the petitioner must show that the decisionmaker had an irrevocably closed mind on the subject under investigation or adjudication. Here, RV failed to establish that the council member's mind was irrevocably closed. The District Court's determination that the town council was not required to disqualify the member from voting and that the council's decision should not be vacated because of its failure to disqualify the member in question was affirmed. Madison River R.V. Ltd. v. Ennis, 2000 MT 15, 298 M 91, 994 P2d 1098, 57 St. Rep. 84 (2000).

*Town Council's Findings Timely Filed and Properly Part of Record for Court Review:* Madison River R.V. Ltd. (RV) applied to build a recreational vehicle park in Ennis, but the application was denied by the Ennis Town Council. RV appealed to the District Court, but the council's findings were filed 15 days after RV filed the appeal, which RV contended was not timely. Under this section, a decision to deny a subdivision application must include a written statement giving the reason for the denial, but the 30 days allowed for appeal under 76-3-625 do not begin to run until the council members sign the written findings. The fact that RV's notice of appeal was filed prematurely did not render untimely the written statements of reasons for denial of the application for plat approval. Madison River R.V. Ltd. v. Ennis, 2000 MT 15, 298 M 91, 994 P2d 1098, 57 St. Rep. 84 (2000).

## **76-3-621. Park dedication requirement.**

### **Compiler's Comments**

*2009 Amendment:* Chapter 446 inserted (3)(e) relating to first minor subdivision from tract of record; in (8)(a) after "for" substituted (i) and (ii) for "a minor subdivision"; and made minor changes in style. Amendment effective May 5, 2009.

*Applicability:* Section 25(3), Ch. 446, L. 2009, provided: "(3) [Section 21] [76-3-621] applies upon revision of subdivision regulations or on December 31, 2010, whichever occurs first."

*2007 Amendment:* Chapter 264 deleted former (3)(a) that read: "(a) a minor subdivision"; inserted (8) making park dedication for minor subdivision discretionary; and made minor changes in style. Amendment effective October 1, 2007.

*2005 Amendment:* Chapter 333 in (1) near beginning after "(6)" substituted "through (8)" for "and (7)"; inserted (8) allowing a subdivider to dedicate land to a school district for school facilities or buildings; and made minor changes in style. Amendment effective October 1, 2005.

*2003 Amendment:* Chapter 469 at beginning of (1) in exception clause inserted reference to subsection (7); inserted (6)(d) requiring governing body to waive park dedication requirement if subdivider provides land outside subdivision for park and recreational uses and certain conditions are met; inserted (7) allowing governing body to waive park dedication requirement if subdivider provides land outside subdivision for long-term protection of critical wildlife habitat, cultural, historical, or natural resources, agricultural interests, or aesthetic values and certain conditions are met; inserted (9) allowing land donation to be inside or outside subdivision; and made minor changes in style. Amendment effective October 1, 2003.

*2001 Amendment:* Chapter 348 in (1) in exception clause inserted reference to 76-3-509; and made minor changes in style. Amendment effective October 1, 2001.

*Preamble:* The preamble attached to Ch. 348, L. 2001, provided: "WHEREAS, agricultural land is increasingly being taken out of production for development and becoming unavailable for production of food; and

WHEREAS, farmers and ranchers are often forced to sell their land to generate sufficient income to retire; and

WHEREAS, cluster development can facilitate the preservation of Montana's unique landscape; and

WHEREAS, cluster development can reduce local government costs for infrastructure and provision of services by concentrating building sites on smaller lots so that services and utilities can be concentrated in a smaller area; and

WHEREAS, the Montana Department of Commerce is charged with providing technical assistance and information related to community development; and

WHEREAS, local governments need mechanisms to encourage development approaches that minimize costs to local citizens and that promote effective and efficient provision of public services."

*1999 Amendment:* Chapter 582 in two places in (2) substituted "growth policy" for "master plan" or "plans"; and made minor changes in style. Amendment effective October 1, 1999.

*Saving Clause:* Section 35, Ch. 582, L. 1999, was a saving clause.

*Transition:* Section 36, Ch. 582, L. 1999, provided: "A governing body that adopts a master plan pursuant to Title 76, chapter 1, before October 1, 1999, may adopt zoning regulations that are consistent with the master plan pursuant to Title 76, chapter 2, part 2 or 3, until October 1, 2001."

*1995 Statement of Intent:* The statement of intent attached to Ch. 468, L. 1995, provided: "It is the intent of the legislature that the department of commerce, local government assistance division, update its model subdivision rules to minimize the fiscal impacts to local governments in implementing this legislation."

*Applicability:* Section 13, Ch. 468, L. 1995, provided: "Funds in a park fund that exceed $10,000 as of [the effective date of this act] [October 1, 1995] must be used for park land acquisition and initial development. Funds in a park fund up to $10,000 as of [the effective date of this act] [October 1, 1995] may be used for park maintenance in accordance with a formally adopted park plan."

**Case Notes**

*Cash Donation in Lieu of Park Dedication Requirement Proper:* This section allows a Board of County Commissioners to accept either a land or a cash donation to satisfy the park dedication requirement. Here, the Board proposed that a developer satisfy the park requirement with a cash-in-lieu payment because the land proposed by the developer was not suitable for use as parkland. Absent evidence to the contrary, the Board did not act arbitrarily or capriciously in requesting cash in lieu of a land donation. Fielder v. Bd. of County Comm'rs, 2007 MT 118, 337 M 256, 162 P3d 67 (2007).

## 76-3-622. Water and sanitation information to accompany preliminary plat.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 1, Ch. 673, L. 2023. Amendment effective May 19, 2023.

*2021 Amendment:* Chapter 324 in (1)(g) in middle of first sentence after "adopted" deleted "by the board of environmental review". Amendment effective July 1, 2021.

*2019 Amendment:* Chapter 80 in (2) removed brackets around reference to 76-4-125(1). Amendment effective July 1, 2019.

*Termination Provision Repealed:* Section 18, Ch. 80, L. 2019, repealed sec. 13, Ch. 344, L. 2017, which terminated the 2017 amendments to this section September 30, 2019. Effective July 1, 2019.

*2017 Amendment:* Chapter 344 in (2) substituted "76-4-125(1)" for "76-4-125(2)". Amendment effective October 1, 2017, and terminates September 30, 2019.

*Applicability:* Section 12, Ch. 344, L. 2017, provided: "[This act] applies to subdivision applications submitted on or after October 1, 2017."

*2013 Amendment:* Chapter 165 inserted (1)(b)(ii) concerning statement of jurisdiction; and made minor changes in style. Amendment effective October 1, 2013.

*Applicability:* Section 2, Ch. 165, L. 2013, provided: "[This act] applies to applications submitted on or after [the effective date of this act]." Effective October 1, 2013.

*Effective Date:* This section is effective October 1, 2005.

## 76-3-623. Expedited review for certain subdivisions.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 3, Ch. 171, L. 2023. Amendment effective October 1, 2023.

*Effective Date:* This section is effective October 1, 2021.

## 76-3-625. Violations — actions against governing body.

**Compiler's Comments**

*2021 Amendment:* Chapter 190 in (1) at end of first sentence inserted "within 180 days of the final action, decision, order, or adoption of a regulation"; in (2)(a) near middle after "plat for a proposed subdivision" deleted "or a final subdivision plat" and at end inserted "to challenge the approval, imposition of conditions, or denial of the preliminary plat"; inserted (2)(b) concerning the right of a party identified in (3) who is aggrieved by any other final decision of the governing body regarding a subdivision to appeal the decision; in (2)(c) at beginning substituted "A petition allowed in subsections (2)(a) and (2)(b)" for "The petition"; and made minor changes in style. Amendment effective October 1, 2021.

*2017 Amendment:* Chapter 362 in (1) in first sentence at end after "pursuant to this chapter" deleted "that is arbitrary or capricious" and inserted last sentence concerning sustaining the governing body's decision unless the decision is arbitrary, capricious, or unlawful; and in (2) inserted last sentence concerning sustaining the governing body's decision unless the decision is arbitrary, capricious, or unlawful. Amendment effective October 1, 2017.

*2009 Amendment:* Chapter 446 in (2) in first sentence after "30 days" substituted "from the date of the written decision" for "after the decision". Amendment effective May 5, 2009.

*Applicability:* Section 25(1), Ch. 446, L. 2009, provided: "(1) [Sections 13, 20, and 22] [76-3-504, 76-3-620, and 76-3-625], concerning adoption of regulations and time references in the regulations, apply upon adoption of regulations under [section 13] [76-3-504] or on May 1, 2010, whichever occurs first."

*2005 Amendment:* Chapter 298 in (2) in first sentence near middle substituted "or deny an application and preliminary plat for a proposed subdivision or a final subdivision" for "or disapprove a proposed preliminary plat or final subdivision". Amendment effective April 19, 2005.

*Applicability:* Section 19(1), Ch. 298, L. 2005, provided: "(1) [This act] applies to subdivision applications submitted on or after [the effective date of this act]." Effective April 19, 2005.

*1995 Statement of Intent:* The statement of intent attached to Ch. 468, L. 1995, provided: "It is the intent of the legislature that the department of commerce, local government assistance division, update its model subdivision rules to minimize the fiscal impacts to local governments in implementing this legislation."

*Applicability:* Section 13, Ch. 468, L. 1995, provided: "Funds in a park fund that exceed $10,000 as of [the effective date of this act] [October 1, 1995] must be used for park land acquisition and initial development. Funds in a park fund up to $10,000 as of [the effective date of this act] [October 1, 1995] may be used for park maintenance in accordance with a formally adopted park plan."

**Case Notes**

*Statute of Limitations in 76-3-625(2) Not Applied to Case Filed Under 76-3-625(1) — District Court Decision Reversed.* Tai Tam, LLC v. Missoula County, 2022 MT 229, 410 Mont. 465, 520 P.3d 312.

*District Court Incorrectly Determined Plain Language of Subdivision Covenant Unambiguous — Related Documents Constituting Instrument Not Reviewed — Negative Easement — Ambiguity Interpreted Against Drafter Not Dispositive — Disputed Facts Whether County Acted Arbitrarily or Capriciously — Doctrine of Impossibility or Impracticality Not Applicable — Attorney Fees Award Reversed.* Lewis & Clark County v. Wirth, 2022 MT 105, 409 Mont. 1, 510 P.3d 1206.

*Final Approval Granted Despite Failure to Meet Conditions of Plat Approval — No Impact on Validity of Title:* In a dispute involving the creation of an easement, the county argued that the underlying transfer of title to the plaintiff from the owner who subdivided the property was invalid because the county's Board of Commissioners (Board) approved the subdivision but the conditions of that approval were never met. The Supreme Court disagreed and found that the plaintiff held proper title. Although not all of the conditions of final plat approval were met, the Board reviewed and granted final approval, which was within the Board's authority under the Montana Subdivision and Platting Act (Act). Likewise, the defendant landowners argued that because no access agreement had ever been reached between them and the owner who subdivided the property as required by the Board, the owner lacked title to convey to the plaintiff. The court disagreed and held that because the defendant landowners failed to pursue the remedies provided for in the Act or to appeal the Board's final plat approval, they had established no basis for the conclusion that the owner lacked title. Yorlum Properties, Ltd. v. Lincoln County, 2013 MT 298, 372 Mont. 159, 311 P.3d 748.

*Requirements for Associational Standing Satisfied — Standing to Challenge City's Subdivision Approval:* After the Missoula City Council approved a subdivision in the Rattlesnake watershed, three neighbors who were members of the North Duncan Drive Neighborhood Association sued to overturn the city's decision, alleging specific injuries as a basis for their petition. The Supreme Court, citing Geil v. Missoula Irrigation District, 2002 MT 269, 312 Mont. 320, 59 P.3d 398, and Mont. Envt'l. Information Center v. Dept. Of Environmental Quality, 1999 MT 248, 296 Mont. 207, 988 P.2d 1236, held that because the three members were injured and could have sued in their own right, the Neighborhood Association had "associational standing" to represent the Association and thereby give the Association standing as an aggrieved party. Heffernan v. Missoula City Council, 2011 MT 91, 360 Mont. 207, 255 P.3d 80, followed in JRN Holdings, LLC v. Dearborn Meadows Land Owners Ass'n, 2021 MT 204, 405 Mont. 200, 493 P.3d 340.

*Substantial Evidence for Upholding County Denial — Conflicts in Evidence Not Controlling:* MM&I submitted an application to the Belgrade City-County Planning Board for approval of its subdivision plat, which the Planning Board approved. However, because of unmitigated impacts, the application was denied by the Gallatin County Board of County Commissioners (Board) and MM&I brought suit, claiming that the Board acted in an arbitrary and capricious manner. After reviewing the evidence before the District Court regarding various types of impacts, the Supreme Court upheld the District Court. Relying upon Hansen v. Granite County, 2010 MT 107, 356 Mont. 269, 232 P.3d 409, the Supreme Court held that as long as there was substantial evidence of unmitigated impacts before the Board, the fact that the evidence was conflicting did not mean that the commissioners acted in an arbitrary or capricious manner. MM&I, LLC v. Bd. of County Comm'rs, 2010 MT 274, 358 Mont. 420, 246 P.3d 1029.

*Subdivision Application Not Arbitrary, Capricious, or Unlawful — Denial of Application Affirmed:* Granite County denied plaintiffs' subdivision application on the basis that there were significant and unmitigable adverse impacts to agriculture, local schools, traffic, and the public health and safety. Plaintiffs appealed. The Supreme Court considered the potential impacts of each of the factors and affirmed. The county's decision to deny the application was not arbitrary, capricious, or unlawful, and the District Court properly affirmed the application denial. Hansen v. Granite County, 2010 MT 107, 356 Mont. 269, 232 P.3d 409.

*Sufficient Showing of Alleged Injury to Confer Standing by Adjacent Landowner to Challenge Subdivision Plat:* A subdivision developer claimed that landowners with property in the area of the proposed subdivision lacked standing to challenge the City Commission's approval of the subdivision plat. The District Court disagreed, and on appeal the Supreme Court affirmed. The parties conceded that one landowner's property was contiguous to the proposed subdivision, and that landowner averred that the subdivision would affect the enjoyment of his property, given that: (1) the area of the subdivision was prone to flooding and had potential to change the channel of a nearby stream; (2) dense development and accompanying storm water runoff would potentially disturb natural recharge of the aquifer and could adversely impact his water supply; and (3) alleged impacts to wildlife habitat and wetlands and increased noise, traffic, and light pollution would result in a decrease in his property values. The landowner's allegations of potential injury were sufficiently distinguishable from potential injury to the general public to confer standing. Additionally, the standing of any one of the landowners allowed the suit to go forward because all the landowners sought to void the preliminary plat. Aspen Trails Ranch, LLC v. Simmons, 2010 MT 79, 356 Mont. 41, 230 P.3d 808. See also Clinton v. City of N.Y., 524 US 417 (1998), and Mont. Envtl. Information Center v. Dept. of Environmental Quality, 1999 MT 248, 296 Mont. 207, 988 P.2d 1236.

*Application of Proper Standard of Review of Summary Judgment on Subdivision Decision:* The District Court granted defendants summary judgment absent a material fact regarding whether plaintiff's subdivision review was properly denied. Plaintiff contended that the court applied an abuse of discretion standard rather than the arbitrary or capricious standard required under 76-3-625. The Supreme Court disagreed. The District Court provided a wealth of reasoning for its decision and noted that clear and convincing evidence supported the decision to deny plaintiff's subdivision proposal. Overwhelming evidence and the absence of disputed fact entitled defendants to summary judgment on the issue, and the District Court was affirmed. Richards v. Missoula County, 2009 MT 453, 354 M 334, 223 P3d 878 (2009), followed in Richards v. Missoula County, 2012 MT 236, 366 Mont. 416, 288 P.3d 175.

*Inapplicability of Appeal Period Absent Application for Subdivision Review:* The 30-day period for appealing a governing body's approval or denial of a subdivision does not apply to a party that never applied for subdivision review. The act of recording and filing certificates of survey with the County Clerk and Recorder is not considered a decision by a governing body approving or denying a subdivision. Mills v. Alta Vista Ranch, LLC, 2008 MT 214, 344 M 212, 187 P3d 627 (2008).

*Complaint in Possession of Clerk of Court Within Thirty Days of Approval of Preliminary Subdivision Plat Considered Timely Despite Filing After Thirty Days:* An aggrieved party may appeal the approval of a preliminary subdivision plat to the District Court within 30 days of the date when a governing body conditionally approves the plat. Sanders County Commissioners approved a preliminary plat on March 30, so a timely appeal was required on or before April 29, 2004. Plaintiffs' attorney delivered a complaint to UPS in Missoula on April 28 for overnight delivery. UPS tracking information showed that the complaint was delivered to the Sanders

County Clerk of the District Court on April 29, but the clerk did not stamp the complaint as filed until May 3. Defendant asserted that the complaint was filed after the 30-day appeal period, and the District Court agreed but addressed the merits nevertheless. On appeal, the Supreme Court held that because the undisputed evidence showed that the clerk received the complaint on April 29, the appeal was timely regardless of the date that the complaint was stamped as filed. Fielder v. Bd. of County Comm'rs, 2007 MT 118, 337 M 256, 162 P3d 67 (2007). See also Cintron v. Union Pac. RR Co., 813 F2d 917 (9th Cir. 1987), and Sheviakov v. I.N.S., 237 F3d 1144 (9th Cir. 2001).

*City Council Minutes and Testimony of Its Members Inadmissible to Show Cause for Denial of Subdivision Approval:* Because the City Council violated 76-3-620 by failing to issue a written statement of the reasons and evidence for denying a subdivision approval, it could not use the minutes of its meeting on the subject and the testimony of its members to explain the denial. The minutes were not the equivalent of a written statement and evidence of them was properly excluded by the District Court. The testimony of the City Council members constituted after-the-fact opinions that were not properly part of the record. Kiely Constr. v. Red Lodge, 2002 MT 241, 312 M 52, 57 P3d 836 (2002), followed in MM&I, LLC v. Bd. of County Comm'rs, 2010 MT 274, 358 Mont. 420, 246 P.3d 1029.

*Damages for City's Wrongful Delay in Approving Preliminary Subdivision Plat:* Plaintiff subdivider's certified valuation analyst presented evidence that because of the city's delay of its decision on an application for preliminary plat approval, the subdivider lost investment value of funds, and the subdivider testified that its property was devalued because of a decline in market value and that the subdivider incurred costs from the delay and suffered lost future investment value. The city claimed that the damages award should be modified. The Supreme Court concluded that the conditional plat approval ordered by the court should not eliminate or reduce the damages award and that it was not error for the District Court to decline to adjust the award. Kiely Constr. v. Red Lodge, 2002 MT 241, 312 M 52, 57 P3d 836 (2002).

*Evidence of Negotiation and Agreement Between Subdivider and City Offered for Purpose Other Than to Show Liability or Validity of Claim:* In a suit by a developer over conditions that the City Council attached to its preliminary subdivision plat approval, Rule 408, M.R.Ev. (Title 26, ch. 10), did not bar testimony regarding settlement negotiations and the resulting subdivision improvement agreement because under 76-3-608, the City Council was required to consult with the developer and give due weight and consideration to the expressed preference of the developer and was thus required to negotiate. The Supreme Court also stated that Rule 408 excludes only evidence offered to prove liability or the validity of a claim or amount and does not require exclusion when the evidence is offered for another purpose and that, in this case, the evidence was offered to show the arbitrary and capricious nature of the City Council's decision. Thus, the evidence fell under the exception clause of the rule. Kiely Constr. v. Red Lodge, 2002 MT 241, 312 M 52, 57 P3d 836 (2002).

*Immunity of Council Members From Suit Relating to Approval or Denial of Subdivision Plat Application by City Council:* A legislative act is an action by a legislative body that results in the creation of law or declaration of public policy. An administrative act is an action taken in the execution of a law or public policy. The approval or denial of a subdivision plat application is an administrative act. Therefore, neither the governmental entity nor a member of it who acts for the entity is immune under 2-9-111 from suit based on the approval or denial. However, in this case, all the claims alleged by the developer suing over the conditions that the City Council attached to its approval of the preliminary plat application related to actions performed by City Council members acting as the City Council. Therefore, under 2-9-305, the individual Council members were immune from suit. Kiely Constr. v. Red Lodge, 2002 MT 241, 312 M 52, 57 P3d 836 (2002).

*Retroactive Application of Ordinances to Application for Plat Approval:* A provision of 76-3-501 stating that review and approval or disapproval of a subdivision may occur only under regulations in effect at the time of an application for preliminary plat approval expressly precluded the retroactive application of the city's development code to the developer's application for approval. (See 2005 amendments to 76-3-501 and 76-3-604.) The District Court properly ruled that the code could not be retroactively applied to the application and excluded evidence of the code in the developer's suit for attaching conditions to the preliminary approval. Kiely Constr. v. Red Lodge, 2002 MT 241, 312 M 52, 57 P3d 836 (2002).

*Standard for Relief in District Court:* This section's provision for appeal to the District Court by a party aggrieved by a governing body's decision to approve, conditionally approve, or disapprove a proposed preliminary plat or final plat is not rendered nugatory by the fact that the section does not specifically prescribe the relief that may be granted. The relief or disposition depends on the facts and circumstances of each case, and the plain language of the section grants the District Court the authority to fashion an appropriate remedy. The Supreme Court declined to fashion relief limits out of thin air. The Supreme Court affirmed the District Court's ruling that denial of the preliminary plat application be vacated and that the previous conditionally approved preliminary plat application be reinstated. Kiely Constr. v. Red Lodge, 2002 MT 241, 312 M 52, 57 P3d 836 (2002).

*Standard of Review by Supreme Court — Test:* The standard of review of a District Court ruling under this section's provision for appeal to the District Court by a party aggrieved by a governing body's decision to approve, conditionally approve, or disapprove a proposed preliminary plat or final plat is whether the record establishes that the governing body acted arbitrarily, capriciously, or unlawfully. A reversal is not permitted merely because the record contains inconsistent evidence or evidence that might support a different result. The decision must appear to be random, unreasonable, or seemingly unmotivated, based on the record. Kiely Constr. v. Red Lodge, 2002 MT 241, 312 M 52, 57 P3d 836 (2002).

*Unlawful Delay, Use of Out-of-Date Regulations, Imposition of Conditions, and Failure to Issue Written Findings Explaining Denial of Application:* The city approved a preliminary application for plat approval, subject to 26 conditions imposed by the city, and the developer sued the city for imposing the conditions. The District Court did not err in determining that the city acted arbitrarily, capriciously, and unlawfully. The city did not timely act on the application for preliminary plat approval and used out-of-date regulations to approve the application subject to conditions, the conditions included unlawful conditions, and the city failed to issue written findings explaining the denial when it denied the application. Kiely Constr. v. Red Lodge, 2002 MT 241, 312 M 52, 57 P3d 836 (2002).

*Zoning Requirements Irrelevant to Grant or Denial of Preliminary Plat Approval:* Evidence of zoning requirements was not relevant to whether the City Council was arbitrary and capricious when it acted on a request for preliminary plat approval and was properly excluded in the developer's suit for attaching conditions to the approval. Kiely Constr. v. Red Lodge, 2002 MT 241, 312 M 52, 57 P3d 836 (2002).

*Reversal of Denial of Preliminary Injunction — Consideration of Underlying Issues Precluded:* On appeal of the merits of a preliminary injunction, plaintiff requested that the Supreme Court provide substantive guidance by addressing several underlying issues regarding interaction between injunction laws and subdivision statutes, as well as the likelihood of plaintiff to prevail on issues still pending in District Court. In determining the merits of a preliminary injunction on appeal, it is not the province of either the District Court or the Supreme Court to make final determinations on matters that might arise upon a trial on the merits. The request for substantive guidance was declined. Sweet Grass Farms, Ltd. v. Bd. of County Comm'rs, 2000 MT 147, 300 M 66, 2 P3d 825, 57 St. Rep. 576 (2000). See also Porter v. K&S Partnership, 192 M 175, 627 P2d 836 (1981), and Dreyer v. Bd. of Trustees of Mid-Rivers Tel. Co-op, Inc., 193 M 95, 630 P2d 226 (1981).

*Showing of Irrevocably Closed Mind as Proof of Prejudice by Administrative Decisionmaker:* Madison River R.V. Ltd. (RV) sought to build a recreational vehicle park in Ennis. Prior to a hearing before the Ennis Town Council, RV requested in writing that one of the council members recuse himself, based on his alleged bias against the project. The request was denied without objection by the other council members, and RV's application for the park was also denied. On appeal, RV contended that the council member's participation in the council's deliberations was error, citing the principle that one who makes decisions in a judicial or quasi-judicial capacity must be free from bias. However, no authority was cited that the principle applies to elected members of a city council. Pursuant to Fed. Trade Comm'n v. Cement Institute, 333 US 683, 92 L Ed 1010, 68 S Ct 793 (1948), in order to prevail on a claim of prejudice or bias against an administrative decisionmaker, the petitioner must show that the decisionmaker had an irrevocably closed mind on the subject under investigation or adjudication. Here, RV failed to establish that the council member's mind was irrevocably closed. The District Court's determination that the town council was not required to disqualify the member from voting and that the council's decision should not be vacated because of its failure to disqualify the member in question was affirmed. Madison River R.V. Ltd. v. Ennis, 2000 MT 15, 298 M 91, 994 P2d 1098, 57 St. Rep. 84 (2000).

*Standard of Review — Denial of Preliminary Subdivision Application Not Arbitrary, Capricious, or Unlawful:* A preliminary plat of a proposed subdivision is subject to the review of the governing body to determine whether the plat conforms to the master growth plan (now growth policy) adopted for the area and the plat's effect on the public health, safety, and welfare. The standard of review applied as to whether the review was conducted correctly is whether the record establishes that the governing body acted arbitrarily, capriciously, or unlawfully. Here, the record established that the Ennis Town Council heard evidence that a proposed recreational vehicle park did not conform to the goals of the Ennis comprehensive plan (now growth policy) and that the proposed park posed a threat to the health, safety, and welfare of the townspeople of Ennis. The decision to deny the preliminary subdivision application was not arbitrary, capricious, or unlawful and was properly affirmed. Madison River R.V. Ltd. v. Ennis, 2000 MT 15, 298 M 91, 994 P2d 1098, 57 St. Rep. 84 (2000). See also N. Fork Preservation Ass'n v. Dept. of State Lands, 238 M 451, 778 P2d 862 (1989).

*Town Council's Findings Timely Filed and Properly Part of Record for Court Review:* Madison River R.V. Ltd. (RV) applied to build a recreational vehicle park in Ennis, but the application was denied by the Ennis Town Council. RV appealed to the District Court, but the council's findings were filed 15 days after RV filed the appeal, which RV contended was not timely. Under 76-3-620, a decision to deny a subdivision application must include a written statement giving the reason for the denial, but the 30 days allowed for appeal under this section do not begin to run until the council members sign the written findings. The fact that RV's notice of appeal was filed prematurely did not render untimely the written statements of reasons for denial of the application for plat approval. Madison River R.V. Ltd. v. Ennis, 2000 MT 15, 298 M 91, 994 P2d 1098, 57 St. Rep. 84 (2000).

**Law Review Articles**

The Role of Fish and Wildlife Evidence in Local Land Use Regulation, Mudd, Dunning, & Hayes, 30 Pub. Land & Resources L. Rev. 107 (2009).

# CHAPTER 4
## STATE REGULATION OF SUBDIVISIONS

**Chapter Administrative Rules**

Title 17, chapter 36, ARM Subdivisions — on-site subsurface wastewater treatment.

**Chapter Case Notes**

*Unenforceability of Buy-Sell Agreement on Grounds of Impossibility or Impracticality of Performance — Requiring Performance of Contract With Potential for Environmental Degradation Unconstitutional:* Cape-France Enterprises (Cape-France) entered a buy-sell agreement with Peed (now deceased) and Moore to purchase some property near Bozeman for a subdivision. Before the subdivision could be completed, water needed to be procured for the site. According to the agreement, as buyers, Peed and Moore were responsible to bring water to the property, but because city water was not available, a well needed to be drilled. However, the presence of a pollution plume was discovered near the land. After the subdivision process was commenced, the Department of Environmental Quality notified Cape-France that: (1) the plume may have advanced under the property; (2) a subdivision would not be approved unless a well was drilled and tested; (3) a well could be drilled, but if testing showed pollution in the water, treatment would be extensive; and (4) if drilling or pumping of the water caused expansion of the pollution, then Cape-France, as owner of the property, would be held liable for cleanup costs. On cross-motions for summary judgment, the District Court held that the buy-sell agreement could be rescinded on the basis of mutual mistake of fact and impossibility or impracticality of performance and that specific performance would not be granted. The Supreme Court affirmed. A court may determine that an act is impossible in legal contemplation when it is not practicable, when the act can be done only at an excessive, unreasonable, and unbargained-for cost. The doctrine of impossibility or impracticability is applied when, aside from the object of a contract being unlawful, the public policy underlying the strict performance of the contract is outweighed by the senselessness of requiring performance. The doctrine is not limited to cases of literal impossibility but may also be applied in cases that present a potential for substantial and unbargained-for damages. In this case, requiring Cape-France to go forward with the performance of the contract when there was a very real possibility of substantial environmental degradation and resultant financial liability for cleanup was not in the public interest or in the interests of the contracting parties and was not in accord with the guarantee of a clean and healthful environment in Art. II, sec. 3, Mont. Const., or the mandate to maintain and improve a clean and healthful environment for present and future generations in Art. IX, sec. 1, Mont. Const. Thus, rescission of the contract was proper. Cape-France Enterprises v. Estate of Peed, 2001 MT 139, 305 M 513, 29 P3d 1011 (2001). See also Smith v. Zepp, 173 M 358, 567 P2d 923 (1977), and Mont. Envtl. Information Center v. Dept. of Environmental Quality, 1999 MT 248, 296 M 207, 988 P2d 1236 (1999).

**Chapter Attorney General's Opinions**

*Subsequent Sale of Parcel Originally Used as Lien Security — State and Local Regulation Inapplicable:* The provisions of Title 76 relating to local and state regulation of subdivisions do not apply to the subsequent sale of an undivided parcel that was originally used as security for a construction lien pursuant to 76-3-201, and nothing in the Montana Subdivision and Platting Act requires that the parcel be reviewed or surveyed upon subsequent sale. 42 A.G. Op. 101 (1988).

**Chapter Law Review Articles**

Murky Waters: Private Action and the Right to a Clean and Healthful Environment, Naber, 64 Mont. L. Rev. 357 (2003).

Constitutionalizing the Environment: The History and Future of Montana's Environmental Provisions, Thompson, 64 Mont. L. Rev. 157 (2003).

**Chapter Collateral References**

Subdivision Review Program, Montana Department of Environmental Quality, https://deq.mt.gov/water/Programs/eng.

## Part 1
## Sanitation in Subdivisions

**Part Administrative Rules**

Title 17, chapter 36, ARM Subdivisions — on-site subsurface wastewater treatment.

**Part Case Notes**

*Clerk Under No Clear Duty to Record Deed — Mandamus Erroneously Granted:* Where the plaintiff attempted to record a deed to a 5-acre parcel of land without the removal or approval of sanitary restrictions by the county health department (which the court held was estopped from withholding its approval of a disposal permit) but was refused by the Clerk and Recorder, the District Court erred in granting a Writ of Mandamus ordering the Clerk to file a certificate of survey and record the warranty deed. The Clerk and Recorder was statutorily required to refuse to file the survey and record the deed and lacked any discretion to accept a survey absent compliance with the requirements of 76-4-122. Huttinga v. Pringle, 205 M 482, 668 P2d 1068, 40 St. Rep. 1444 (1983).

*Department Under No Clear Legal Duty to Approve Subdivision — Mandamus Erroneously Granted:* Where the plaintiff applied to the county health department for a disposal permit and was not informed by the county for a period of 6 years whether the permit would be issued, the District Court erred in granting a Writ of Mandamus directing the Department of Health and Environmental Sciences (now Department of Environmental Quality) to certify that the deeded property was not subject to sanitary restrictions. No application for such certification had ever been submitted to the Department, and it therefore had no official knowledge of the plaintiff's disposal system. Absent an appropriate application to the Department, there is no factual or statutory basis for holding that the Department had violated a clear legal duty. Huttinga v. Pringle, 205 M 482, 668 P2d 1068, 40 St. Rep. 1444 (1983).

*Regulatory Powers Regarding Subdivision Control:* The 1973 Montana Subdivision and Platting Act vests control of subdivisions in local government units. The Department of Health and Environmental Sciences (now Department of Environmental Quality) has no regulatory functions regarding subdivisions outside water supply, sewage, and solid waste disposal. Mont. Wilderness Ass'n v. Bd. of Health & Environmental Sciences, 171 M 477, 559 P2d 1157 (1976).

**Part Attorney General's Opinions**

*Review of Certificate of Survey:* The Department of Health and Environmental Sciences (now Department of Environmental Quality) has authority under Title 76, ch. 4, part 1, to review certificates of survey. 38 A.G. Op. 81 (1980).

*Subdivision Remainders:* The Department of Health and Environmental Sciences (now Department of Environmental Quality) may require that plats show the remainder of land less than 20 acres left after the segregation of subdivided parcels and has authority to review such remainders under Title 76, ch. 4, part 1. 37 A.G. Op. 74 (1977).

*Local Sanitary Regulations:* County Commissioners may adopt reasonably stricter sanitation regulations for subdivisions than those adopted by the Department of Health and Environmental Sciences (now Department of Environmental Quality). 35 A.G. Op. 39 (1973).

**Part Collateral References**

Multi-State Comparison: Onsite Wastewater Treatment System Regulations, Mont. Leg. Serv. Div. (2020).

Senate Joint Resolution 3: Study of Alternative On-Site Wastewater Systems: Final Report to the 67th Montana Legislature, Local Government Interim Committee (2020).

### 76-4-101. Public policy.

**Compiler's Comments**

*Severability Clause:* Section 9, Ch. 509, L. 1973, was a severability clause.

**Case Notes**

*Regulatory Powers Regarding Subdivision Control:* The 1973 Montana Subdivision and Platting Act vests control of subdivisions in local government units. The Department of Health and Environmental Sciences (now Department of Environmental Quality) has no regulatory functions regarding subdivisions outside water supply, sewage, and solid waste disposal. Mont. Wilderness Ass'n, v. Bd. of Health & Environmental Sciences, 171 M 477, 559 P2d 1157 (1976).

**Attorney General's Opinions**

*Local Government Required to Adopt Subdivision Water Supply and Sewage and Solid Waste Disposal That Conform to State Regulations:* Unless a local governing body makes specific findings to support the conclusion that more stringent rules are required to protect public health, a local governing body must adopt subdivision regulations for water supply and sewage and solid waste disposal that are as stringent as the state standards adopted by the Department of Environmental Quality under Title 76, ch. 4, part 1. The local government may incorporate the state regulations by reference, but the actual method of adoption is up to the discretion of the local government. 49 A.G. Op. 7 (2001).

*Review When Intended Use Changes — Condominiums:* The Department's authority to review condominiums includes condominiums to be built on parcels of land previously approved by the Department for uses not including condominiums. 39 A.G. Op. 28 (1981).

*Condominiums as Subdivisions:* The phrase "regardless of size, which provides permanent multiple space for recreational camping vehicles or mobile homes" only applies to the antecedent "area" and not "condominiums". Condominium is an independent class expressly included in the definition of subdivision whether or not constructed on a parcel of land containing 20 acres or more. Therefore, condominiums are subject to review by the Department of Health and Environmental Sciences (now Department of Environmental Quality) under the provisions of this chapter. The clause "sale, rent, lease, or other conveyance of one or more parts of a building" in 76-3-204 (now repealed) refers to something other than condominiums and thus does not provide an exemption for condominiums. 39 A.G. Op. 28 (1981).

### 76-4-102. Definitions.

**Compiler's Comments**

*2023 Amendments — Composite Section:* Section 6, Ch. 353, L. 2023, in definition of adequate municipal facilities at end inserted "including development plans approved by the department pursuant to 75-6-130"; and made minor changes in style. Amendment effective May 2, 2023.

Section 2, Ch. 611, L. 2023, inserted definition of independent reviewer; and made minor changes in style. Amendment effective October 1, 2023.

Section 2, Ch. 673, L. 2023, in definition of well isolation zone at end inserted "or a smaller, site-specific radius as approved by the department". Amendment effective May 19, 2023.

Section 2, Ch. 752, L. 2023, in definition of certifying authority at end substituted "76-4-104(7)" for "76-4-104(6)". Amendment effective May 22, 2023.

*Applicability:* Section 11, Ch. 611, L. 2023, provided: "[This act] applies to applications received on or after January 1, 2024."

*Saving Clause:* Section 9, Ch. 611, L. 2023, was a saving clause.

*Nonseverability:* Section 10, Ch. 611, L. 2023, was a nonseverability clause.

*2021 Amendment:* Chapter 419 inserted definition of regional authority; in definition of subdivision near end after "townhouse, or any" substituted "parcel" for "area" and after "that provides" substituted "two or more permanent spaces" for "permanent multiple space"; and made minor changes in style. Amendment effective October 1, 2021.

*2019 Amendment:* Chapter 80 inserted definitions of adequate county water and/or sewer district facilities, certifying authority, proposed drainfield mixing zone, proposed well isolation zone, and sewage; in definition of subdivision near middle after "any resubdivision" substituted "any condominium, townhome, or townhouse, or any area" for "and any condominium or area"; and made minor changes in style. Amendment effective July 1, 2019.

*2017 Amendment:* Chapter 261 inserted definition of individual water system; and made minor changes in style. Amendment effective October 1, 2017.

*2013 Amendment:* Chapter 195 inserted definition of well isolation zone. Amendment effective October 1, 2013.

*Saving Clause:* Section 5, Ch. 195, L. 2013, was a saving clause.

*2001 Amendment:* Chapter 280 inserted definitions of adequate municipal facilities, mixing zone, and public sewage system or public sewage disposal system; substituted extension of a public sewage system for extension of public sewage disposal system as defined term; in definition of public water supply system at beginning substituted "has the meaning provided in 75-6-102" for "or "public sewage disposal system" means, respectively, a water supply or sewage disposal system that serves 10 or more families or 25 or more persons for at least 60 days out of the calendar year"; in definition of sewer service line at end substituted "public sewage system or to an extension of a public sewage system" for "public sewer system or extension of a system"; substituted definition of solid waste for former definition that read: ""Solid wastes" means all putrescible and nonputrescible solid wastes (except body wastes), including garbage, rubbish, street cleanings, dead animals, yard clippings, and solid market and solid industrial wastes"; in definition of water service line at end substituted "public water supply system or to an extension of a public water supply system" for "public water system or extension of a system"; and made minor changes in style. Amendment effective April 20, 2001.

*Applicability:* Section 18(1), Ch. 280, L. 2001, provided that [this act] applies to subdivision applications submitted to the reviewing authority after [the effective date of this act]. Effective April 20, 2001.

*1995 Amendment:* Chapter 418 in definition of Board substituted "board of environmental review" for "board of health and environmental sciences"; in definition of Department substituted "department of environmental quality" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1985 Amendments:* Chapter 490 inserted definitions of registered professional engineer, registered sanitarian, and reviewing authority.

Chapter 592 inserted definitions of extension of public sewage disposal system, extension of public water supply system, sewer service line, and water service line.

**Case Notes**

*Condominiums as Subdivision — Unreasonable Reliance by Developers on County Opinion as to Review Requirements:* The District Court awarded damages against the county in an action by condominium developers who claimed they reasonably relied to their detriment on the county's opinion that the condominiums would not be subject to subdivision review. The Supreme Court reversed after finding that the County Attorney's office maintained no confidential or professional relationship with the developers—therefore, the developers' reliance on the county's opinion was unreasonable in light of: (1) the state's determination that review would be necessary; (2) the fact that developers were represented by their own counsel; (3) the inclusion of condominiums in the definitions of "subdivision" in 76-3-103 and this section; and (4) the actual opposition to the lack of subdivision review expressed by opponents of the project, who ultimately filed suit. Young v. Flathead County, 232 M 274, 757 P2d 772, 45 St. Rep. 1047 (1988).

*Clerk Under No Clear Duty to Record Deed — Mandamus Erroneously Granted:* Where the plaintiff attempted to record a deed to a 5-acre parcel of land without the removal or approval of sanitary restrictions by the county health department (which the court held was estopped from withholding its approval of a disposal permit) but was refused by the Clerk and Recorder, the District Court erred in granting a Writ of Mandamus ordering the Clerk to file a certificate of survey and record the warranty deed. The Clerk and Recorder was statutorily required to refuse to file the survey and record the deed and lacked any discretion to accept a survey absent compliance with the requirements of 76-4-122. Huttinga v. Pringle, 205 M 482, 668 P2d 1068, 40 St. Rep. 1444 (1983).

*Definition of "Plat" — Applicability:* Whenever the meaning of a word or phrase is defined in any part of the code, such definition is applicable to the same word or phrase wherever it occurs, except where a contrary intention plainly appears. The definition of "plat" found in 76-3-103 of the Montana Subdivision and Platting Act is clearly applicable to Title 76, ch. 4, part 1, on sanitation in subdivisions. The Department of Health and Environmental Sciences' (now Department of Environmental Quality) contention that it has broad authority in defining the term "plat" by virtue of the lack of a statutory definition under the sanitation in subdivisions law is without merit. (Case considered under pre-1977 law.) State ex rel. Dept. of Health & Environmental Sciences v. Lasorte, 182 M 267, 596 P2d 477, 36 St. Rep. 1126 (1979).

### Attorney General's Opinions

*Review When Intended Use Changes — Condominiums:* The Department's authority to review condominiums includes condominiums to be built on parcels of land previously approved by the Department for uses not including condominiums. 39 A.G. Op. 28 (1981).

*Condominiums as Subdivisions:* The phrase "regardless of size, which provides permanent multiple space for recreational camping vehicles or mobile homes" only applies to the antecedent "area" and not "condominiums". Condominium is an independent class expressly included in the definition of subdivision whether or not constructed on a parcel of land containing 20 acres or more. Therefore, condominiums are subject to review by the Department of Health and Environmental Sciences (now Department of Environmental Quality) under the provisions of this chapter. The clause "sale, rent, lease, or other conveyance of one or more parts of a building" in 76-3-204 (now repealed) refers to something other than condominiums and thus does not provide an exemption for condominiums. 39 A.G. Op. 28 (1981).

## 76-4-103. What constitutes subdivision.

### Compiler's Comments

*2021 Amendment:* Chapter 419 in first sentence substituted "The plat for a subdivision must show all parcels" for "A subdivision consists of only those parcels of less than 20 acres that have been created by a division of land, and the plat must show all of the parcels", and inserted second sentence concerning a parcel that is 20 acres or more in size, exclusive of public roadways, not being subject to review. Amendment effective October 1, 2021.

*2019 Amendment:* Chapter 80 near beginning after "A subdivision" substituted "consists of" for "shall comprise" and in second sentence before "building" inserted "single"; and made minor changes in style. Amendment effective July 1, 2019.

*1985 Amendment:* Inserted last sentence providing that rental or lease of parts of building, structure, or existing or proposed improvement is not a subdivision under state regulation.

### Administrative Rules

ARM 17.36.101 Definitions.

## 76-4-104. Rules for administration and enforcement.

### Compiler's Comments

*2023 Amendments — Composite Section:* Section 3, Ch. 611, L. 2023, in (5)(a) near middle substituted "local department, local board of health, or independent reviewer" for "local department, or board of health"; inserted (5)(b) concerning prequalified independent reviewers; inserted (13) concerning the review of subdivisions by independent reviewer; inserted (14) concerning independent reviewers and conflicts of interest; inserted (15) concerning independent reviewer's compliance with public information requests; inserted (16) concerning documents completed by independent reviewer; and made minor changes in style. Amendment effective October 1, 2023.

Section 3, Ch. 673, L. 2023, in (12)(a) at beginning inserted exception clause; inserted (12)(b) concerning water well locations; and made minor changes in style. Amendment effective May 19, 2023.

Section 3, Ch. 752, L. 2023, inserted (3) concerning storm drainage review requirements; inserted (7)(n) concerning rules for construction details of wastewater systems; inserted (7)(o) concerning rules for simplified methods for storm water reviews; inserted (7)(p) concerning exempting previously approved facilities; and made minor changes in style. Amendment effective May 22, 2023.

*2023 Amendment of Administrative Rule:* Section 1, Ch. 239, L. 2023, directed the Department of Environmental Quality to amend ARM 17.36.328. See 2023 Session Law for amendment made by sec. 1, Ch. 239, L. 2023. Effective April 24, 2023.

*Direction to Department of Environmental Quality:* Section 1, Ch. 518, L. 2023, provided: "The department of environmental quality, under its authority to promulgate rules pursuant to 75-5-305 and 76-4-104, shall amend the technical standards found in DEQ4 and all necessary administrative rules to allow for a new subsurface wastewater treatment system in an area that has been cut or filled.

(2) The amendments to DEQ4 and all necessary administrative rules required in subsection (1) must provide that soil testing conditions and 4 feet of natural soil separation to a limiting layer are required. Cut or fill may not be used to provide the required vertical or horizontal separation under rule or circular." Effective May 18, 2023.

*Applicability:* Section 11, Ch. 611, L. 2023, provided: "[This act] applies to applications received on or after January 1, 2024."

*Saving Clause:* Section 9, Ch. 611, L. 2023, was a saving clause.

*Nonseverability:* Section 10, Ch. 611, L. 2023, was a nonseverability clause.

*2021 Amendments — Composite Section:* Chapter 49 inserted (8) concerning review and approval of experimental wastewater system components; and made minor changes in style. Amendment effective October 1, 2021.

Chapter 419 in (6)(a)(ii) near beginning after "number of proposed" deleted "dwelling"; in (6)(e) near beginning of first sentence after "to ensure proper drainage ways" inserted clause concerning rules not requiring storm water review and inserted last sentence concerning no relief from duty to comply; in (6)(i)(i) at beginning after "A proposed" inserted "drainfield", near middle after "50 feet inside the" deleted "proposed", and after "outside the boundaries of the" deleted "proposed"; inserted (7) concerning proposed drainfield mixing zones and proposed well isolation zones; and made minor changes in style. Amendment effective October 1, 2021.

*2019 Amendment:* Chapter 80 in (3)(b)(ii) near beginning after "may be certified" inserted "by the department" and in middle after "existing municipal" inserted "or county water and/or sewer district"; in (6)(i) in seven places inserted "proposed"; in (6)(k) near middle substituted "subdivision application under this chapter" for "preliminary or final plan or plat"; inserted (6)(m) regarding eligibility requirements for municipalities and county water and/or sewer districts to qualify as a certifying authority under the provisions of 76-4-127; and made minor changes in style. Except for subsection (6)(m), amendment effective July 1, 2019. Subsection (6)(m) effective January 1, 2020.

*2017 Amendments — Composite Section:* Chapter 261 in (6)(i) in second sentence after "mixing zone" inserted "or a well isolation zone for an individual water system well that is a minimum of 50 feet inside the subdivision boundary" and at end inserted last sentence regarding no intention by section to prohibit improvements to public sewage systems within a specific type of well isolation zone. Amendment effective October 1, 2017.

Chapter 344 in (3)(a) near beginning after "subdivisions" inserted "consistent with 76-4-114"; deleted former (7) that read: "(7) If the reviewing authority is a local department or board of health, it shall notify the department of its recommendation for approval or disapproval of the subdivision not later than 45 days from its receipt of the subdivision application. The department shall make a final decision on the subdivision within 10 days after receiving the recommendation of the local reviewing authority, but not later than 55 days after the submission of a complete application, as provided in 76-4-125"; and made minor changes in style. Amendment effective October 1, 2017, and terminates September 30, 2019.

*Applicability:* Section 12, Ch. 344, L. 2017, provided: "[This act] applies to subdivision applications submitted on or after October 1, 2017."

*2013 Amendment:* Chapter 195 in (6)(i) inserted "and a proposed well isolation zone", in two places after "where the drainfield" inserted "or well", and after "drainfield mixing zone" inserted "or well isolation zone"; and made minor changes in style. Amendment effective October 1, 2013.

*Saving Clause:* Section 5, Ch. 195, L. 2013, was a saving clause.

*2011 Amendment:* Chapter 83 inserted (6)(i) relating to mixing zones; and made minor changes in style. Amendment effective March 30, 2011.

Chapter 217 in (6)(k) inserted last sentence requiring evidence in the form of certification from health department; and made minor changes in style. Amendment effective April 18, 2011.

*Code Commissioner Correction — 2011 Codification:* This section was amended by Chapters 83 and 217, Laws of 2011. The amendments to 76-4-104(7) made by Ch. 217 that reduced the number of days allowed for the review of a subdivision from 50 days to 45 days and for the department's final decision from 60 days to 55 days were erroneously omitted in the published MCA.

*Applicability:* Section 3, Chapter 83, L. 2011, provided: "[This act] applies to subdivision applications received on or after [the effective date of this act]." Effective March 30, 2011.

*2005 Amendment:* Chapter 302 inserted (10) authorizing adoption of rules regarding water and sanitation information. Amendment effective October 1, 2005.

*2001 Amendment:* Chapter 280 throughout section substituted references to subdivisions for references to divisions of land; in (2) near middle of first sentence substituted "subdivisions for various types of public and private water supplies, sewage disposal facilities, storm water drainage ways, and solid waste disposal" for "subdivision plats for various types of water, sewage facilities, and solid waste disposal, both public and private"; at beginning of (3) inserted exception clause; deleted former (3)(a) that read: "(a) divisions of land containing five or fewer parcels, whenever each parcel will contain individual onsite water and sewage disposal facilities"; inserted (3)(b)(i) providing that a local department or board of health may review only certain public water supply systems, public sewage systems, or extensions of or connections to these systems; at beginning of (3)(b)(ii) inserted "A local department or board of health may be certified to review"; in (6)(a) after "copy of the plat" inserted "or certificate of survey subject to review under this part"; in (6)(a)(ii) after "dwelling units" inserted "and structures requiring facilities for water supply or sewage disposal"; in (6)(f) after "including soil" deleted "percolation" and after "testing" deleted "and required percolation rates"; inserted (6)(i) requiring that rules provide criteria for granting waivers and deviations from the standards and technical procedures; in (6)(j) near beginning after "public" substituted "water supply system or a public sewage system" for "sewage disposal system" and near middle after "methods of" inserted "water supply or"; inserted (6)(k) requiring that rules provide for evidence to demonstrate that appropriate easements, covenants, agreements, and management entities have been established; in (7) near beginning after "it shall" substituted "notify the department of its recommendation for approval or disapproval of the subdivision not later than 50 days from its receipt of the subdivision application. The department shall make a final decision on the subdivision within 10 days after receiving the recommendation of the local reviewing authority, but not later than 60 days after the submission of a complete application, as provided in 76-4-125" for "upon approval of a division of land under this part, notify the department of the approval and submit to the department a copy of the approval statement"; in (8) near middle after "rules in effect" substituted "when a complete application is submitted to the reviewing authority" for "at the time plans and specifications are submitted to the department"; in (9) in first sentence near beginning after "deny or condition a" substituted "certificate of subdivision approval" for "certification that a division of land is not subject to sanitary restrictions" and near end after "circumstances of the" deleted "certification"; and made minor changes in style. Amendment effective April 20, 2001.

*Applicability:* Section 18(1), Ch. 280, L. 2001, provided that [this act] applies to subdivision applications submitted to the reviewing authority after [the effective date of this act]. Effective April 20, 2001.

*1995 Amendments:* Chapter 224 inserted (9) concerning denial or condition imposition for sanitary restrictions; and made minor changes in style.

Chapter 471 in (1), near beginning, inserted "subject to the provisions of 76-4-135". Amendment effective April 14, 1995.

*Applicability:* Section 22(3), Ch. 471, L. 1995, provided: "(3) [This act] does not apply to the establishment of fees or public participation requirements."

*1985 Amendments:* Chapter 378 inserted (8) relating to rules used for review of certification or denial of certification of subdivision.

Chapter 490 inserted (3), (4), and (5) requiring review of specific divisions of land and requiring Department to adopt standards and procedures for certification and maintaining certification of subdivisions; in (6)(a) near beginning, changed "department" to "reviewing authority"; and inserted (7) requiring local department or board of health to notify and submit copy of subdivision approval to Department of Health and Environmental Sciences (now Department of Environmental Quality).

*Statement of Intent:* The statement of intent attached to Ch. 378, L. 1985, provided: "It is the intent of the legislature that a subdivision be reviewed under the rules in effect at the time an application for approval of the subdivision is submitted. Neither a local governing body (under the provisions of the Montana Subdivision and Platting Act) nor the department of health and environmental sciences [now department of environmental quality] (under Title 76, chapter 4, part 1) may modify its subdivision rules and apply the modified rules to a subdivision submitted for review when previously existing rules were in effect."

*Statement of Intent:* The statement of intent attached to Ch. 490, L. 1985, provided: "A statement of intent is needed for this bill because it delegates additional rulemaking authority to the department of health and environmental sciences [now department of environmental quality] in section 2 [76-4-104(3) and (4)]. Under the provisions of section 2 [76-4-104(3) and (4)], the department must adopt rules and standards for certifying and maintaining certification to ensure that local boards of health are competent to review those subdivisions described in section 2 [76-4-104(3)]. The rules must provide for department delegation to local boards of health of review of those subdivisions if the department certifies that the local reviewing authority is competent to undertake that review and if the local reviewing authority chooses to do the review."

**Administrative Rules**

Title 17, chapter 36, ARM Subdivisions/On-site subsurface wastewater treatment.

**Case Notes**

*Local Board of Health Not Considered Governing Body Despite Interlocal Agreement:* Despite the fact that a county board of health was created by interlocal agreement, the District Court erred in concluding that a local board of health is considered a governing body by definition under 76-3-103. The Montana Subdivision and Platting Act does not, under 76-3-501 and 76-3-504, authorize local boards of health to adopt and enforce regulations governing sanitation in subdivisions, regardless of size. The authority of a local board of health to regulate subdivisions derives from 50-2-116, not from the Montana Subdivision and Platting Act. Skinner Enterprises, Inc. v. Lewis & Clark County Bd. of Health, 286 M 256, 950 P2d 733, 54 St. Rep. 1398 (1997).

*Review, Not Regulatory, Function Applicable to Local Board of Health Control of Minor Subdivision:* Section 50-2-106, when read in conjunction with this section, does not authorize a local board of health to regulate sanitation in minor subdivisions containing five or fewer parcels. By its plain language, this section delegates to local boards of health the power to review select subdivisions but not the power to promulgate regulations. As a reviewing authority, the board's function is limited to reviewing the proposed water supply, sewage, and solid waste disposal facilities and advising the Department of Environmental Quality of its recommendation for approval or disapproval of the subdivision. However, 50-2-116 explicitly authorizes a local board of health to regulate sewage control and disposal that is not regulated by the Montana Subdivision and Platting Act. The Act limits state sanitation regulation to subdivisions containing parcels of fewer than 20 acres each and precludes regulation of subdivisions in which each parcel of land contains more than 20 acres. Thus, the regulation of sanitation in subdivisions containing parcels of more than 20 acres each is clearly the responsibility of local boards of health. Nevertheless, 76-4-122 requires both state and local approval before filing a subdivision plat with the County Clerk and Recorder, and to hold that approval by the local board of health is a ministerial, nondiscretionary act would render 76-4-122 inoperative. Giving effect to the purpose of all the applicable statutes and examining the legislative history of 50-2-116, the Supreme Court held that the 1991 enactment of 50-2-116(1)(i) revealed a legislative intent to expand, rather than diminish, the authority of local boards of health to regulate subdivision sanitation. Thus, local boards of health have discretionary statutory authority to regulate all subdivisions, regardless of size, notwithstanding the state's authority to regulate certain subdivisions under the Montana Subdivision and Platting Act. Skinner Enterprises, Inc. v. Lewis & Clark County Bd. of Health, 286 M 256, 950 P2d 733, 54 St. Rep. 1398 (1997).

*County Not Acting as State's Agent in Denial of Disposal Permit — Mandamus Erroneously Granted:* Where the plaintiff applied to the county health department for a disposal permit but was not informed for a period of 6 years whether the permit would be granted, the District Court erred in holding that the Department of Health and Environmental Sciences (now Department of Environmental Quality) was estopped from denying the permit by the county's failure to act. There were no statutes or decisions that made the county the agent of the Department at the time of the 1971 permit application. Under the rationale of St. v. District Court, 170 M 15, 550 P2d 382 (1976), the record and statutes show that the county did not act as an agent for the state in the denial of the 1971 application. Huttinga v. Pringle, 205 M 482, 668 P2d 1068, 40 St. Rep. 1444 (1983).

**Attorney General's Opinions**

*Local Government Required to Adopt Subdivision Water Supply and Sewage and Solid Waste Disposal That Conform to State Regulations:* Unless a local governing body makes specific findings to support the conclusion that more stringent rules are required to protect public health, a local governing body must adopt subdivision regulations for water supply and sewage and solid waste disposal that are as stringent as the state standards adopted by the Department of Environmental Quality under Title 76, ch. 4, part 1. The local government may incorporate the state regulations by reference, but the actual method of adoption is up to the discretion of the local government. 49 A.G. Op. 7 (2001).

*County Commissioners Authorized to Impose Stricter Standards:* County Commissioners may adopt reasonably stricter sanitation regulations for subdivisions than those adopted by the Department of Health and Environmental Sciences (now Department of Environmental Quality). 35 A.G. Op. 39 (1973).

### 76-4-105. Subdivision fees — subdivision program funding.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 4, Ch. 611, L. 2023. Amendment effective October 1, 2023.

*Applicability:* Section 11, Ch. 611, L. 2023, provided: "[This act] applies to applications received on or after January 1, 2024."

*Saving Clause:* Section 9, Ch. 611, L. 2023, was a saving clause.

*Nonseverability:* Section 10, Ch. 611, L. 2023, was a nonseverability clause.

*2021 Amendment:* Chapter 419 inserted (3) concerning local reviewing authority fee. Amendment effective October 1, 2021.

*2019 Amendment:* Chapter 80 in (1) at end of second sentence deleted "or, if applicable, to another reviewing authority for deposit in the general fund of the reviewing authority's jurisdiction"; and made minor changes in style. Amendment effective July 1, 2019.

*2001 Amendment:* Chapter 280 in (1) in first sentence of introductory clause after "actual costs" substituted "for reviewing plats and subdivisions, conducting inspections pursuant to 76-4-107, and conducting enforcement activities pursuant to 76-4-108" for "to the department in reviewing plats and subdivisions", in second sentence after "applicant" deleted "for plat or subdivision review", and after "department" deleted "for deposit in the state special revenue fund", and at end of third sentence inserted "conducting inspections pursuant to 76-4-107, and conducting enforcement activities pursuant to 76-4-108"; in (2) after "local" substituted "reviewing authority for reviews conducted pursuant to 76-4-104, inspections conducted pursuant to 76-4-107, and enforcement activities conducted pursuant to 76-4-108" for "governing body, as provided in 76-4-128"; deleted former (3) and (4) that read: "(3) A fee as described in this section is not required for the review of subdivisions in which divisions are made for the purpose of relocating common boundary lines unless the division will result in the installation of additional water supply or sewage disposal facilities.

(4) Fees collected by the department under this section must be deposited in the account in the state special revenue fund provided for in 76-4-132"; and made minor changes in style. Amendment effective April 20, 2001.

*Applicability:* Section 18(1), Ch. 280, L. 2001, provided that [this act] applies to subdivision applications submitted to the reviewing authority after [the effective date of this act]. Effective April 20, 2001.

*1993 Amendment:* Chapter 514 in (1), in second sentence before "fund", substituted "special revenue" for "general"; in (2), after "fees", substituted "to" for "between" and after "body" deleted "and the state general fund" and deleted former second sentence that read: "When a subdivision is reviewed under the provisions of 76-4-124, the local governing body shall, within 20 days after receiving preliminary plat approval under the Montana Subdivision and Platting Act, distribute the lot fees according to the fee schedule adopted under this section"; deleted former (3) that read: "When a local department or board of health conducts a review under the provisions of 76-4-104, it shall submit to the department, along with its approval statement, a fee of $5 per reviewed lot, for purposes of offsetting costs incurred in providing certification to a local reviewing authority and other administrative costs"; inserted (4) requiring fees to be deposited in state special revenue fund; deleted (5) that read: "(5) Costs of implementing this part must be paid from the state general fund as provided by legislative appropriation"; and made minor changes in style. Amendment effective July 1, 1993.

*Applicability:* Section 4, Ch. 514, L. 1993, provided: "[This act] applies to all lot fees received by the department of health and environmental sciences [now department of environmental quality] on or after July 1, 1993."

*1991 Amendment:* In (1), in first sentence after "exceed", substituted "actual costs to the department in reviewing" for "$48 per parcel, for services rendered in the review of"; and made minor changes in style.

*1991 Statement of Intent:* The statement of intent attached to Ch. 645, L. 1991, provided: "A statement of intent is provided for this bill because rulemaking authority is delegated to the board of health and environmental sciences [now department of environmental quality] to prescribe procedures for administrative enforcement actions undertaken by the department of health and environmental sciences [now department of environmental quality] in administering the public water supply laws, as provided in Title 75, chapter 6, and to develop a fee schedule to enable the department to recover costs in administering these laws. Rulemaking authority is also delegated to the department to develop fees to pay for costs of reviewing plats and subdivisions under the laws related to sanitation in subdivisions, as provided in Title 76, chapter 4. It is the intent of the legislature that the rules establish a reasonable fee schedule that approximates the department's actual and necessary costs.

The legislature anticipates that the department will expand its enforcement activity in order to address ongoing and increasing health problems with public water supply systems and public sewage systems in Montana. In undertaking this effort, the legislature expects that the department will have the option to pursue administrative enforcement as a means of expediting and encouraging compliance with Title 75, chapter 6. Nonetheless, it is the department's duty to clearly inform each violator of:

(1) the nature of the action taken against it;
(2) what the department requires to resolve the matter; and
(3) what legal avenues are available to the violator if he desires to contest the matter.

The legislature recognizes that an economic hardship may be imposed on a public water supply system in order for that system to be brought into compliance with state and federal public water supply laws and that this hardship may be further increased by the levying of administrative and civil penalties for noncompliance. It is the intention of the legislature that the department adopt rules that establish a procedure for the progressive enforcement of this act in which the levying of administrative and civil penalties is a final action. The department may adopt rules that allow for the bypass of the enforcement procedures and the immediate assessment of penalties if specific circumstances warrant this action.

The rules also require the board of health and environmental sciences [now department of environmental quality] to develop fees for recovery of costs incurred by the department in delivering services to persons who own or operate or intend to own or operate a public water supply system or public sewage system. These costs include costs associated with review of engineering plans and specifications, inspections, and general assistance. To assist the board in developing these rules, the department shall prepare and submit to the board a detailed estimate of projected costs associated with these services for fiscal years 1992 and 1993. The board shall develop a fee schedule that will provide revenues that are commensurate with the projected costs. A similar approach should be used by the department in developing rules setting new fees for review of plats and subdivisions under 76-4-105."

*1985 Amendments:* Chapter 490 in (1) near middle of second sentence, after "state general fund", inserted remainder of sentence concerning deposit of lot fees in general fund of reviewing authority; in (2) near middle of first sentence, after "distribution of", deleted "lot" and in second sentence, near end after "lot fees", substituted remainder of sentence relating to adopted fee schedule for "as determined by this subsection"; and inserted (3) requiring local department or board of health conducting review to submit to Department of Health and Environmental Sciences (now Department of Environmental Quality) a $5-per-reviewed-lot fee to offset certification and administration costs.

Chapter 592 in (2) in second sentence, after "reviewed under the", deleted "master plan", and after "receiving", substituted "preliminary plat approval" for "an application".

Chapter 708 in (1) near beginning of first sentence, before "rules", deleted "reasonable", and at end of second sentence substituted "general fund" for "special revenue fund provided for in 17-2-102"; and in (2) in first sentence substituted "state general fund" for "department".

Subsection (5), requiring costs of implementing this part to be paid from state general fund, was enacted by Ch. 708, L. 1985, as a separate section but was codified as part of this section for logic and convenience.

*Lot Fees Coordination Instruction:* Section 19, Ch. 490, L. 1985, provided: "If House Bill No. 633 [Ch. 708, L. 1985], including the section of that bill that appropriates money to the department [Department of Health and Environmental Sciences (DHES)] (now Department of Environmental Quality) for subdivision review in fiscal years 1986 and 1987, is not passed and approved, section 3, subsection (3) [76-4-105(3)] of this act is amended to provide a fee of $10 per reviewed lot." As passed and approved, HB 633 (Ch. 708, L. 1985) included, in section 3, an appropriation to the DHES (now Department of Environmental Quality), but the appropriation was reduced from the amounts set forth in the introduced version of the bill as follows: for fiscal year 1986, from $202,595 to $136,787 and for fiscal year 1987, from $212,725 to $139,825. Because the conditions of sec. 19, Ch. 490, L. 1985, were not fulfilled in Ch. 708, the Code Commissioner did not amend 76-4-105(3) to increase the lot fee.

*1983 Amendments:* Chapter 281, in second sentence of (1), substituted "state special revenue fund" for "agency fund".

Chapter 696 changed fees in (1) from "$30" to "$48" per parcel.

*1983 Saving Clause:* Section 2, Ch. 696, L. 1983, was a saving clause.

*1981 Amendment:* Changed fees in (1) from "$25" to "$30" per parcel.

*1981 Saving Clause:* Section 3, Ch. 553, L. 1981, was a saving clause.

*Nonseverability:* Section 4, Ch. 553, L. 1981, provided: "It is the intent of the legislature that each part of this act is essentially dependent upon every other part; and if one part is held unconstitutional or invalid, all other parts are invalid."

**Administrative Rules**

ARM 17.36.101 Definitions.
ARM 17.36.116 Certification of local department or board of health.
ARM 17.36.801 Purpose.
ARM 17.36.802 Fee schedules.
ARM 17.36.804 Disposition of fees.
ARM 17.36.805 Changes in subdivision.

## 76-4-106. Cooperation with other governmental agencies.

**Compiler's Comments**

*1985 Amendment:* In (1) at beginning changed "department" to "reviewing authority"; in (2) near beginning after "county, and", changed "city" to "municipal" and near middle after "with the", changed "board and the department" to "reviewing authority"; and inserted (3) authorizing local reviewing authority without registered sanitarian or registered professional engineer to conduct review by contracting with another local reviewing authority for such services.

**Case Notes**

*Regulatory Powers Regarding Subdivision Control:* The 1973 Montana Subdivision and Platting Act vests control of subdivisions in local government units. The Department of Health and Environmental Sciences (now Department of Environmental Quality) has no regulatory functions regarding subdivisions outside water supply, sewage, and solid waste disposal. Mont. Wilderness Ass'n v. Bd. of Health & Environmental Sciences, 171 M 477, 559 P2d 1157 (1976).

## 76-4-107. Authority to inspect and monitor — certification.

**Compiler's Comments**

*2019 Amendment:* Chapter 80 in (1)(a) near middle substituted "ensure" for "assure"; in (2) at end substituted "disposal system required by rule to be designed by a registered professional engineer has been constructed according to plans and specifications" for "disposal system has been constructed according to approved specifications"; and made minor changes in style. Amendment effective January 1, 2020.

*1987 Amendment:* Inserted (2) requiring reviewing authority to receive certification from registered engineer that public water supply or sewage disposal systems have been constructed according to approved specifications.

*1985 Amendment:* In lead-in, near middle after "development, the", changed "department or the board" to "reviewing authority" and after "whenever", changed "a public water supply or public sewage disposal system" to "any water supply or sewage disposal system"; in (1) near middle after "representative of the", changed "department" to "reviewing authority"; and in (2) deleted "public" before "sewage disposal" and before "water supply".

## 76-4-108. Enforcement.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 4, Ch. 752, L. 2023. Amendment effective May 22, 2023.

*2005 Amendment:* Chapter 443 in (1) in first sentence near beginning after "adopted" inserted "or an order issued" and inserted third sentence relating to assessment of an administrative penalty; in (5) in first sentence near middle after "part" inserted "a rule adopted under this part, or an order issued under this part"; and made minor changes in style. Amendment effective April 28, 2005.

*Saving Clause:* Section 12, Ch. 443, L. 2005, was a saving clause.

*2001 Amendment:* Chapter 79 in (1) in first sentence after "notice" inserted "and an order" and substituted "certified mail" for "mail to the last-known address of", deleted former third sentence that read: "For the purpose of this part, service by mail is complete on the date of mailing", in third sentence after "notice" inserted "and order", before "reviewing authority" inserted "local", after "authority" inserted "if it issued the notice of violation", and after "board" inserted "if the department issued the notice of violation", and inserted fourth sentence regarding a request for a hearing; in (5) substituted language regarding revocation of a certificate of approval for former language that read: "If a violation of this part is found to exist, a reviewing authority may revoke a certificate of approval and reimpose sanitary restrictions on a subdivision, following a hearing before the reviewing authority under this section"; inserted (6) applying the contested case provisions of the Montana Administrative Procedure Act to the hearing; and made minor changes in style. Amendment effective March 20, 2001.

*Preamble:* The preamble attached to Ch. 79, L. 2001, provided: "WHEREAS, certain environmental statutes administered by the Montana Department of Environmental Quality provide that a person aggrieved by a decision of the Department may appeal that decision to the Director of the Department; and

WHEREAS, the possibility of an appeal prevents the Director from becoming involved in certain Department decisions that are subject to appeal to the Director; and

WHEREAS, section 82-4-427, MCA, states that a contested case hearing requested under The Opencut Mining Act must be held within 30 days after the hearing is requested; and

WHEREAS, it is difficult for the Department to conduct a contested case hearing under that Act within 30 days after the hearing is requested; and

WHEREAS, certain revisions to statutes administered by the Department are necessary for clarity and consistency and to conform the statutes to current drafting style."

*Saving Clause:* Section 18, Ch. 79, L. 2001, was a saving clause.

*1985 Amendment:* In (1) substituted language relating to service of notice of violation to alleged violator or agent for former language that read: "If a written complaint alleging violation is made to the department or if the department has reason to believe that a person has violated this part or any rule thereunder and if a violation is found to exist, the department shall issue notice and hold a hearing pursuant to the Montana Administrative Procedure Act"; in (2) changed "department" to "reviewing authority" and after "action", substituted "to compel compliance with" for "for injunction or for recovery of penalty as provided in"; inserted (3) relating to proper enforcement agency; and inserted (4) requiring local reviewing authority to accept legal responsibility for actions relating to subdivision sanitation.

## 76-4-109. Penalties.

**Compiler's Comments**

*2021 Amendment:* Chapter 535 in (2)(b) at end deleted "or, if mutually agreed on by the parties in the action, in the district court of the first judicial district, Lewis and Clark County". Amendment effective October 1, 2021.

*2005 Amendments — Composite Section:* Chapter 443 in (1) and (2)(a) after "rule" inserted "adopted"; in (2)(a) in first sentence near middle after "subject to" inserted "an administrative penalty in an amount not to exceed $250 or"; and made minor changes in style. Amendment effective April 28, 2005.

Chapter 487 inserted (2)(b) relating to penalty factors, district court action, and venue; and made minor changes in style. Amendment effective January 1, 2006.

*Saving Clause:* Section 12, Ch. 443, L. 2005, was a saving clause.

Section 29, Ch. 487, L. 2005, was a saving clause.

*1985 Amendment:* Inserted (2) authorizing civil penalty up to $1,000; and in (3) at beginning changed "Action" to "Penalties imposed" and after "subsection (1)", inserted "or (2)".

## 76-4-110. Additional remedies available.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

## 76-4-111. Exemption for certain condominiums, townhomes, and townhouses.

**Compiler's Comments**

*2021 Amendment:* Chapter 419 in (1) near middle after "constructed on land" substituted "subdivided in compliance with parts 5 and 6 of the Montana Subdivision and Platting Act" for "divided in compliance with the Montana Subdivision and Platting Act"; and in (2) near beginning after "a given number of living" inserted "units, duplexes, or commercial". Amendment effective October 1, 2021.

*2019 Amendments — Composite Section:* Chapter 80 in (2) after "provided that" substituted "if a new extension" for "no new extension" and at end inserted "to serve the development, the department reviews and approves plans for the extension"; and made minor changes in style. Amendment effective July 1, 2019.

Chapter 323 in (2) near middle inserted reference to a conversion. Amendment effective October 1, 2019.

*Nonapplicability:* Section 10, Ch. 323, L. 2019, provided: "Nothing in [this act] may be interpreted to modify or expand existing insurance coverage on a condominium unit, townhome, or townhouse."

*2017 Amendment:* Chapter 62 in (1) after "Condominiums" inserted "townhomes, or townhouses, as those terms are defined in 70-23-102"; in (2) after "living units" deleted "for rental or lease" and after "condominium units" inserted "townhomes, or townhouses"; and made minor changes in style. Amendment effective October 1, 2017.

*2001 Amendment:* Chapter 280 in (2) at end substituted "extension of a public sewage system is required" for "a public sewage disposal system is required as defined in this part"; and deleted former (3) that read: "(3) Subdivisions located within jurisdictional areas that have adopted growth policies pursuant to chapter 1 and first- or second-class municipalities that will be provided with municipal facilities for the supply of water and disposal of sewage and solid waste are not subject to the provisions of this part; except that, if the municipal facilities for water supply or sewage disposal to serve the subdivision constitute either an extension of a public water supply system or a public sewage disposal system, the subdivision must be reviewed in accordance with the provisions of 76-4-105, 76-4-124, and 76-4-127." Amendment effective April 20, 2001.

*Applicability:* Section 18(1), Ch. 280, L. 2001, provided that [this act] applies to subdivision applications submitted to the reviewing authority after [the effective date of this act]. Effective April 20, 2001.

*1999 Amendment:* Chapter 582 in (3) after "within" substituted "jurisdictional areas that have adopted growth policies pursuant to chapter 1" for "master planning areas". Amendment effective October 1, 1999.

*Saving Clause:* Section 35, Ch. 582, L. 1999, was a saving clause.

*Transition:* Section 36, Ch. 582, L. 1999, provided: "A governing body that adopts a master plan pursuant to Title 76, chapter 1, before October 1, 1999, may adopt zoning regulations that are consistent with the master plan pursuant to Title 76, chapter 2, part 2 or 3, until October 1, 2001."

*1985 Amendment:* Inserted (2) providing that construction of same or fewer number of condominium units on parcel previously reviewed and approved is not subject to regulations if no new extension of public water supply system or public sewage disposal system is required.

**Administrative Rules**

ARM 17.36.125 Condominium conversions.

**Attorney General's Opinions**

*Condominiums on Land Divided Prior to Act:* The effect of this section is to remove the need for any subsequent review of parcels already approved for condominiums. However, this does not exempt from review condominiums to be built on such parcels after the effective date of this part. 39 A.G. Op. 28 (1981). (Opinion rendered prior to amendment of 76-4-111 by Ch. 592, L. 1985.)

## 76-4-112. Easements and restrictive covenants.

**Compiler's Comments**

*Effective Date:* Section 17, Ch. 280, L. 2001, provided that this section is effective April 20, 2001.

*Applicability:* Section 18(2), Ch. 280, L. 2001, provided that this section applies to subdivision applications submitted to the reviewing authority after the effective date of the rules implementing this section.

**Case Notes**

*Subdivision Covenant Containing One Hundred Foot Setback Restriction and One-Garage Restriction — Implied Consent to Trial of Garage Restriction — Amendment of Pleadings:* Defendants constructed a building on their subdivision property. Plaintiffs sued because the building violated a 100-foot setback restriction. During trial, defendant testified that the building was intended to be used as a second garage. Plaintiffs sought to amend the pleadings to include a violation of a one-garage restriction that was also part of the covenants. The District Court did not rule on the motion to amend the pleadings, but nevertheless held in favor of plaintiffs, finding that defendants violated both the 100-foot restriction and the one-garage restriction, and ordered removal of the garage. On appeal, defendants contended that the trial court erred in addressing the garage issue because it was not included in the pleadings. The Supreme Court affirmed. Under former Rule 15(b), M.R.Civ.P. (now superseded), issues not raised by the pleadings may be tried by the express or implied consent of the parties, in which case the pleadings may be amended to conform to the issues actually litigated. Having raised the issue during direct examination, defendants impliedly consented to its subsequent litigation. Defendants' argument that the motion to amend the pleadings was not timely, because it was not made at trial, also failed. The rule allows amendment of the pleadings at any time, even after judgment. Armbrust v. York, 2003 MT 36, 314 M 260, 65 P3d 239 (2003). See also Glacier Nat'l Bank v. Challinor, 253 M 412, 833 P2d 1046 (1992).

## 76-4-113. Notification to purchasers.

**Compiler's Comments**

*2021 Amendment:* Chapter 419 in (1) near end of first sentence after "sewer district" inserted "or regional authority" and inserted third sentence concerning reference to exclusion and a statement that lot has not been reviewed or approved; and made minor changes in style. Amendment effective October 1, 2021.

*2019 Amendment:* Chapter 80 in first sentence substituted "approved type and locations" for "approved locations" and after "sewage disposal facilities" inserted "and information regarding connection to municipal or county water and/or sewer district facilities provided for under 76-4-130". Amendment effective July 1, 2019.

*Effective Date:* Section 17, Ch. 280, L. 2001, provided that this section is effective April 20, 2001.

*Applicability:* Section 18(1), Ch. 280, L. 2001, provided that [this act] applies to subdivision applications submitted to the reviewing authority after [the effective date of this act]. Effective April 20, 2001.

## 76-4-114. Review of application.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 5, Ch. 611, L. 2023. Amendment effective October 1, 2023.

*Applicability:* Section 11, Ch. 611, L. 2023, provided: "[This act] applies to applications received on or after January 1, 2024."

*Saving Clause:* Section 9, Ch. 611, L. 2023, was a saving clause.

*Nonseverability:* Section 10, Ch. 611, L. 2023, was a nonseverability clause.

*2019 Amendment:* Chapter 80 deleted former (4) that read: "(4) If an environmental impact statement is required, the deadline to issue a final decision in (3)(c)(i) may be increased to 120 days"; in (4) at beginning inserted exception clause, near middle of first sentence after "complete its review" inserted "or if an applicant requests an extension of a deadline", substituted "then the reviewing authority" for "then it", and after "notify the applicant" inserted "of the extension" and near beginning of second sentence inserted "under this subsection"; inserted (5) regarding extending a deadline in this section until the items required in 76-4-115(2) are submitted; inserted (6) regarding extending a deadline under subsections (3)(c) and (3)(d) by 90 days if an environmental assessment is required; inserted (7) regarding extending a deadline under subsections (3)(c) and (3)(d) by 120 days if an environmental impact statement is required; and made minor changes in style. Amendment effective July 1, 2019.

*Termination Provision Repealed:* Section 18, Ch. 80, L. 2019, repealed sec. 13, Ch. 344, L. 2017, which terminated this section September 30, 2019. Effective July 1, 2019.

*Effective Date:* This section is effective October 1, 2017.

*Applicability:* Section 12, Ch. 344, L. 2017, provided: "[This act] applies to subdivision applications submitted on or after October 1, 2017."

*Termination:* Section 13, Ch. 344, L. 2017, provided: "[This act] terminates September 30, 2019."

**Administrative Rules**

ARM 17.36.106 Review procedures — applicable rules.

## 76-4-115. Contents of application — supplemental information.

**Compiler's Comments**

*2023 Amendments — Composite Section:* Section 6, Ch. 611, L. 2023, in (2) near middle inserted "or independent reviewer". Amendment effective October 1, 2023.

Section 5, Ch. 752, L. 2023, in (2)(a) at end substituted "76-4-104(7)(k)" for "76-4-104(6)(k)". Amendment effective May 22, 2023.

*Applicability:* Section 11, Ch. 611, L. 2023, provided: "[This act] applies to applications received on or after January 1, 2024."

*Saving Clause:* Section 9, Ch. 611, L. 2023, was a saving clause.

*Nonseverability:* Section 10, Ch. 611, L. 2023, was a nonseverability clause.

*Termination Provision Repealed:* Section 18, Ch. 80, L. 2019, repealed sec. 13, Ch. 344, L. 2017, which terminated this section September 30, 2019. Effective July 1, 2019.

*Effective Date:* This section is effective October 1, 2017.

*Applicability:* Section 12, Ch. 344, L. 2017, provided: "[This act] applies to subdivision applications submitted on or after October 1, 2017."

*Termination:* Section 13, Ch. 344, L. 2017, provided: "[This act] terminates September 30, 2019."

### 76-4-116. Annual and quarterly reports.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 7, Ch. 611, L. 2023. Amendment effective October 1, 2023.

*Applicability:* Section 11, Ch. 611, L. 2023, provided: "[This act] applies to applications received on or after January 1, 2024."

*Saving Clause:* Section 9, Ch. 611, L. 2023, was a saving clause.

*Nonseverability:* Section 10, Ch. 611, L. 2023, was a nonseverability clause.

*2021 Amendment:* See 2021 Session Law for amendment made by sec. 105, Ch. 261, L. 2021. Amendment effective April 20, 2021.

*Termination Provision Repealed:* Section 18, Ch. 80, L. 2019, repealed sec. 13, Ch. 344, L. 2017, which terminated this section September 30, 2019. Effective July 1, 2019.

*Effective Date:* This section is effective October 1, 2017.

*Applicability:* Section 12, Ch. 344, L. 2017, provided: "[This act] applies to subdivision applications submitted on or after October 1, 2017."

*Termination:* Section 13, Ch. 344, L. 2017, provided: "[This act] terminates September 30, 2019."

### 76-4-120. Development plans — exceptions.

**Compiler's Comments**

*Effective Date:* Section 8, Ch. 353, L. 2023, provided: "[This act] is effective on passage and approval." Approved May 2, 2023.

### 76-4-121. Restrictions on subdivision activities.

**Compiler's Comments**

*2019 Amendment:* Chapter 80 in (1) removed brackets around reference to 76-4-114; in (2) at beginning substituted "the certifying authority" for "the governing body", after "the subdivision" deleted "is within a jurisdictional area that has adopted a growth policy pursuant to chapter 1 of this title or within a first-class or second-class municipality, as described in 7-1-4111", and near end after "adequate municipal" inserted "or county water and/or sewer district"; and made minor changes in style. Amendment effective July 1, 2019.

*Termination Provision Repealed:* Section 18, Ch. 80, L. 2019, repealed sec. 13, Ch. 344, L. 2017, which terminated the 2017 amendments to this section September 30, 2019. Effective July 1, 2019.

*2017 Amendment:* Chapter 344 in (1) substituted "76-4-114" for "76-4-125". Amendment effective October 1, 2017, and terminates September 30. 2019.

*Applicability:* Section 12, Ch. 344, L. 2017, provided: "[This act] applies to subdivision applications submitted on or after October 1, 2017."

*2003 Amendment:* Chapter 543 in introductory clause at end after "until" deleted "the subdivision plat or certificate of survey subject to review under this part has been accepted for filing by the county clerk and recorder in accordance with 76-4-122 and recorded pursuant to Title 70, chapter 21"; and inserted (1) through (3) concerning issuance of certificate of approval, certification of location within area of adopted growth policy or municipality, and exemption from review. Amendment effective April 30, 2003.

*2001 Amendment:* Chapter 280 at beginning substituted "A person may not dispose of any lot" for "Until the local governing body has certified that a subdivision is to be provided with municipal facilities for a supply of water and disposal of sewage and solid waste or that the reviewing authority has indicated that the subdivision is subject to no restrictions, a person may not file a subdivision plat with a county clerk and recorder, make disposition of any lot" and at end inserted "until the subdivision plat or certificate of survey subject to review under this part has been accepted for filing by the county clerk and recorder in accordance with 76-4-122 and recorded pursuant to Title 70, chapter 21"; and made minor changes in style. Amendment effective April 20, 2001.

*Applicability:* Section 18(1), Ch. 280, L. 2001, provided that [this act] applies to subdivision applications submitted to the reviewing authority after [the effective date of this act]. Effective April 20, 2001.

*1985 Amendment:* Near middle changed "department" to "reviewing authority".

## **76-4-122. Certain filings prohibited.**

**Compiler's Comments**

*2019 Amendment:* Chapter 80 in (1), (2), (2)(a), (2)(b), and two places in (2)(c) after "certificate of survey" inserted "or townhome, townhouse, or condominium declaration"; in (2)(a) removed brackets around reference to 76-4-114; in (2)(b) near middle substituted "certifying authority" for "governing body", after "the subdivision" deleted "is within an area covered by a growth policy pursuant to chapter 1 of this title or within a first-class or second-class municipality, as described in 7-1-4111", and after "adequate municipal" inserted "or county water and/or sewer district"; and made minor changes in style. Amendment effective July 1, 2019.

*Termination Provision Repealed:* Section 18, Ch. 80, L. 2019, repealed sec. 13, Ch. 344, L. 2017, which terminated the 2017 amendments to this section September 30, 2019. Effective July 1, 2019.

*2017 Amendment:* Chapter 344 in (2)(a) substituted "76-4-114" for "76-4-125". Amendment effective October 1, 2017, and terminates September 30, 2019.

*Applicability:* Section 12, Ch. 344, L. 2017, provided: "[This act] applies to subdivision applications submitted on or after October 1, 2017."

*2003 Amendment:* Chapter 599 in (2)(b) near middle after "within" substituted "an area covered by" for "a jurisdictional area that has adopted". Amendment effective May 9, 2003.

*2001 Amendment:* Chapter 280 in (1) after "record any" substituted "plat or certificate of survey subject to review under this part" for "map or plat"; in (2) in introductory clause after "plat" inserted "or certificate of survey subject to review under this part"; in (2)(a) at beginning deleted "whenever reviewing authority approval is necessary", after "plat" inserted "or certificate of survey", and near middle after "reviewing authority" substituted "and a certificate of subdivision approval has been issued pursuant to 76-4-125 indicating that the reviewing authority has approved the subdivision application" for "and the reviewing authority has indicated by stamp or certificate that it has approved the plat and plans and specifications"; in (2)(b) at beginning deleted "whenever reviewing authority approval is not necessary", after "plat" inserted "or certificate of survey", after "governing body" inserted "pursuant to 76-4-127", and after "jurisdictional area" substituted "that has adopted a growth policy pursuant to chapter 1 of this title or within a first-class or second-class municipality, as described in 7-1-4111, and will be provided with adequate municipal facilities and adequate storm water drainage" for "of a growth policy adopted pursuant to chapter 1 or a class 1 or class 2 municipality and will be provided with municipal facilities for the supply of water and disposal of sewage and solid waste"; inserted (2)(c) allowing acceptance of a subdivision plat if the person wishing to file the plat or certificate of survey has placed on the plat or certificate of survey an acknowledged certification that the subdivision is exempt from review; and made minor changes in style. Amendment effective April 20, 2001.

The amendments to this section made by sec. 4, Ch. 340, L. 2001, were rendered void by sec. 6, Ch. 340, L. 2001, a coordination instruction.

*Applicability:* Section 18(1), Ch. 280, L. 2001, provided that [this act] applies to subdivision applications submitted to the reviewing authority after [the effective date of this act]. Effective April 20, 2001.

*1999 Amendment:* Chapter 582 in (2)(b) substituted "the jurisdictional area of growth policy adopted pursuant to chapter 1" for "a master planning area"; and made minor changes in style. Amendment effective October 1, 1999.

*Saving Clause:* Section 35, Ch. 582, L. 1999, was a saving clause.

*Transition:* Section 36, Ch. 582, L. 1999, provided: "A governing body that adopts a master plan pursuant to Title 76, chapter 1, before October 1, 1999, may adopt zoning regulations that are consistent with the master plan pursuant to Title 76, chapter 2, part 2 or 3, until October 1, 2001."

*1985 Amendments:* Chapter 490 changed "department" to "reviewing authority" three times in (2)(a) and once in (2)(b).

Chapter 592 in (2)(b) inserted "or a class 1 or class 2 municipality".

**Administrative Rules**
ARM 17.36.101 Definitions.

**Case Notes**

*Exemption to Sanitation Review — Petition for Writ of Mandamus to Record Certificate of Survey Properly Dismissed — No Legal Duty to Record Unsupported Claim:* The petitioner filed a petition for a writ of mandamus to order the County Clerk and Recorder to record a certificate of survey he filed. The clerk had previously refused to record the document because its certification that the parcels were exempt from sanitation review was not supported by proper evidence. The District Court dismissed the petition, finding that the certification of exemption was not supported by evidence, and therefore the Clerk and Recorder was not under a nondiscretionary duty to record the certificate of survey. On appeal, the Supreme Court affirmed, ruling that the District Court correctly dismissed the petition. Richards v. Gernant, 2020 MT 239, 401 Mont. 364, 472 P.3d 1189.

*Clerk Under No Clear Duty to Record Deed — Mandamus Erroneously Granted:* Where the plaintiff attempted to record a deed to a 5-acre parcel of land without the removal or approval of sanitary restrictions by the county health department (which the court held was estopped from withholding its approval of a disposal permit) but was refused by the Clerk and Recorder, the District Court erred in granting a Writ of Mandamus ordering the Clerk to file a certificate of survey and record the warranty deed. The Clerk and Recorder was statutorily required to refuse to file the survey and record the deed and lacked any discretion to accept a survey absent compliance with the requirements of 76-4-122. Huttinga v. Pringle, 205 M 482, 668 P2d 1068, 40 St. Rep. 1444 (1983).

## 76-4-125. Land divisions excluded from review.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 6, Ch. 752, L. 2023. Amendment effective May 22, 2023.

*2021 Amendments — Composite Section:* Chapter 419 in (1)(c) after "of water supply or sewage" substituted "or" for "and"; in (1)(d)(iii) at beginning after "divisions or" inserted "previously divided"; and inserted (3) concerning previously divided parcel that meets the eligibility criteria for an existing exemption. Amendment effective October 1, 2021.

Chapter 518 inserted (4) concerning conditions for the reissuance of an original certificate of subdivision approval. Amendment effective May 14, 2021.

*2019 Amendments — Composite Section:* Chapter 3 in (1)(e) substituted "subsection (2)" for "subsection (3)". Amendment effective October 1, 2019.

Chapter 80 in (1)(d) substituted "as certified pursuant to 76-4-127" for "divisions located within jurisdictional areas that have adopted growth policies pursuant to chapter 1 or within first-class or second-class municipalities for which the governing body certifies, pursuant to 76-4-127, that adequate storm water drainage and adequate municipal facilities will be provided"; inserted (1)(d)(i), (1)(d)(ii), and (1)(d)(iii) regarding new divisions, divisions or previously divided parcels recorded with sanitary restrictions, and divisions or parcels exempt from the Montana Subdivision and Platting Act review; in (1)(e) substituted "subsection (2)" for "subsection (3)"; inserted (1)(f) regarding the sale of cabin or home sites as provided for and subject to the limitations in 77-2-318(2); and made minor changes in style. Amendment effective July 1, 2019.

*Termination Provision Repealed:* Section 18, Ch. 80, L. 2019, repealed sec. 13, Ch. 344, L. 2017, which terminated the 2017 amendments to this section September 30, 2019. Effective July 1, 2019.

*2017 Amendments — Composite Section:* (Version effective October 1, 2019) Chapter 224 in (1)(c) in three places and in (1)(d) in two places before "days" inserted "calendar". Amendment effective April 20, 2017.

Chapter 344 deleted former (1) that read: "(1) Except as provided in subsection (2), an application for review of a subdivision must be submitted to the reviewing authority. The review by the reviewing authority must be as follows:

(a) At any time after the developer has submitted an application under the Montana Subdivision and Platting Act, the developer shall present a subdivision application to the reviewing authority. The application must include preliminary plans and specifications for the proposed development, whatever information the developer feels necessary for its subsequent review, any public comments or summaries of public comments collected as provided in 76-3-604(7), and information required by the reviewing authority. Subdivision fees assessed by the reviewing authority must accompany the application. If the proposed development includes onsite sewage disposal facilities, the developer shall notify the designated agent of the local board of health prior to presenting the subdivision application to the reviewing authority. The agent may conduct a preliminary site assessment to determine whether the site meets applicable state and local requirements.

(b) Within 5 working days after receipt of an application that is not subject to review by a local reviewing authority under 76-4-104, the department shall provide a written notice for informational purposes to the applicant if the application does not include a copy of the certification from the local health department required by 76-4-104(6)(k) or, if applicable, contain an approval from the local governing body under Title 76, chapter 3, together with any public comments or summaries of public comments collected as provided in 76-3-604(7)(a).

(c) If the reviewing authority denies an application and the applicant resubmits a corrected application within 30 days after the date of the denial letter, the reviewing authority shall complete review of the resubmitted application within 30 days after receipt of the resubmitted application. If the review of the resubmitted application is conducted by a local department or board of health that is certified under 76-4-104, the department shall make a final decision on the application within 10 days after the local reviewing authority completes its review.

(d) Except as provided in 75-1-205(4) and 75-1-208(4)(b), the department shall make a final decision on the proposed subdivision within 55 days after the submission of a complete application and payment of fees to the reviewing authority unless an environmental impact statement is required, at which time this deadline may be increased to 120 days. The reviewing authority may not request additional information for the purpose of extending the time allowed for a review and final decision on the proposed subdivision. If the department approves the subdivision, the department shall issue a certificate of subdivision approval indicating that it has approved the plans and specifications and that the subdivision is not subject to a sanitary restriction"; and made minor changes in style. Amendment effective October 1, 2017, and terminates September 30, 2019.

*Applicability:* Section 3, Ch. 224, L. 2017, provided: "[This act] applies to applications submitted on or after [the effective date of this act]." Effective April 20, 2017.

Section 12, Ch. 344, L. 2017, provided: "[This act] applies to subdivision applications submitted on or after October 1, 2017."

*Preamble:* The preamble attached to Ch. 221, L. 2015, provided: "WHEREAS, the Legislature, consistent with its constitutional duties, adopted the Montana Water Use Act in 1973, which recognizes existing water rights and provides for the orderly administration of new water right permits while protecting senior water right users; and

WHEREAS, the Legislature recognizes that a permit to appropriate water is not necessary in all circumstances and has created certain exceptions to the permit requirement; and

WHEREAS, the Legislature has provided that a permit is not required for an appropriation that is 35 gallons a minute or less and does not exceed 10 acre-feet a year unless the appropriation is determined to be a combined appropriation; and

WHEREAS, since 1993 the Department of Natural Resources and Conservation has defined the term "combined appropriation" as an appropriation of water from the same source aquifer by two or more ground water developments that are physically manifold into the same system; and

WHEREAS, water users in the state have relied upon the department's definition of "combined appropriation" for more than 20 years; and

WHEREAS, on October 17, 2014, the Montana First Judicial District Court in Clark Fork Coalition v. Tubbs, Cause No. BDV-2010-874, invalidated the Department's combined appropriation definition as being inconsistent with the Water Use Act; and

WHEREAS, substantial financial investment was made by persons on the basis of the 1993 definition of "combined appropriation" prior to the District Court's October 17, 2014, order; and

WHEREAS, the District Court ordered that the Department's rule defining "combined appropriation", in effect from 1987 to 1993, be reinstated; and

WHEREAS, it is the intent of the Legislature to ensure that the Department's 1993 definition of combined appropriation applies to all projects, developments, or subdivisions in existence or for which an application for review was pending on or before the District Court's October 17, 2014, ruling."

*Wells Exempt From Permitting — Definition of Combined Appropriation — Retroactive Applicability:* Section 1, Ch. 221, L. 2015, provided: "For purposes of implementing the provisions of 85-2-306, the department of natural resources and conservation's definition of combined appropriation as an appropriation of water from the same source aquifer by two or more ground water developments that are physically manifold into the same system applies retroactively to any project, development, or subdivision in existence on or before October 17, 2014, and to any pending project, development, or subdivision for which the application and required fees were received by the department of environmental quality in accordance with 76-4-125 or by the local reviewing authority in accordance with 76-3-604(1)(a) on or before October 17, 2014."

*2013 Amendments — Composite Section:* Chapter 123 in (1)(b) substituted "76-4-104(6)(k)" for "76-4-104(6)(j)". Amendment effective October 1, 2013.

Chapter 379 in (2)(a) substituted "exclusion cited in 76-3-201" for "exclusions cited in 76-3-201 and 76-3-204". Amendment effective September 1, 2013.

*Preamble:* The preamble attached to Ch. 379, L. 2013, provided: "WHEREAS, The Montana Subdivision and Platting Act provides for the local review of proposed subdivisions; and

WHEREAS, Title 76, chapter 3, part 2, provides miscellaneous exemptions from subdivision review for certain divisions of land and conveyances; and

WHEREAS, sections 76-3-202, 76-3-204, and 76-3-208, MCA, address the sale, lease, or rent or other conveyance of one or more parts of a building, structure, or other improvement; and

WHEREAS, section 76-3-204, MCA, provides that the sale, lease, rent, or other conveyance of one or more parts of a building, structure, or other improvement is not subject to subdivision review; and

WHEREAS, this exemption has been interpreted to exempt only one or more parts of a single building, structure, or improvement on a tract of record from subdivision review; and

WHEREAS, a strict interpretation of section 76-3-204, MCA, places an undue burden of undergoing full subdivision review on property owners who seek to lease or rent certain buildings; and

WHEREAS, it is the intent of the Legislature to provide an alternative process to subdivision review for the creation of buildings for lease or rent on tracts of land."

*Saving Clause:* Section 16, Ch. 379, L. 2013, was a saving clause.

*Severability:* Section 17, Ch. 379, L. 2013, was a severability clause.

*Applicability:* Section 19, Ch. 379, L. 2013, provided: "[This act] applies to buildings created for lease or rent on a single tract on or after [the effective date of this act]." Effective September 1, 2013.

*2011 Amendment:* Chapter 217 inserted (1)(b) requiring department to provide written notice for informational purposes; inserted (1)(c) regarding review of resubmitted application; and made minor changes in style. Amendment effective April 18, 2011.

*2009 Amendment:* Chapter 405 in (1)(a) near middle of second sentence following "provided in" substituted "76-3-604(7)" for "76-3-604(6)". Amendment effective April 28, 2009.

*Preamble:* The preamble attached to Ch. 405, L. 2009, provided: "WHEREAS, the Montana Subdivision and Platting Act (the Act) is designed to balance the rights of landowners with public health, safety, and general welfare; and

WHEREAS, if the Act is not clear and predictable, neither landowners nor the public health, safety, and general welfare can be effectively protected; and

WHEREAS, land use regulations should be designed to permit and promote economic growth in the state; and

WHEREAS, certain provisions of the Act have proven over time to be unclear and to promote unpredictability in the process; and

WHEREAS, it is believed that these modifications will promote clarity, efficiency, predictability, and increased public participation in the process."

*2007 Amendments — Composite Section:* Chapter 111 in (2)(e)(ii) near middle substituted "serving a discharge source that was in existence" for "that was constructed" and after "installed" inserted "the system". Amendment effective March 30, 2007.

Chapter 150 in (3) after "50-2-116" deleted "(1)(i)". Amendment effective October 1, 2007.

*2005 Amendments — Composite Section:* Chapter 302 in (1)(a) near end of second sentence inserted language concerning comments collected as provided in 76-3-604(6). Amendment effective October 1, 2005.

Chapter 337 near beginning of (1)(b) in exception clause inserted "75-1-205(4) and". Amendment effective April 21, 2005.

*Applicability:* Section 22, Ch. 337, L. 2005, provided: "[This act] applies to environmental impact statements on which the agency responsible for preparation commenced preparation after December 31, 2004."

*2001 Amendments — Composite Section:* Chapter 280 in (1) in first sentence of introductory clause substituted "Except as provided in subsection (2), an application for review of a subdivision must be submitted to the reviewing authority" for "Plans and specifications of a subdivision, as defined in this part, must be submitted to the reviewing authority, and the reviewing authority shall indicate by certificate that it has approved the plans and specifications and that the subdivision is not subject to a sanitary restriction" and at beginning of second sentence after "The" deleted "plan"; in (1)(a) in first sentence after "present" inserted "a subdivision application", at beginning of second sentence substituted "The application must include preliminary plans and specifications for the proposed development" for "a preliminary plan of the proposed development", and inserted third through fifth sentences requiring payment of fees and a preliminary site assessment to determine whether the site meets applicable requirements; in (1)(b) at beginning of first sentence substituted "The department shall make a final decision on the proposed subdivision within 60 days after the submission of a complete application and payment of fees to the reviewing authority" for "The reviewing authority shall give final action of the proposed plan within 60 days" and inserted second and third sentences precluding a request for further information to extend review time and regarding issuance of a certificate of approval; in (2)(b) near middle after "provided that" substituted "water or sewage disposal facilities may not be constructed" for "a dwelling or structure requiring water or sewage disposal may not be erected"; inserted (2)(d) providing that certain divisions located within jurisdictional areas that have adopted growth policies are not subject to review unless the exclusions are used to evade the provisions of this part; in (2)(e)(i) after "public or" substituted "multiple-user" for "multifamily"; in (3) near beginning after "prior to the" substituted "filing of a plat or a certificate of survey subject to review under this part for the parcel" for "transfer of the parcel"; and made minor changes in style. Amendment effective April 20, 2001.

Chapter 299 in (1)(b) at beginning inserted exception clause; and made minor changes in style. Amendment effective October 1, 2001.

*Applicability:* Section 18(1), Ch. 280, L. 2001, provided that [this act] applies to subdivision applications submitted to the reviewing authority after [the effective date of this act]. Effective April 20, 2001.

Section 16, Ch. 299, L. 2001, provided: "[This act] applies to environmental reviews that are begun after [the effective date of this act]." Effective October 1, 2001.

*1997 Amendment:* Chapter 289 in (2), after "divisions", inserted "or parcels"; inserted (2)(d) exempting from development plan review a parcel served by multifamily sewage system or parcel 1 acre or larger that has an existing well and septic system; inserted (3) authorizing local health officer to require that parcel include acreage or features to accommodate replacement drainfield; and made minor changes in style.

*1985 Amendment:* In (1) at beginning deleted "When a subdivision as defined in this part is excluded from the provisions of 76-3-302 and 76-3-401 through 76-3-403, but not 76-3-201, and the subdivision is otherwise subject to the provisions of this part", and changed "department" to "reviewing authority" three times; in (1)(a) changed "department" to "reviewing authority" twice; in (1)(b) changed "department" to "reviewing authority"; in (2), near beginning and at end, after "review", deleted "by the department", and after "divisions", inserted "unless such exclusions are used to evade the provisions of this part"; and in (2)(b) at end after "parcel", inserted remainder of subsection regarding division that does not fall within previously platted or approved subdivision.

**Administrative Rules**

Title 17, chapter 36, ARM Subdivisions/On-site subsurface wastewater treatments.

**Case Notes**

*State Agency Review Under Sanitation in Subdivision Law Not Applicable to Certificate of Survey:* Where after a series of real estate transactions, each denominated an "occasional sale" and evidenced by a certificate of survey, one 14-acre parcel of land became 13 separate and distinct parcels reconveyed to the original owner, the Department of Health and Environmental Sciences (now Department of Environmental Quality) had no authority under the sanitation in subdivisions law to review the certificates of survey. That act provides for Department review only of subdivision plats, and Department regulation which included certificate of survey within definition of plat was held void. (Case considered under pre-1977 law.) State ex rel. Dept. of Health & Environmental Sciences v. Lasorte, 182 M 267, 596 P2d 477, 36 St. Rep. 1126 (1979).

**Attorney General's Opinions**

*Review of Certificate of Survey:* The Department of Health and Environmental Sciences (now Department of Environmental Quality) has authority under Title 76, ch. 4, part 1, to review certificates of survey. 38 A.G. Op. 81 (1980).

## 76-4-126. Right to hearing.

**Compiler's Comments**

*2001 Amendment:* Chapter 79 in (1) at end of first sentence after "board" deleted "or the reviewing authority", inserted second sentence requiring that a hearing be requested within 30 days of receipt of notice of denial, and in third sentence substituted language applying the contested case provisions of the Montana Administrative Procedure Act to the hearing for former sentence that read: "Such hearings will be held pursuant to the Montana Administrative Procedure Act"; inserted (2) regarding referral of local compliance issue to the appropriate local authority and incorporation of the local authority's determination into the board's final decision; and made minor changes in style. Amendment effective March 20, 2001.

*Preamble:* The preamble attached to Ch. 79, L. 2001, provided: "WHEREAS, certain environmental statutes administered by the Montana Department of Environmental Quality provide that a person aggrieved by a decision of the Department may appeal that decision to the Director of the Department; and

WHEREAS, the possibility of an appeal prevents the Director from becoming involved in certain Department decisions that are subject to appeal to the Director; and

WHEREAS, section 82-4-427, MCA, states that a contested case hearing requested under The Opencut Mining Act must be held within 30 days after the hearing is requested; and

WHEREAS, it is difficult for the Department to conduct a contested case hearing under that Act within 30 days after the hearing is requested; and

WHEREAS, certain revisions to statutes administered by the Department are necessary for clarity and consistency and to conform the statutes to current drafting style."

*Saving Clause:* Section 18, Ch. 79, L. 2001, was a saving clause.

*1985 Amendment:* Near middle after "board", inserted "or the reviewing authority".

## 76-4-127. Notice of certification that adequate storm water drainage and adequate municipal facilities will be provided.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 8, Ch. 611, L. 2023. Amendment effective October 1, 2023.

*Applicability:* Section 11, Ch. 611, L. 2023, provided: "[This act] applies to applications received on or after January 1, 2024."

*Saving Clause:* Section 9, Ch. 611, L. 2023, was a saving clause.

*Nonseverability:* Section 10, Ch. 611, L. 2023, was a nonseverability clause.

*2019 Amendment:* Chapter 80 in (1) at beginning deleted "Except as provided in subsection (3)", removed brackets around reference to 76-4-125(1)(d), substituted "the certifying authority shall" for "the governing body, as defined in 76-3-103, shall, prior to final plat approval under the Montana Subdivision and Platting Act", after "the reviewing authority that" deleted "a subdivision has been submitted for approval and that", and inserted last sentence requiring notice of certification for a subdivision subject to Title 76, chapter 3; in (2)(b) substituted "for a subdivision not subject to Title 76, chapter 3" for "if subsection (3) applies"; in (2)(c) substituted "the number of parcels in the subdivision" for "the number of proposed parcels in the subdivision or division under subsection (3)"; deleted former (2)(f) that read: "(f) certification that the subdivision or division under subsection (3) is within an area covered by a growth policy pursuant to chapter 1 of this title or within a first-class or second-class municipality, as described in 7-1-4111, and a copy of the growth policy, when applicable, if one has not yet been submitted to the reviewing authority"; in (2)(f) substituted "the subdivision to the city or the county water and/or sewer district" for "the subdivison or division under subsection (3) to the city or town"; in (2)(g) after "adequate municipal" inserted "or county water and/or sewer district" and at end following "sewage and solid waste" substituted "will be provided. Facilities for subdivision subject to 76-3-507 must be provided within the time that section provides" for "are available or, unless subsection (3) applies, will be provided within the time provided in 76-3-507. If subsection (3) applies, the requirements to 76-3-507 do not apply"; in (2)(h) near end substituted "will be" for "are"; in (2)(i) substituted "the certifying authority has or will review and approve plans" for "the governing body has reviewed and approved plans"; deleted former (3) that read: "(3) A division of land that is exempt from the Montana Subdivision and Platting Act review under 76-3-203 or 76-3-207(1)(a), (1)(b), (1)(d), (1)(e), or (1)(f) qualifies for an exemption under [76-4-125(1)(d)] if the governing body, as defined in 76-3-103, sends a notice of certification under subsection (2) to the reviewing authority stating that adequate storm water drainage and adequate municipal facilities will be provided for the division"; and made minor changes in style. Amendment effective July 1, 2019.

*Termination Provision Repealed:* Section 18, Ch. 80, L. 2019, repealed sec. 13, Ch. 344, L. 2017, which terminated the 2017 amendments to this section September 30, 2019. Effective July 1, 2019.

*2017 Amendments — Composite Section — Code Commissioner Correction:* Chapter 344 in (1) substituted "76-4-125(1)(d)" for "76-4-125(2)(d)". Amendment effective October 1, 2017, and terminates September 30, 2019.

Chapter 371 in (1) at beginning inserted exception clause; in (2)(b) after "is not necessary" inserted remainder of subsection requiring a copy of certificate of survey map or amended plat map, or a declaration and floor plan; in (2)(c), (2)(f), and (2)(g) inserted "or division under subsection (3)"; in (2)(h) near middle of first sentence inserted "unless subsection (3) applies" and inserted second sentence regarding when requirements of 76-3-507 do not apply; inserted (3) regarding exemption from Montana Subdivision and Platting Act review; and made minor changes in style. Amendment effective May 9, 2017. The code commissioner in (3) changed the subsection reference to 76-4-125 to reflect amendments made by Ch. 344.

*Applicability:* Section 12, Ch. 344, L. 2017, provided: "[This act] applies to subdivision applications submitted on or after October 1, 2017."

*2005 Amendment:* Chapter 433 in (1) near beginning substituted "prior to final plat approval" for "within 20 days after preliminary plat approval"; in (2)(b) inserted "included with the application for the proposed subdivision"; and in (2)(h) at end substituted "the time provided in 76-3-507" for "1 year after the notice of certification is issued". Amendment effective October 1, 2005.

The amendments to this section made by sec. 15, Ch. 298, L. 2005, and sec. 1, Ch. 433, L. 2005, were rendered void by sec. 2, Ch. 433, L. 2005, a coordination section.

*Applicability:* Section 19(1), Ch. 298, L. 2005, provided: "(1) [This act] applies to subdivision applications submitted on or after [the effective date of this act]." Effective April 19, 2005.

*2003 Amendment:* Chapter 599 in (2)(f) near beginning after "within" substituted "an area covered by" for "a jurisdictional area that has adopted". Amendment effective May 9, 2003.

*2001 Amendment:* Chapter 280 in (1) at beginning substituted "To qualify for the exemption from review set out in 76-4-125(2)(d), the governing body, as defined in 76-3-103, shall" for "When a subdivision is reviewed under the provisions of 76-4-124, the local governing body shall", after "20 days after" deleted "receiving", and near end before "will be provided" substituted "adequate storm water drainage and adequate municipal facilities" for "municipal facilities for the supply of water and disposal of sewage and solid waste"; in (2)(f) at beginning inserted "certification that the subdivision is within a jurisdictional area that has adopted a growth policy pursuant to chapter 1 of this title or within a first-class or second-class municipality, as described in 7-1-4111, and"; inserted (2)(i) requiring that the notice of certification contain certification from the facility owners that adequate facilities are available if water supply, sewage disposal, or solid waste facilities are not municipally owned; inserted (2)(j) requiring certification that the governing body has reviewed and approved plans to ensure adequate storm water drainage; and made minor changes in style. Amendment effective April 20, 2001.

*Applicability:* Section 18(1), Ch. 280, L. 2001, provided that [this act] applies to subdivision applications submitted to the reviewing authority after [the effective date of this act]. Effective April 20, 2001.

*1999 Amendment:* Chapter 582 in (2)(f) substituted "growth policy" for "master plan"; and made minor changes in style. Amendment effective October 1, 1999.

*Saving Clause:* Section 35, Ch. 582, L. 1999, was a saving clause.

*Transition:* Section 36, Ch. 582, L. 1999, provided: "A governing body that adopts a master plan pursuant to Title 76, chapter 1, before October 1, 1999, may adopt zoning regulations that are consistent with the master plan pursuant to Title 76, chapter 2, part 2 or 3, until October 1, 2001."

*1985 Amendments:* Chapter 490 in (1) and (2)(f) changed "department" to "reviewing authority".

Chapter 592 near beginning of (1), after "reviewed under the", deleted "master plan", and after "receiving", substituted "preliminary plat approval" for "an application"; and in (2)(f) inserted "when applicable".

**Administrative Rules**

ARM 17.36.101 Definitions.

ARM 17.36.610 Certifying authority under 76-4-127, MCA.

## 76-4-129. Joint application form and concurrent review.

**Compiler's Comments**

*2021 Amendment:* Chapter 419 deleted former (1) that read: "(1) Within 90 days after July 1, 1977, the department shall prepare and distribute a joint application form that can be used by an applicant to apply for approval of a subdivision under the provisions of this part and the provisions of chapter 3. When an application is received by either the department or a local government, the department or local government is responsible for forwarding the appropriate parts of the application to the other entity"; near middle after "provisions of chapter 3" substituted "may" for "shall" and at end inserted "subject to the requirements of 76-4-115"; and made minor changes in style. Amendment effective October 1, 2021.

*1981 Amendments — Composite:* Chapter 236 deleted "and the department of community affairs" after "the department" near the beginning of (1).

Chapter 274 substituted "department of commerce" for "department of community affairs" in (1).

In preparing the composite of 1981 amendments to this section, the Code Commissioner did not include the change made by Ch. 274 because the deletion made by Ch. 236 is in the nature of a repealer (see 1-2-204).

*Transfer of Function:* Section 6, Ch. 274, L. 1981, provided in part: "(1) The department of community affairs is abolished.

(2) The following functions of the department of community affairs are transferred to the department of commerce: . . .

(g) establishing minimum subdivision review rules under 76-3-502 [repealed 1981] and 76-4-129; . . ."

## 76-4-130. Deviation from certificate of subdivision approval.

**Compiler's Comments**

*2021 Amendment:* Chapter 419 in (2) near end of first sentence and near end of second sentence after "sewer district" inserted ", or regional authority"; and made minor changes in style. Amendment effective October 1, 2021.

*2019 Amendment:* Chapter 80 in (1) at beginning inserted exception clause; inserted (2) regarding deviation from the certificate of subdivision approval without approval by the reviewing authority and allowing the department to require notification; and made minor changes in style. Amendment effective July 1, 2019.

*2001 Amendment:* Chapter 280 near middle after "deviates from the" substituted "certificate of subdivision approval" for "plans and specifications filed with the reviewing authority"; and made minor changes in style. Amendment effective April 20, 2001.

*Applicability:* Section 18(1), Ch. 280, L. 2001, provided that [this act] applies to subdivision applications submitted to the reviewing authority after [the effective date of this act]. Effective April 20, 2001.

*1985 Amendment:* Changed "department" to "reviewing authority" twice.

## 76-4-131. Applicability of public water supply laws.

**Compiler's Comments**

*2021 Amendment:* Chapter 419 in beginning of first sentence substituted "An exclusion provided for in this part does not" for "The exclusions provided for in 76-4-121, 76-4-122, 76-4-125, and 76-4-130(2) do not". Amendment effective October 1, 2021.

*2019 Amendment:* Chapter 80 inserted reference to 76-4-130(2); and made minor changes in style. Amendment effective July 1, 2019.

*2001 Amendment:* Chapter 280 near beginning of first sentence after "76-4-121" substituted "76-4-122, and 76-4-125 do not" for "through 76-4-130 shall not" and inserted second sentence requiring review of an extension of a public water supply system or an extension of a public sewage system to serve a subdivision. Amendment effective April 20, 2001.

*Applicability:* Section 18(1), Ch. 280, L. 2001, provided that [this act] applies to subdivision applications submitted to the reviewing authority after [the effective date of this act]. Effective April 20, 2001.

## 76-4-132. Special revenue account — deposit and use of fees.

**Compiler's Comments**

*2001 Amendment:* Chapter 280 in (1) at beginning after "All" deleted "lot", after "collected" inserted "by the department", and at end deleted "for implementation of the subdivision review program as provided in this part"; and in (2) after "only" substituted "as provided in 76-4-105" for "to pay department costs of implementation of the subdivision review program as provided in this part". Amendment effective April 20, 2001.

*Applicability:* Section 18(1), Ch. 280, L. 2001, provided that [this act] applies to subdivision applications submitted to the reviewing authority after [the effective date of this act]. Effective April 20, 2001.

*Applicability:* Section 4, Ch. 514, L. 1993, provided: "[This act] applies to all lot fees received by the department of health and environmental sciences [now department of environmental quality] on or after July 1, 1993."

*Effective Date:* Section 5, Ch. 514, L. 1993, provided: "[This act] is effective July 1, 1993."

### 76-4-133. Installation inspection.

**Compiler's Comments**

*2019 Amendment:* Chapter 80 in introductory clause inserted "shared"; and made minor changes in style. Amendment effective July 1, 2019.

*2007 Amendment:* Chapter 150 in (1) after "defined in" substituted "50-1-101" for "50-2-101". Amendment effective October 1, 2007.

*Effective Date:* Section 17, Ch. 280, L. 2001, provided that this section is effective April 20, 2001.

*Applicability:* Section 18(1), Ch. 280, L. 2001, provided that [this act] applies to subdivision applications submitted to the reviewing authority after [the effective date of this act]. Effective April 20, 2001.

### 76-4-134. Owner request for review.

**Compiler's Comments**

*Effective Date:* Section 3, Ch. 279, L. 2009, provided that this section is effective July 1, 2009.

### 76-4-135. State regulations no more stringent than federal regulations or guidelines.

**Compiler's Comments**

*Preamble:* The preamble attached to Ch. 471, L. 1995, provided: "WHEREAS, the federal government frequently regulates areas that are also subject to state regulation; and

WHEREAS, differing state and federal policy goals and unique state prerogatives frequently result in different levels of regulation, different standards, and different requirements being imposed by state and federal programs covering the same subject matter; and

WHEREAS, Montana must simultaneously move toward reducing redundant and unnecessary regulation that dulls the state's competitive advantage while being ever vigilant in the protection of the public's health, safety, and welfare; and

WHEREAS, Montana's administrative agencies should consider applicable federal standards when adopting, readopting, or amending rules with analogous federal counterparts; and

WHEREAS, Montana's administrative agencies should analyze whether analogous federal standards sufficiently protect the health, safety, and welfare of Montana's citizens; and

WHEREAS, as part of the formal rulemaking process, the public should be advised of the agencies' conclusions about whether analogous federal standards sufficiently protect the health, safety, and welfare of Montana citizens."

*1995 Statement of Intent:* The statement of intent attached to Ch. 471, L. 1995, provided: "A statement of intent is required for this bill in order to provide guidance to the board of health and environmental sciences [now board of environmental review], the department of health and environmental sciences [now department of environmental quality], and local units of government in complying with [this act].

The legislature intends that in addition to all requirements imposed by existing law and rules, the board or the department include as part of the initial publication and all subsequent publications of a rule a written finding if the rule in question contains any standards or requirements that exceed the standards or requirements imposed by comparable federal law.

If the rules are more stringent than comparable federal law, the written finding must include but is not limited to a discussion of the policy reasons and an analysis that supports the board's or department's decision that the proposed state standards or requirements protect public health or the environment of the state and that the state standards or requirements to be imposed can mitigate harm to the public health or the environment and are achievable under current technology. The department is not required to show that the federal regulation is inadequate to protect public health. The written finding must also include information from the hearing record regarding the costs to the regulated community directly attributable to the proposed state standard or requirement."

*Effective Date:* Section 23, Ch. 471, L. 1995, provided that this section is effective on passage and approval. Approved April 14, 1995.

*Applicability:* Section 22(1) and (3), Ch. 471, L. 1995, provided: "(1) [Sections 1 through 3] are intended to apply to any rule that is in effect, adopted, or amended, and that regulates those resources or activities for which the state has been given primary authority to regulate by federal authority pursuant to Title 75, chapter 2; Title 75, chapter 3 [except for part 6, renumbered Title 50, chapter 79]; Title 75, chapter 5; Title 75, chapter 6; or Title 75, chapter 10, as of [the effective date of this act] [April 14, 1995].

(3) [This act] does not apply to the establishment of fees or public participation requirements."

### 76-4-136. Exemption from environmental review — rulemaking.

**Compiler's Comments**

*Effective Date:* Section 3, Ch. 354, L. 2023, provided: "[This act] is effective on passage and approval." Approved May 2, 2023.

## Part 10

## Penalties, Fees, and Interest

**Part Compiler's Comments**

*Saving Clause:* Section 29, Ch. 487, L. 2005, was a saving clause.

*Effective Date:* Section 31, Ch. 487, L. 2005, provided that this part is effective January 1, 2006.

### 76-4-1001. Penalty factors.

**Compiler's Comments**

*2021 Amendment:* Chapter 324 in (5) substituted current text granting the department of environmental quality rulemaking authority for former text that read: "The board of environmental review and the department of environmental quality may, for the statutes listed in subsection (4) for which each has rulemaking authority, adopt rules to implement this section." Amendment effective July 1, 2021.

# CHAPTER 5

# FLOOD PLAIN AND FLOODWAY MANAGEMENT

**Chapter Administrative Rules**

Title 36, chapter 15, ARM Flood plain management.

## Part 1

## General Provisions

### 76-5-101. Findings.

**Compiler's Comments**

*Severability Clause:* Section 16, Ch. 393, L. 1971, was a severability clause.

### 76-5-102. Policy and purposes.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

### 76-5-103. Definitions.

**Compiler's Comments**

*2009 Amendments — Composite Section:* Chapter 113 in definitions of designated flood plain and designated floodway at end after "designated" substituted "pursuant to part 2 of this chapter" for "and established by order of the department". Amendment effective April 1, 2009.

Chapter 124 in definition of flood plain inserted "or a "shaded X zone"". Amendment effective October 1, 2009.

*Saving Clause:* Section 3, Ch. 113, L. 2009, was a saving clause.

*1995 Amendment:* Chapter 418 deleted definition of Board that read: ""Board" means the board of natural resources and conservation provided for in 2-15-3302"; in definition of designated floodplain, in definition of designated floodway, and in definition of watercourse substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1981 Amendment:* Added the exception for sheetflood areas which are considered zone B to the definition of floodplain in (11).

**Administrative Rules**

ARM 36.15.101 Definitions.

### 76-5-105. Authority to enter and investigate lands or waters.

**Compiler's Comments**

*1985 Amendment:* In (1) inserted last two sentences requiring Department or political subdivision to provide written notice of entry to owner, agent, or lessee if no written consent for entry is obtained and if persons listed are not available, to affix copy of notice conspicuously on property; in (2) in first sentence, after "department", inserted "or the responsible political subdivision", and inserted last sentence requiring Department or political subdivision to release names and addresses of those requesting investigation upon request of owner, agent, or lessee.

### 76-5-106. Exemption for small drainage area.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 at end substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

### 76-5-109. Other legal remedies preserved — immunity.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 in (3), after "given to the", deleted "board or the"; in (4), after "state", deleted "the board, a member of the board"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

**Case Notes**

*Statute Constitutional When Statute Rationally Related to Legitimate Government Purpose — Summary Judgment for State Proper.* Hamlin Constr. & Dev. Co. v. Dept. of Transportation, 2022 MT 190, 410 Mont. 187, 521 P.3d 9.

## Part 2

## Role of State Agencies

**Part Administrative Rules**

Title 36, chapter 15, subchapter 5, ARM Floodplain and floodway delineations.

### 76-5-201. Program for delineation of flood plains and floodways.

**Compiler's Comments**

*2009 Amendment:* Chapter 113 inserted (3) authorizing political subdivisions to adopt federally designated flood plains and floodways. Amendment effective April 1, 2009.

*Saving Clause:* Section 3, Ch. 113, L. 2009, was a saving clause.

*1995 Amendment:* Chapter 418 at beginning of (2) substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

**Administrative Rules**

ARM 36.15.501 through 36.15.504 Flood plain and floodway delineation.

**Collateral References**

Floodplain Management Program, Montana Department of Natural Resources & Conservation, https://dnrc.mt.gov/Water-Resources/Floodplains/.

## 76-5-202. Designation of flood plains and floodways.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 in (1) and (2) substituted "department" for "board"; in (4), after "floodways", deleted "established by the board"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1987 Amendment:* In (3) inserted second sentence establishing that designations made by federal emergency management agency based on reasonable hydrological certainty are presumed rebuttable.

## 76-5-203. Alteration of flood plains or floodways.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 near beginning substituted "department" for "board". Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

## 76-5-204. What constitutes notice.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 near beginning substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

## 76-5-205. Furnishing of material to local governments.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 in three places substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

## 76-5-208. Orders and rules.

**Compiler's Comments**

*2011 Amendment:* Chapter 23 in (1) in first sentence after "rules" deleted "that are necessary"; deleted former (2) that read: "(2) If an order is issued to the owner of an artificial obstruction or nonconforming use not exempt under 76-5-401 through 76-5-404 for its removal or repair, the order may not become effective less than 10 days after a hearing is held relating to the order"; in (2) substituted language regarding notice to titleholders of land adjacent to a watercourse or drainway for language that read: "In addition to any requirement imposed by 76-5-202 through 76-5-205, when an order is issued that affects with particularity the land adjacent to a watercourse or drainway, notice of the contents of the order and of any required hearing must be mailed to the titleholder of the land not less than 10 days before the effective date of the order or, if there is a required hearing, to the titleholder of the land and to the owner of the artificial obstruction or nonconforming use not less than 10 days before the date of the hearing. However, the notice need not be given to the owner of the artificial obstruction or nonconforming use for an order issued pursuant to 76-5-206(2) if the owner cannot be found or determined"; and made minor changes in style. Amendment effective March 18, 2011.

*1995 Amendment:* Chapter 418 in (1), near beginning of first sentence, substituted "department" for "board" and in second sentence, after "rules", deleted "adopted by the board"; in (3), near middle of first sentence after "mailed", deleted "by the department"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

**76-5-209. Appeal from order.**

**Compiler's Comments**

*1995 Amendment:* Chapter 418 near beginning substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

## Part 3
## Role of Local Government

**76-5-301. Land use regulations.**

**Compiler's Comments**

*1995 Amendment:* Chapter 418 throughout section substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1983 Amendment:* In (1), inserted last sentence authorizing regulations to include, for floodplain management only, floodplain management regulations within sheetflood areas determined by federal emergency management agency.

**Administrative Rules**

ARM 36.15.209 Department regulation and enforcement.

**76-5-302. Substitution of local control for state permit system.**

**Compiler's Comments**

*1995 Amendment:* Chapter 418 throughout section substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

**Administrative Rules**

ARM 36.15.101 Definitions.

ARM 36.15.201 through 36.15.205 Local regulation and enforcement.

## Part 4
## Use of Flood Plains and Floodways

**Part Administrative Rules**

Title 36, chapter 15, ARM Floodplain management.

**76-5-401. Permissible open-space uses.**

**Compiler's Comments**

*2001 Amendment:* Chapter 7 in (3) near middle after "natural areas" substituted "alternative livestock ranches" for "game farms"; and made minor changes in style. Amendment effective October 1, 2001.

**76-5-402. Permissible uses within flood plain but outside floodway.**

**Compiler's Comments**

*2009 Amendment:* Chapter 124 in (2)(b) and (2)(c) after "constructed" deleted "on fill"; and made minor changes in style. Amendment effective October 1, 2009.

*1995 Amendment:* Chapter 418 in (2)(a) and (2)(c) substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

### 76-5-404. Artificial obstructions and nonconforming uses.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 in (3)(a) substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

**Attorney General's Opinions**

*Diversion Dike Construction — Permit or Plan Required:* The construction of a diversion dike with heavy equipment requires either a "310 permit" or an approved operation plan under Title 75, ch. 7, part 1. When this work is performed within a designated floodplain or floodway, the construction additionally requires a permit from the responsible political subdivision. 42 A.G. Op. 106 (1988).

### 76-5-405. Variance for obstruction or nonconforming use.

**Compiler's Comments**

*2011 Amendment:* Chapter 23 deleted former (3) that read: "(3) An application for a permit must be accompanied by a nonrefundable application fee of $10, which the state treasurer shall credit to the floodway obstruction removal fund"; in (3) in first sentence substituted "issue the permit with" for "make a part of the permit any" and after "conditions" deleted "that it may consider advisable", and in second sentence substituted "The permitted" for "In order for the permit to continue to remain in force, the" and near end substituted "in compliance with" for "so as to comply with the conditions and specifications of"; and made minor changes in style. Amendment effective March 18, 2011.

*1995 Amendment:* Chapter 418 in (2), in second sentence, substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

### 76-5-406. Criteria to be considered in connection with variance request.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 at end of introductory clause substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

## Part 11

## Water Conservation and Flood Control Projects

### 76-5-1101. Water conservation and flood control projects authorized.

**Compiler's Comments**

*Severability Clause:* Section 15, Ch. 272, L. 1965, was a severability clause.

### 76-5-1106. Requirements to change project boundaries — election.

**Compiler's Comments**

*2015 Amendment:* Chapter 49 substituted "approval by" for "the vote of", at beginning of second sentence deleted "Such electors are to be determined", and substituted "Title 13, chapter 1, part 5" for "76-5-1117"; and made minor changes in style. Amendment effective November 4, 2015.

### 76-5-1108. Acquisition of property.

**Compiler's Comments**

*2001 Amendment:* Chapter 125 in (1) inserted reference to Title 70, chapter 30; in (2) substituted "All applicable provisions of Title 70, chapter 30, apply to the condemnation of property under this section" for "All provisions of the laws of Montana relating to the condemnation of lands for public purposes shall apply to the provisions thereof insofar as applicable"; and made minor changes in style. Amendment effective October 1, 2001.

*Interim Study Bill — Eminent Domain:* Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

### 76-5-1109. Contracts for use of railroads and highways.

**Compiler's Comments**

*1991 Amendment:* Substituted references to Department of Transportation for references to Department of Highways. Amendment effective July 1, 1991.

### 76-5-1111. Apportionment of costs.

**Compiler's Comments**

*2001 Amendment:* Chapter 125 in (1) inserted reference to Title 70, chapter 30; and made minor changes in style. Amendment effective October 1, 2001.

*Interim Study Bill — Eminent Domain:* Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

### 76-5-1116. Determination of fees and charges.

**Compiler's Comments**

*1999 Amendment:* Chapter 584 in (2) and (3) inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

*Severability:* Section 172, Ch. 584, L. 1999, was a severability clause.

*Retroactive Applicability:* Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

### 76-5-1117. Bonds authorized — procedure.

**Compiler's Comments**

*1981 Amendment:* Substituted "or" for "and" following "Title 7, chapter 12, parts 41 and 42" and added "or 76-5-1114(1)" in (1).

# CHAPTER 6
# OPEN SPACES

**Chapter Compiler's Comments**

*Severability Clause Not Codified:* The first paragraph of section 62-609, R.C.M. 1947, a severability clause, was not codified. The section has not been repealed and is still valid law. Citation may be made to sec. 9, Ch. 337, L. 1969.

## Part 1
## General Provisions

### 76-6-102. Intent, findings, and policy.

**Compiler's Comments**

*2003 Amendment:* Chapter 361 inserted (1) relating to constitutional obligations and legislative intent; and made minor changes in style. Amendment effective April 16, 2003.

*Preamble:* The preamble attached to Ch. 361, L. 2003, provided: "WHEREAS, Article II, section 3, of the Montana Constitution enumerates certain inalienable individual rights, including the right to a clean and healthful environment, the right of pursuing life's basic necessities, the right of enjoying and defending an individual's life and liberty, the right of acquiring, possessing, and protecting property, and the right of seeking individual safety, health, and happiness in all lawful ways; and

WHEREAS, the constitutionally enumerated rights are by their very nature bound to result in competing interests in specific fact situations; and

WHEREAS, Article IX, section 1, of the Montana Constitution provides that the state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations and directs the Legislature to provide for the administration and enforcement of this duty and also directs the Legislature to provide adequate remedies for the protection of the environmental life support system from degradation and to provide adequate remedies to prevent unreasonable depletion and degradation of natural resources; and

WHEREAS, the Legislature has reviewed the intent of the framers of the 1972 Montana Constitution as evidenced in the verbatim transcripts of the constitutional convention; and

WHEREAS, there is no indication that one enumerated inalienable right is intended to supersede other inalienable rights, including the right to use property in all lawful means; and

WHEREAS, the Legislature, mindful of its constitutional obligation to provide for the administration and enforcement of the constitution, has enacted a comprehensive set of laws to accomplish the goals of the constitution, including the Montana Clean Indoor Air Act of 1979, Title 50, chapter 40, part 1, MCA; the Montana Environmental Policy Act, Title 75, chapter 1, parts 1 through 3, MCA; the Clean Air Act of Montana, Title 75, chapter 2, parts 1 through 4, MCA; water quality laws, Title 75, chapter 5, MCA; The Natural Streambed and Land Preservation Act of 1975, Title 75, chapter 7, part 1, MCA; The Montana Solid Waste Management Act, Title 75, chapter 10, part 2, MCA; The Montana Hazardous Waste Act, Title 75, chapter 10, part 4, MCA; the Comprehensive Environmental Cleanup and Responsibility Act, Title 75, chapter 10, part 7, MCA; the Montana Megalandfill Siting Act, sections 75-10-901 through 75-10-945, MCA; the Montana Underground Storage Tank Installer and Inspector Licensing and Permitting Act, Title 75, chapter 11, part 2, MCA; the Montana Underground Storage Tank Act, Title 75, chapter 11, part 5, MCA; the Montana Major Facility Siting Act, Title 75, chapter 20, MCA; the Open-Space Land and Voluntary Conservation Easement Act, Title 76, chapter 6, MCA; the Environmental Control Easement Act, Title 76, chapter 7, MCA; The Strip and Underground Mine Siting Act, Title 82, chapter 4, part 1, MCA; The Montana Strip and Underground Mine Reclamation Act, Title 82, chapter 4, part 2, MCA; The Opencut Mining Act, Title 82, chapter 4, part 4, MCA; and The Nongame and Endangered Species Conservation Act, Title 87, chapter 5, part 1, MCA."

*Severability:* Section 39, Ch. 361, L. 2003, was a severability clause.

*Retroactive Applicability:* Section 41, Ch. 361, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to actions for judicial review or other causes of action challenging the issuance of a permit, petition for review, amendment, license, arbitration, action, certificate, or inspection that are pending but not yet decided on or after [the effective date of this act]." Effective April 16, 2003.

### 76-6-105. Construction of chapter.

**Compiler's Comments**

*2001 Amendment:* Chapter 125 in (2) in second sentence inserted reference to Title 70, chapter 30. Amendment effective October 1, 2001.

*Interim Study Bill — Eminent Domain:* Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

*1997 Amendment:* Chapter 42 in (2), at beginning, substituted "chapter" for "subsection"; and made minor changes in style. Amendment effective March 12, 1997.

*Severability Clause Not Codified:* The first paragraph of section 62-609, R.C.M. 1947, a severability clause, was not codified. The section has not been repealed and is still valid law. Citation may be made to sec. 9, Ch. 337, L. 1969.

**Case Notes**

*Valid Easement in Gross Created for Conservation Purpose — Restriction Enforceable Against New Owners — Conservation Easement Laws Not Only Means of Creating Conservation Restriction:* A seller of a 40-acre parcel of land imposed restrictions in a deed that prevented usage of the property in a manner that reduced the quality of the stream and the riparian area, in addition to limiting construction to one single-family residence. The purchaser of the property eventually sold it to the plaintiffs. Twelve years after purchasing the property, the plaintiffs filed a complaint in District Court against the trust of the original seller for the purpose of invalidating the property restrictions and going forward with a subdivision of the property. The District Court held that the restrictions were enforceable against the plaintiffs by the trust, despite the fact that the restrictions were not created as a Title 76, ch. 6, conservation easement. On appeal, the Supreme Court affirmed, determining that the restrictions were enforceable against the plaintiffs as an easement in gross and that a conservation restriction is not invalid simply because it was not created under Title 76, ch. 6. The court reasoned that the restrictions were made for conservation purposes within the scope of 70-17-102, the benefit and burden of the easement passed to the successors in interest, the plaintiffs had actual notice of the restrictions, the restrictions were recorded, and there was no language in the deed from the original seller to the original buyer limiting the seller's ability to transfer the easement. The court also reasoned that 76-6-105 allows for restrictions for the purpose of conserving land even if the restrictions are not created under Title 76, ch. 6. Scott v. Lee and Donna Metcalf Charitable Trust, 2015 MT 265, 381 Mont. 64, 358 P.3d 879.

### 76-6-107. Conversion or diversion of open-space land.

**Compiler's Comments**

*2005 Amendment:* Chapter 88 in (1)(c) at end after "easement" inserted "in the terms of the acquisition agreement, or by the governing body resolution"; in (2) near middle of first sentence after "exceeding" substituted "3 years" for "1 year"; and made minor changes in style. Amendment effective March 24, 2005.

### 76-6-109. Powers of public bodies — county real property acquisition procedure maintained.

**Compiler's Comments**

*2017 Amendment:* Chapter 255 in (4) substituted "Title 7, chapter 8, parts 22 and 25" for "7-8-2202". Amendment effective October 1, 2017.

*2003 Amendments — Composite Section:* Chapter 114 deleted former (3)(f) that read: "(f) livestock described in 15-6-136(1)(a)"; and made minor changes in style. Amendment effective October 1, 2003.

Chapter 430 deleted former (3)(f) that read: "(f) livestock described in 15-6-136(1)(a)"; inserted (4) concerning 7-8-2202; and made minor changes in style. Amendment effective April 21, 2003.

*2001 Amendments — Composite Section:* Chapter 463 in (2)(c) after "state" inserted "subject to subsection (3)"; inserted (3) providing that property taxes levied to pay the principal and interest on general obligation bonds may not be levied against certain property; and made minor changes in style. Amendment effective April 30, 2001.

Chapter 574 at end of (2)(b) deleted "not to exceed 1 mill". Amendment effective July 1, 2001.

*Applicability:* Section 3, Ch. 463, L. 2001, provided: "[This act] [76-6-109] applies to mill levies assessed against property for the payment of interest and principal on open-space bonds issued after [the effective date of this act]." Effective April 30, 2001.

*1999 Amendment:* Chapter 584 in (2)(b) inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

*Severability:* Section 172, Ch. 584, L. 1999, was a severability clause.

*Retroactive Applicability:* Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

**Attorney General's Opinions**

*Use of Open-Space Bond Proceeds:* A city may use proceeds from bonds issued pursuant to Title 76, ch. 6, the Open-Space Land and Voluntary Conservation Easement Act, for the maintenance of open-space land acquired with bond proceeds and to fund the development of a comprehensive plan (now growth policy) for purchase, use, development, and maintenance of open-space land. 47 A.G. Op. 8 (1997).

### 76-6-110. Authorization and funding for planning commission.

**Attorney General's Opinions**

*Use of Open-Space Bond Proceeds:* A city may use proceeds from bonds issued pursuant to Title 76, ch. 6, the Open-Space Land and Voluntary Conservation Easement Act, for the maintenance of open-space land acquired with bond proceeds and to fund the development of a comprehensive plan (now growth policy) for purchase, use, development, and maintenance of open-space land. 47 A.G. Op. 8 (1997).

## Part 2

## Conservation Easements

**Part Law Review Articles**

Conservation Easements and Renewable Energy: Why Conservation Values Should Embrace Wind and Solar, Hromadka, 77 Mont. L. Rev. 367 (2016).

### 76-6-202. Duration of conservation easements.

**Attorney General's Opinions**

*Applicability of Provisions to Federal Conservation Easements:* Sections 76-6-202, 76-6-206, and 76-6-207 apply only to easements created under Title 76, chapter 6. These provisions do not apply to other easements created or acquired under other state law provisions or to conservation easements acquired or created by federal agencies under federal law. 54 A.G. Op. 2 (2011).

## 76-6-203. Types of permissible easements.

### Compiler's Comments

*2013 Amendment:* Chapter 379 in (7) after "76-3-104" deleted "and 76-3-202"; and made minor changes in style. Amendment effective September 1, 2013.

*Preamble:* The preamble attached to Ch. 379, L. 2013, provided: "WHEREAS, The Montana Subdivision and Platting Act provides for the local review of proposed subdivisions; and

WHEREAS, Title 76, chapter 3, part 2, provides miscellaneous exemptions from subdivision review for certain divisions of land and conveyances; and

WHEREAS, sections 76-3-202, 76-3-204, and 76-3-208, MCA, address the sale, lease, or rent or other conveyance of one or more parts of a building, structure, or other improvement; and

WHEREAS, section 76-3-204, MCA, provides that the sale, lease, rent, or other conveyance of one or more parts of a building, structure, or other improvement is not subject to subdivision review; and

WHEREAS, this exemption has been interpreted to exempt only one or more parts of a single building, structure, or improvement on a tract of record from subdivision review; and

WHEREAS, a strict interpretation of section 76-3-204, MCA, places an undue burden of undergoing full subdivision review on property owners who seek to lease or rent certain buildings; and

WHEREAS, it is the intent of the Legislature to provide an alternative process to subdivision review for the creation of buildings for lease or rent on tracts of land."

*Saving Clause:* Section 16, Ch. 379, L. 2013, was a saving clause.

*Severability:* Section 17, Ch. 379, L. 2013, was a severability clause.

*Applicability:* Section 19, Ch. 379, L. 2013, provided: "[This act] applies to buildings created for lease or rent on a single tract on or after [the effective date of this act]." Effective September 1, 2013.

## 76-6-206. Review by local planning authority.

### Attorney General's Opinions

*Applicability of Provisions to Federal Conservation Easements:* Sections 76-6-202, 76-6-206, and 76-6-207 apply only to easements created under Title 76, chapter 6. These provisions do not apply to other easements created or acquired under other state law provisions or to conservation easements acquired or created by federal agencies under federal law. 54 A.G. Op. 2 (2011).

## 76-6-207. Recording and description of easement.

### Compiler's Comments

*2007 Amendment:* Chapter 352 substituted (2)(b) requiring county clerk and recorder to provide copy of conservation easement to department of revenue office for "shall cause a copy of the conservation easement to be mailed to the department of revenue"; and made minor changes in style. Amendment effective April 27, 2007.

### Attorney General's Opinions

*Applicability of Provisions to Federal Conservation Easements:* Sections 76-6-202, 76-6-206, and 76-6-207 apply only to easements created under Title 76, chapter 6. These provisions do not apply to other easements created or acquired under other state law provisions or to conservation easements acquired or created by federal agencies under federal law. 54 A.G. Op. 2 (2011).

## 76-6-211. Who may enforce easement.

### Case Notes

*No Grant of Private Express Easement Created by Conservation Easement Over Private Road:* The owners adjacent to a large ranch possessed an access easement over the private road owned by the large ranch. The adjacent owners sold a portion of their property but expressly reserved the road easement and indicated in the purchase agreement that they could not guarantee access using the private road. The large ranch sued for a declaratory judgment that the purchasers had no legal access on the private road except for hunting purposes during specific months pursuant to a conservation easement. The purchasers argued that the existence of the conservation easement created an express access easement in their favor. The District Court granted summary judgment in favor of the large ranch. On appeal, the Supreme Court affirmed, finding that the purchasers had no standing to enforce the conservation easement because they neither owned any land burdened by the conservation easement nor were they the public body holding the easement. Sieben Ranch Co. v. Adams, 2021 MT 172, 404 Mont. 510, 494 P.3d 307.

**76-6-212. Additional reporting procedures — coordination of information collection, transfer, and accessibility.**

**Compiler's Comments**

*2013 Amendment:* Chapter 175 in (3)(a), (3)(b), (3)(c) in two places, and (3)(d) substituted references to state library for references to department of administration; and in (3)(d) substituted "incorporate" for "provide", after "data" deleted "to the Montana natural heritage program for incorporation", and after "maintained" inserted "by the Montana natural heritage program". Amendment effective July 1, 2013.

*Effective Date:* Section 7(2), Ch. 352, L. 2007, provided that this section is effective October 1, 2007.

# CHAPTER 7
# ENVIRONMENTAL CONTROL EASEMENT ACT

**Chapter Compiler's Comments**

*Effective Date:* Section 22, Ch. 503, L. 1999, provided: "[This act] is effective July 1, 1999."

## Part 1
## General Provisions

**76-7-102. Intent, findings, and purpose.**

**Compiler's Comments**

*2003 Amendment:* Chapter 361 inserted (1) relating to constitutional obligations and legislative intent; and made minor changes in style. Amendment effective April 16, 2003.

*Preamble:* The preamble attached to Ch. 361, L. 2003, provided: "WHEREAS, Article II, section 3, of the Montana Constitution enumerates certain inalienable individual rights, including the right to a clean and healthful environment, the right of pursuing life's basic necessities, the right of enjoying and defending an individual's life and liberty, the right of acquiring, possessing, and protecting property, and the right of seeking individual safety, health, and happiness in all lawful ways; and

WHEREAS, the constitutionally enumerated rights are by their very nature bound to result in competing interests in specific fact situations; and

WHEREAS, Article IX, section 1, of the Montana Constitution provides that the state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations and directs the Legislature to provide for the administration and enforcement of this duty and also directs the Legislature to provide adequate remedies for the protection of the environmental life support system from degradation and to provide adequate remedies to prevent unreasonable depletion and degradation of natural resources; and

WHEREAS, the Legislature has reviewed the intent of the framers of the 1972 Montana Constitution as evidenced in the verbatim transcripts of the constitutional convention; and

WHEREAS, there is no indication that one enumerated inalienable right is intended to supersede other inalienable rights, including the right to use property in all lawful means; and

WHEREAS, the Legislature, mindful of its constitutional obligation to provide for the administration and enforcement of the constitution, has enacted a comprehensive set of laws to accomplish the goals of the constitution, including the Montana Clean Indoor Air Act of 1979, Title 50, chapter 40, part 1, MCA; the Montana Environmental Policy Act, Title 75, chapter 1, parts 1 through 3, MCA; the Clean Air Act of Montana, Title 75, chapter 2, parts 1 through 4, MCA; water quality laws, Title 75, chapter 5, MCA; The Natural Streambed and Land Preservation Act of 1975, Title 75, chapter 7, part 1, MCA; The Montana Solid Waste Management Act, Title 75, chapter 10, part 2, MCA; The Montana Hazardous Waste Act, Title 75, chapter 10, part 4, MCA; the Comprehensive Environmental Cleanup and Responsibility Act, Title 75, chapter 10, part 7, MCA; the Montana Megalandfill Siting Act, sections 75-10-901 through 75-10-945, MCA; the Montana Underground Storage Tank Installer and Inspector Licensing and Permitting Act, Title 75, chapter 11, part 2, MCA; the Montana Underground Storage Tank Act, Title 75, chapter 11, part 5, MCA; the Montana Major Facility Siting Act, Title 75, chapter 20, MCA; the Open-Space Land and Voluntary Conservation Easement Act, Title 76, chapter 6, MCA; the Environmental Control Easement Act, Title 76, chapter 7, MCA; The Strip and Underground Mine Siting Act, Title 82, chapter 4, part 1, MCA; The Montana Strip and Underground Mine Reclamation Act, Title 82, chapter 4, part 2, MCA; The Opencut Mining Act, Title 82, chapter 4, part 4, MCA; and The Nongame and Endangered Species Conservation Act, Title 87, chapter 5, part 1, MCA."

*Severability:* Section 39, Ch. 361, L. 2003, was a severability clause.

*Retroactive Applicability:* Section 41, Ch. 361, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to actions for judicial review or other causes of action challenging the issuance of a permit, petition for review, amendment, license, arbitration, action, certificate, or inspection that are pending but not yet decided on or after [the effective date of this act]." Effective April 16, 2003.

## Part 2
## Environmental Control Easements

### 76-7-203. Permissible easements.

**Compiler's Comments**

*2013 Amendment:* Chapter 379 in (1)(f) after "76-3-104" deleted "and 76-3-202"; and made minor changes in style. Amendment effective September 1, 2013.

*Preamble:* The preamble attached to Ch. 379, L. 2013, provided: "WHEREAS, The Montana Subdivision and Platting Act provides for the local review of proposed subdivisions; and

WHEREAS, Title 76, chapter 3, part 2, provides miscellaneous exemptions from subdivision review for certain divisions of land and conveyances; and

WHEREAS, sections 76-3-202, 76-3-204, and 76-3-208, MCA, address the sale, lease, or rent or other conveyance of one or more parts of a building, structure, or other improvement; and

WHEREAS, section 76-3-204, MCA, provides that the sale, lease, rent, or other conveyance of one or more parts of a building, structure, or other improvement is not subject to subdivision review; and

WHEREAS, this exemption has been interpreted to exempt only one or more parts of a single building, structure, or improvement on a tract of record from subdivision review; and

WHEREAS, a strict interpretation of section 76-3-204, MCA, places an undue burden of undergoing full subdivision review on property owners who seek to lease or rent certain buildings; and

WHEREAS, it is the intent of the Legislature to provide an alternative process to subdivision review for the creation of buildings for lease or rent on tracts of land."

*Saving Clause:* Section 16, Ch. 379, L. 2013, was a saving clause.

*Severability:* Section 17, Ch. 379, L. 2013, was a severability clause.

*Applicability:* Section 19, Ch. 379, L. 2013, provided: "[This act] applies to buildings created for lease or rent on a single tract on or after [the effective date of this act]." Effective September 1, 2013.

### 76-7-204. Environmental control easement conveyances.

**Compiler's Comments**

*2009 Amendment:* Chapter 2 in (4) near end after "tax" inserted "lien". Amendment effective October 1, 2009.

# CHAPTER 8
# BUILDINGS FOR LEASE OR RENT

**Chapter Collateral References**

Buildings for Lease or Rent, Community Technical Assistance Program, Montana Department of Commerce, Community Development Division, https://comdev.mt.gov/Programs-and-Boards/Community-Technical-Assistance-Program/Presentations,-Publications-and-Model-Documents.

## Part 1
## Lease or Rent — General Provisions

**Part Compiler's Comments**

*Preamble:* The preamble attached to Ch. 379, L. 2013, provided: "WHEREAS, The Montana Subdivision and Platting Act provides for the local review of proposed subdivisions; and

WHEREAS, Title 76, chapter 3, part 2, provides miscellaneous exemptions from subdivision review for certain divisions of land and conveyances; and

WHEREAS, sections 76-3-202, 76-3-204, and 76-3-208, MCA, address the sale, lease, or rent or other conveyance of one or more parts of a building, structure, or other improvement; and

WHEREAS, section 76-3-204, MCA, provides that the sale, lease, rent, or other conveyance of one or more parts of a building, structure, or other improvement is not subject to subdivision review; and

WHEREAS, this exemption has been interpreted to exempt only one or more parts of a single building, structure, or improvement on a tract of record from subdivision review; and

WHEREAS, a strict interpretation of section 76-3-204, MCA, places an undue burden of undergoing full subdivision review on property owners who seek to lease or rent certain buildings; and

WHEREAS, it is the intent of the Legislature to provide an alternative process to subdivision review for the creation of buildings for lease or rent on tracts of land."

*Saving Clause:* Section 16, Ch. 379, L. 2013, was a saving clause.

*Severability:* Section 17, Ch. 379, L. 2013, was a severability clause.

*Effective Date:* Section 18, Ch. 379, L. 2013, provided that this part is effective September 1, 2013.

*Applicability:* Section 19, Ch. 379, L. 2013, provided: "[This act] applies to buildings created for lease or rent on a single tract on or after [the effective date of this act]." Effective September 1, 2013.

**Part Collateral References**

Final Report of the Education and Local Government Interim Committee for the 2011-2012 Interim, Mont. Leg. Serv. Div. (2012).

### 76-8-101. Definitions.

**Compiler's Comments**

*2017 Amendment:* Chapter 363 in definition of building substituted "76-3-103(16)" for "76-3-103(15)". Amendment effective May 8, 2017.

*Applicability:* Section 7, Ch. 363, L. 2017, provided: "[This act] applies to phased development applications submitted on or after [the effective date of this act]." Effective May 8, 2017.

### 76-8-103. Buildings for lease or rent — exemptions.

**Compiler's Comments**

*2021 Amendment:* Chapter 484 in (1)(b)(ii) near beginning substituted "building provides accommodations as defined in 15-68-101 that are" for "building is a facility as defined in 15-65-101 that is". Amendment effective October 1, 2021.

*Applicability:* Section 14, Ch. 484, L. 2021, provided: "[This act] applies to sales made on or after October 1, 2021."

*Saving Clause:* Section 13, Ch. 484, L. 2021, was a saving clause.

# CHAPTER 9
# SHOOTING RANGES

## Part 1
## Protection of Shooting Range Location and Investments

### 76-9-101. Policy.

**Compiler's Comments**

*Applicability:* Section 10, Ch. 415, L. 1991, provided: "[This act] applies to shooting ranges in operation on or after [the effective date of this act] [effective April 15, 1991]."

*Severability:* Section 11, Ch. 415, L. 1991, was a severability clause.

*Effective Date:* Section 12, Ch. 415, L. 1991, provided: "[This act] is effective on passage and approval." Approved April 15, 1991.

**Case Notes**

*Civil, Private, and Attractive Nuisance and Trespass Claims Against Shooting Range — Opportunity to Further Develop Certain Claims Allowed on Remand:* After an individual defendant transferred property to defendant ranch company and helped the ranch develop a shooting range on the property, plaintiff neighbors brought multiple claims alleging that operation of the shooting range in close proximity to a subdivision and elementary school constituted a public nuisance, private nuisance, attractive nuisance, trespass, and a violation of various constitutional provisions. The District Court dismissed all claims and plaintiffs appealed. Citing Barnes v. Thompson Falls, 1999 MT 77, 294 Mont. 76, 979 P.2d 1275, the Supreme Court noted that the Legislature explicitly exempted shooting ranges from civil nuisance liability, so plaintiffs' public nuisance claims were properly dismissed. Regarding the private nuisance claims, the District Court should have focused on injury to specific plaintiffs rather than dismissing the claims as related to all plaintiffs. The trespass claims concerned noise from the shooting range invading plaintiffs' property and thus took the form of intangible trespass. The District Court prematurely dismissed the trespass claims by failing to recognize that an intangible invasion supported by actual damages may support a trespass action, and plaintiffs should have been allowed to develop evidence and facts demonstrating actual damages. Plaintiffs should also have been allowed to develop facts of an actual threat of irreparable injury in support of the attractive nuisance claims. Lastly, plaintiffs failed to show how common law or statutory remedies would not adequately address any potential damages or to demonstrate how the constitutional provisions in question directly addressed the conduct of private parties, so the constitutional claims were properly dismissed. The case was remanded to allow plaintiffs the opportunity to develop their trespass and public, private, and attractive nuisance claims. Tally Bissell Neighbors, Inc. v. Eyrie Shotgun Ranch, LLC, 2010 MT 63, 355 Mont. 387, 228 P.3d 1134.

### 76-9-102. Prohibitions.

**Compiler's Comments**

*Applicability:* Section 10, Ch. 415, L. 1991, provided: "[This act] applies to shooting ranges in operation on or after [the effective date of this act] [effective April 15, 1991]."

*Severability:* Section 11, Ch. 415, L. 1991, was a severability clause.

*Effective Date:* Section 12, Ch. 415, L. 1991, provided: "[This act] is effective on passage and approval." Approved April 15, 1991.

### 76-9-103. Planning — effect on shooting ranges.

**Compiler's Comments**

*2007 Amendment:* Chapter 44 in introductory clause after "planning" substituted "or growth policies, as defined in 76-1-103" for "master plans, or comprehensive plans"; and made minor changes in style. Amendment effective October 1, 2007.

*Applicability:* Section 10, Ch. 415, L. 1991, provided: "[This act] applies to shooting ranges in operation on or after [the effective date of this act] [effective April 15, 1991]."

*Severability:* Section 11, Ch. 415, L. 1991, was a severability clause.

*Effective Date:* Section 12, Ch. 415, L. 1991, provided: "[This act] is effective on passage and approval." Approved April 15, 1991.

### 76-9-104. Zoning — effect on shooting ranges.

**Compiler's Comments**

*1999 Amendment:* Chapter 582 in introduction substituted "growth policy" for "master plan". Amendment effective October 1, 1999.

*Saving Clause:* Section 35, Ch. 582, L. 1999, was a saving clause.

*Transition:* Section 36, Ch. 582, L. 1999, provided: "A governing body that adopts a master plan pursuant to Title 76, chapter 1, before October 1, 1999, may adopt zoning regulations that are consistent with the master plan pursuant to Title 76, chapter 2, part 2 or 3, until October 1, 2001."

*Applicability:* Section 10, Ch. 415, L. 1991, provided: "[This act] applies to shooting ranges in operation on or after [the effective date of this act] [effective April 15, 1991]."

*Severability:* Section 11, Ch. 415, L. 1991, was a severability clause.

*Effective Date:* Section 12, Ch. 415, L. 1991, provided: "[This act] is effective on passage and approval." Approved April 15, 1991.

### 76-9-105. Closure of shooting ranges — limitations — relocation cost.

**Compiler's Comments**

*Applicability:* Section 10, Ch. 415, L. 1991, provided: "[This act] applies to shooting ranges in operation on or after [the effective date of this act] [effective April 15, 1991]."

*Severability:* Section 11, Ch. 415, L. 1991, was a severability clause.

*Effective Date:* Section 12, Ch. 415, L. 1991, provided: "[This act] is effective on passage and approval." Approved April 15, 1991.

**Case Notes**

*Civil, Private, and Attractive Nuisance and Trespass Claims Against Shooting Range — Opportunity to Further Develop Certain Claims Allowed on Remand:* After an individual defendant transferred property to defendant ranch company and helped the ranch develop a shooting range on the property, plaintiff neighbors brought multiple claims alleging that operation of the shooting range in close proximity to a subdivision and elementary school constituted a public nuisance, private nuisance, attractive nuisance, trespass, and a violation of various constitutional provisions. The District Court dismissed all claims and plaintiffs appealed. Citing Barnes v. Thompson Falls, 1999 MT 77, 294 Mont. 76, 979 P.2d 1275, the Supreme Court noted that the Legislature explicitly exempted shooting ranges from civil nuisance liability, so plaintiffs' public nuisance claims were properly dismissed. Regarding the private nuisance claims, the District Court should have focused on injury to specific plaintiffs rather than dismissing the claims as related to all plaintiffs. The trespass claims concerned noise from the shooting range invading plaintiffs' property and thus took the form of intangible trespass. The District Court prematurely dismissed the trespass claims by failing to recognize that an intangible invasion supported by actual damages may support a trespass action, and plaintiffs should have been allowed to develop evidence and facts demonstrating actual damages. Plaintiffs should also have been allowed to develop facts of an actual threat of irreparable injury in support of the attractive nuisance claims. Lastly, plaintiffs failed to show how common law or statutory remedies would not adequately address any potential damages or to demonstrate how the constitutional provisions in question directly addressed the conduct of private parties, so the constitutional claims were properly dismissed. The case was remanded to allow plaintiffs the opportunity to develop their trespass and public, private, and attractive nuisance claims. Tally Bissell Neighbors, Inc. v. Eyrie Shotgun Ranch, LLC, 2010 MT 63, 355 Mont. 387, 228 P.3d 1134.

# CHAPTER 10
# REGULATION OF WILDCRAFTING

## Part 1
## General Provisions

**Part Compiler's Comments**

*Effective Date:* Section 11, Ch. 282, L. 2001, provided that this part is effective on passage and approval. Approved April 20, 2001.

# CHAPTER 11
# NATURAL RESOURCES IN GENERAL

## Part 2
## Soil Survey and Mapping Program

**Part Collateral References**

Published Soil Surveys for Montana, United States Department of Agriculture, Natural Resources Conservation Service, www.nrcs.usda.gov, Soils. Soil Surveys by State. Montana.

### 76-11-201. Short title.

**Compiler's Comments**

*Severability:* Section 6, Ch. 358, L. 1979, was a severability clause.

# CHAPTER 12
# WILD AND SCENIC RESOURCES

**Chapter Law Review Articles**

Energy Transmission Across Wild and Scenic Rivers: Balancing Increased Access to Nontraditional Power Sources With Environmental Protection Policies, Glicksman, 34 Pub. Land & Resources L. Rev. 1 (2013).

## Part 1
## Natural Areas

**Part Compiler's Comments**

*Severability Section Not Codified:* Section 81-2713, R.C.M. 1947, a severability provision, was not codified. The section was not repealed and is still valid law. Citation may be made to sec. 13, Ch. 254, L. 1974.

**Part Administrative Rules**

Title 36, chapter 27, subchapter 2, ARM Rules governing the establishment, administration, and management of state natural areas.

ARM 36.27.203 Duties of the Department of Natural Resources and Conservation.

**Part Attorney General's Opinions**

*Compensation for School Trust Fund Land:* The state must compensate its school trust for the full appraised value of school trust lands designated as or exchanged for natural areas under the Montana Natural Areas Act of 1974. 36 A.G. Op. 92 (1976).

### 76-12-102. Legislative findings.

**Compiler's Comments**

*1987 Amendment:* In (2) substituted "selected areas" for "the remaining areas"; inserted (4) relating to a legislative finding of necessity to establish system to develop natural areas and to encourage public and private participation; and inserted (5) concerning legislative finding that designation of natural areas first consider natural features in dedicated lands.

### 76-12-103. Statement of policy.

**Law Review Articles**

Montana's State School Trust Lands, Wiles, 38 Pub. Land & Resources L. Rev. 149 (2017).

### 76-12-104. Definitions.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 in definition of Department substituted "department of natural resources and conservation" for "department of state lands"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*Code Commissioner Correction:* The Code Commissioner deleted the definition of Council because 2-15-3203, which established the Natural Areas Advisory Council, terminated June 30, 1993. The definition was therefore obsolete.

*1987 Amendment:* In (2), after "advisory council", substituted reference to 2-15-3203 for "created by this part"; and inserted definitions of natural areas system and register.

**Administrative Rules**

ARM 36.27.201 Definitions.

### 76-12-107. Methods of bringing land under part.

**Compiler's Comments**

*1987 Amendment:* In (4), after "board", inserted remainder of subsection providing that land passing to the state may be protected and managed under Montana Natural Areas Act of 1974; and inserted (6) providing that registration of land designated, dedicated, or protected by owner as natural area may become subject to Montana Natural Areas Act of 1974.

*Redundant Section Not Codified:* Section 81-2706, R.C.M. 1947, is redundant with 76-12-107(2) and was not codified. The section was not repealed and is still valid law. Citation may be made to sec. 6, Ch. 254, L. 1974.

**Attorney General's Opinions**

*Compensation for School Trust Fund Land:* The state must compensate its school trust for the full appraised value of school trust lands designated as or exchanged for natural areas under the Montana Natural Areas Act of 1974. 36 A.G. Op. 92 (1976).

### 76-12-108. Acquisition of lands.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 4, Ch. 238, L. 2023. Amendment effective April 24, 2023.

*Applicability:* Section 7, Ch. 238, L. 2023, provided: "[This act] does not apply to condemnation proceedings commenced pursuant to 70-30-206 before [the effective date of this act]." Effective April 24, 2023.

*2001 Amendment:* Chapter 125 in second sentence inserted reference to Title 70, chapter 30; and made minor changes in style. Amendment effective October 1, 2001.

*Interim Study Bill — Eminent Domain:* **Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.Administrative Rules**

ARM 36.27.202 Applicability and scope of rules.

## 76-12-109. Report to legislature.

**Compiler's Comments**

*1993 Amendment:* Chapter 349 after "board" substituted "may" for "shall".

*1991 Amendment:* Near beginning inserted reference to 5-11-210 and after "legislature" substituted "a" for "an annual". Amendment effective March 20, 1991.

## 76-12-110. Restriction on condemnation or development of natural areas.

**Compiler's Comments**

*2001 Amendment:* Chapter 125 at end inserted reference to Title 70, chapter 30; and made minor changes in style. Amendment effective October 1, 2001.

*Interim Study Bill — Eminent Domain:* Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

## 76-12-112. Duties of board — administrative rules and hearing requirements.

**Compiler's Comments**

*1987 Amendment:* In (2), in first sentence after "provide", substituted "for meetings by the board" for "at least two board meetings per year" and before "proposed designation" substituted "department's" for "board's"; and inserted (3) requiring Board to consider Department's recommendations and to issue statement of decision concerning proposed designation of natural areas.

**Administrative Rules**

Title 36, chapter 27, subchapter 2, ARM Rules governing the establishment, administration, and management of state natural areas.

## 76-12-115. Consultation with interested parties.

**Compiler's Comments**

*1987 Amendment:* At beginning of section substituted "The department" for "The board and the natural areas advisory council" and after "citizen organizations" inserted "organizations representing Montana's basic resource industries".

## 76-12-121. Duties of department — plan for natural areas system.

**Compiler's Comments**

*Code Commissioner Correction:* In (3) the Code Commissioner deleted a reference to the Council because 2-15-3203, which established the Natural Areas Advisory Council, terminated June 30, 1993. The reference was therefore obsolete.

## 76-12-123. Natural areas account.

**Compiler's Comments**

*1997 Amendment:* Chapter 422 in (3) deleted second sentence that read: "These funds, except funds used for administration of a program, are statutorily appropriated, as provided in 17-7-502." Amendment effective July 1, 1997.

*1989 Amendment:* In (3) inserted "except funds used for administration of a program". Amendment effective July 1, 1989.

# CHAPTER 13
# TIMBER RESOURCES

**Chapter Compiler's Comments**

*Functions of Department of Natural Resources and Conservation Transferred to Department of State Lands (Now Abolished):* Section 1, Ch. 529, L. 1981, provided: "(1) The functions of protecting natural resources from fire in Title 76, chapter 11, part 1 [now renumbered and repealed]; of protection of forest resources in Title 76, chapter 13; of appraising, protecting, and selling state timberlands in Title 77, chapter 5; and of recommending closing lands to hunting and fishing in fire danger areas under 87-3-106 are transferred from the department of natural resources and conservation to the department of state lands [department of state lands now abolished—functions were returned to department of natural resources and conservation].

(2) Unless inconsistent with this act, any reference to "department of natural resources and conservation" in those sections is changed to "department of state lands" [now abolished].

(3) Any corresponding internal references shall be changed by the code commissioner."

*Functions of Board of Natural Resources and Conservation Transferred to Board of Land Commissioners:* Section 2, Ch. 529, L. 1981, provided: "(1) The functions of the board of natural resources and conservation in Title 76, chapter 13, relating to protection of forest resources are transferred to the board of land commissioners.

(2) Unless inconsistent with this act, any reference in that chapter to "board of natural resources and conservation" is changed to "board of land commissioners".

(3) Any corresponding internal references shall be changed by the code commissioner."

*Severability:* Section 9, Ch. 529, L. 1981, was a severability section.

**Chapter Case Notes**

*Federal Law Applied to Road Building and Logging in National Forest:* The U.S. District Court discussed the applicability of federal law to road building and logging activities in certain portions of Beaverhead National Forest. The case examined long-range management guidance, environmental assessments, environmental impact statements, the effects of a finding of no significant impact, and regeneration of timber sale areas as affected by the 1978 Beaverhead National Forest Land Management Plan, the Roadless Area Review Evaluation (RARE II), the Montana Wilderness Study Act of 1977, the National Environmental Policy Act, the National Forest Management Act of 1976, and the Multiple-Use Sustained-Yield Act of 1960. Big Hole Ranchers Ass'n, Inc. v. U.S. Forest Serv., 686 F. Supp. 256, 45 St. Rep. 908 (D.C. Mont. 1988).

**Chapter Law Review Articles**

The Good, the Bad, and the Unnecessary: Forest Fire Suppression Funding and Forest Management Provisions of the Consolidated Appropriations Act of 2018, Taylor, 41 Pub. Land & Resources L. Rev. 79 (2019).

**Chapter Collateral References**

Forestry, Montana Department of Natural Resources & Conservation, https://dnrc.mt.gov/Forestry/.

Montana Forestry Best Management Practices, Montana Department of Natural Resources & Conservation, Forestry Division (2015).

Hazard Reduction Manual, Montana Department of Natural Resources & Conservation, Forestry Assistance Bureau (2014).

Montana's State Assessment of Forest Resources: Base Findings and GIS Methodology, Montana Department of Natural Resources & Conservation (2010).

Montana Statewide Forest Resource Strategy, Montana Department of Natural Resources & Conservation (2010).

## Part 1
## Protection of Forest Resources

**Part Administrative Rules**

Title 36, chapter 10, ARM Fire management.

**Part Collateral References**

Fire and Aviation, Montana Department of Natural Resources & Conservation, https://dnrc.mt.gov/Forestry/.

## 76-13-101. Purpose.

### Compiler's Comments

*2007 Amendment:* Chapter 336 throughout section substituted “natural” for “forest”; in (1)(a)(i) at end deleted “the regulation of streamflow”; and made minor changes in style. Amendment effective June 1, 2007.

*1989 Amendment:* Inserted (2) relating to forest management practices on private land. Amendment effective January 1, 1990.

*Applicability:* Section 8, Ch. 423, L. 1989, provided: “[This act] applies to timber sales that begin after December 31, 1989.”

## 76-13-102. Definitions.

### Compiler's Comments

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 1, Ch. 662, L. 2023. Amendment effective May 19, 2023.

*2007 Amendment:* Chapter 336 inserted definitions of wildfire, wildfire season, wildland, wildland fire protection, wildland fire protection district, and wildland-urban interface; deleted definition of board that read: ““Board” means the board of land commissioners provided for in Article X, section 4, of the Montana constitution”; in definition of conservation substituted “range, water, and soil” for “forest range, forest water, and forest soil”; deleted definition of forest fire protection that read: ““Forest fire protection” means the work of prevention, detection, and suppression of forest fires and includes training required to perform those functions”; deleted definition of forest fire protection district that read: ““Forest fire protection district” means a definite forest land area, the boundaries of which are fixed and in which forest fire protection is provided through the medium of an agency recognized by the department”; deleted definition of forest fire season that read: ““Forest fire season” means the period of each year beginning May 1 and ending September 30, inclusive”; deleted definition of lands that read: ““Lands” for conservation purposes means all forest lands within this state that are officially classified by the department as forest lands under 76-13-107”; in definition of recognized agency after “providing” deleted “forest” and before “lands” deleted “forest”; and made minor changes in style. Amendment effective June 1, 2007.

*Code Commissioner Correction:* Pursuant to sec. 32, Ch. 336, L. 2007, the code commissioner substituted the definition of wildland fire for the definition of forest fire.

*1997 Amendment:* Chapter 27 in definition of forest fire protection district, at end, substituted “department” for “board”; and in definition of recognized agency, in two places, substituted “department” for “board”. Amendment effective February 21, 1997.

*1995 Amendment:* Chapter 418 in definition of Department substituted “department of natural resources and conservation provided for in Title 2, chapter 15, part 33” for “department of state lands provided for in Title 2, chapter 15, part 32”; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: “The provisions of 2-15-131 through 2-15-137 apply to [this act].”

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1989 Amendment:* Inserted definitions of forest practices, operator, person, and timber sale. Amendment effective January 1, 1990.

*Applicability:* Section 8, Ch. 423, L. 1989, provided: “[This act] applies to timber sales that begin after December 31, 1989.”

*1981 Amendment:* Changed the definition of “Board” from “the board of natural resources and conservation, provided for in 2-15-3302” to “the board of land commissioners provided for in Article X, section 4, of the Montana constitution”; and changed the definition of “Department” from “the department of natural resources and conservation” to “the department of state lands” and changed the internal reference from “Title 2, chapter 15, part 33” to “Title 2, chapter 15, part 32.”

*Severability:* Section 9, Ch. 529, L. 1981, was a severability section.

## 76-13-103. Applicability.

### Compiler's Comments

*2007 Amendment:* Chapter 336 substituted “state and private lands” for “forest lands” and at end substituted “susceptible to wildfire, as determined by the department” for “officially classified by the department as forest lands according to the definition of forest land in 76-13-102”; and made minor changes in style. Amendment effective June 1, 2007.

*1997 Amendment:* Chapter 27 near middle substituted “department” for “board”; and made minor changes in style. Amendment effective February 21, 1997.

## 76-13-104. Functions of department — rulemaking.

**Compiler's Comments**

*2017 Amendment:* Chapter 437 in (9)(a) substituted "establish a good neighbor policy that would allow the department to enter into" for "advocate for the inclusion of Montana in federal legislation to establish a good neighbor policy that would allow the secretary of the interior or the secretary of agriculture to enter into"; inserted (9)(a)(ii) concerning federal authority that promotes sustainable forest management; and made minor changes in style. Amendment effective May 22, 2017.

*Preamble:* The preamble attached to Ch. 437, L. 2017, provided: "WHEREAS, Congress passed the 2014 farm bill and established good neighbor authority to focus on forest restoration efforts and increase partnerships between the U.S. forest service and individual states; and

WHEREAS, Montana forests play a significant role in the state's economic well-being, attracting new businesses, supporting a booming tourism industry, and providing good-paying jobs in the timber industry in many smaller communities; and

WHEREAS, Governor Bullock identified more than 5 million acres of federal landscape in need of management and there are millions more acres requiring forest management work to be done to protect the state's economy and maintain a viable wood products industry; and

WHEREAS, projects already are helping sustain 1,047 jobs with a total of $60.5 million in labor and proprietor income, and $23.8 million in state and federal taxes; and

WHEREAS, future goals include using federal revenue from timber projects to fund more restoration work throughout Montana's forests and further bolster the state's economy."

*2013 Amendments — Composite Section:* Chapter 206 in (7) after "necessary" deleted "subject to confirmation by the local county government". Amendment effective October 1, 2013.

Chapter 401 inserted (9) regarding including Montana in federal legislation to establish good neighbor policy; and inserted (10) authorizing department intervention in litigation or appeals. Amendment effective October 1, 2013.

*Preamble:* The preamble attached to Ch. 401, L. 2013, provided: "WHEREAS, Article II, section 3, of the Montana Constitution provides that all persons have a constitutional right to a clean and healthful environment; and

WHEREAS, sound forest management activities to reduce fire risk are critical to preventing catastrophic wildland fires that jeopardize the constitutional right to a clean and healthful environment;

WHEREAS, sound forest management activities to reduce fire risk are not occurring on some federally managed lands located within Montana's wildland-urban interface; and

WHEREAS, the state has the inherent power to enact reasonable legislation to protect the health, safety, and welfare of the public, which includes the protection of property in the wildland-urban interface from catastrophic wildland fire and the resulting devastation."

*2009 Amendment:* Chapter 172 inserted (1)(b) providing that the department may engage in wildfire initial attack on all lands if fire threatens to move onto state or private land; and made minor changes in style. Amendment effective April 6, 2009.

*2007 Amendment — Coordination:* Section 34, Ch. 336, L. 2007, a coordination section, inserted (1) establishing the department's duty to protect state and private land and to suppress wildfires on these lands; inserted (2) establishing that the department shall adopt rules to protect the state's natural resources and may, in declared emergencies, employ personnel and incur other expenses; inserted (3) specifying that the department's duties do not absolve private property owners and local governmental fire agencies from fire protection responsibilities; inserted (6) requiring the department to establish and maintain wildland fire control training programs; deleted former (3) that read: "(3) The department shall require an owner or operator to provide a notification prior to conducting forest practices as provided in 76-13-131, shall adapt as necessary any procedure used for notification with respect to an agreement under 76-13-408 to ensure that the operator provides information on the location of the forest practices in relation to watershed features, and shall conduct onsite consultations as provided for in 76-13-132"; inserted (7) requiring the department to appoint firewardens and adopt rules describing their qualifications and duties; inserted (8) making October 1, 2008, the deadline for department rules on best practices for development within the wildland-urban interface and criteria for providing grant and loan assistance to local governments for development of best practices; and made minor changes in style. Amendment effective June 1, 2007.

The amendments to this section made by sec. 6, Ch. 336, L. 2007, were rendered void by sec. 34, Ch. 336, L. 2007, a coordination section.

*1989 Amendment:* Inserted (3) relating to notification and consultation concerning conduct of forest practices. Amendment effective January 1, 1990.

*Applicability:* Section 8, Ch. 423, L. 1989, provided: "[This act] applies to timber sales that begin after December 31, 1989."

*1981 Amendment:* Deleted subsection (3), which required the department of natural resources and conservation to assist the department of state lands (now abolished) in protecting and developing state forest and forest lands. This deletion was made because Ch. 529, L. 1981, transferred the duty of protecting forest resources from the department of natural resources and conservation to the department of state lands (now abolished).

*Severability:* Section 9, Ch. 529, L. 1981, was a severability section.

## 76-13-105. Protection of lands and improvements from fire.

**Compiler's Comments**

*2007 Amendment:* Chapter 336 in (1) at end inserted "in those areas where a recognized agency is available"; inserted (2) providing that forest land within a wildland fire protection district or otherwise under contract for fire protection must be protected; inserted (3) providing that private and public land that is not within a wildland fire protection district or under the protection of a recognized agency or municipality must be protected by a county; and made minor changes in style. Amendment effective June 1, 2007.

## 76-13-108. Person responsible for performance of duties.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

## 76-13-110. Owner's right to department hearing.

**Compiler's Comments**

*2007 Amendment:* Chapter 336 in (1) in three places substituted "department" for "board", in first sentence after "activities of" deleted "the board", and in second sentence after "operations of" deleted "the board"; and made minor changes in style. Amendment effective June 1, 2007.

## 76-13-111. Permissible expenditures.

**Compiler's Comments**

*1987 Amendment:* In (1)(c), after "collected", inserted "except those collected in a justice's court".

## 76-13-112. Penalty for violation.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 2, Ch. 662, L. 2023. Amendment effective May 19, 2023.

*1997 Amendment:* Chapter 27 near middle, after "adopted", deleted "by the board or department". Amendment effective February 21, 1997.

## 76-13-114. Disposition of fines.

**Compiler's Comments**

*2001 Amendment:* Chapter 257 in first sentence substituted reference to department of revenue for reference to state treasurer; and made minor changes in style. Amendment effective July 1, 2001.

*Applicability:* Section 49, Ch. 257, L. 2001, provided: "[This act] applies to remittances of state money made to the department of revenue for fiscal years beginning after June 30, 2001."

*1997 Amendment:* Chapter 532 near end of first sentence, after "deposit in the", substituted "state special revenue" for "agency"; and made minor changes in style. Amendment effective July 1, 1997.

*1987 Amendment:* In first and last sentences inserted "except those collected in a justice's court".

*1983 Amendment:* In first sentence, substituted "agency fund" for "federal and private grant clearance fund".

## 76-13-115. State fire policy.

**Compiler's Comments**

*2013 Amendment:* Chapter 401 inserted (9) regarding fire in wildland-urban interface areas; and made minor changes in style. Amendment effective October 1, 2013.

*Preamble:* The preamble attached to Ch. 401, L. 2013, provided: "WHEREAS, Article II, section 3, of the Montana Constitution provides that all persons have a constitutional right to a clean and healthful environment; and

WHEREAS, sound forest management activities to reduce fire risk are critical to preventing catastrophic wildland fires that jeopardize the constitutional right to a clean and healthful environment;

WHEREAS, sound forest management activities to reduce fire risk are not occurring on some federally managed lands located within Montana's wildland-urban interface; and

WHEREAS, the state has the inherent power to enact reasonable legislation to protect the health, safety, and welfare of the public, which includes the protection of property in the wildland-urban interface from catastrophic wildland fire and the resulting devastation."

*Effective Date:* Section 35, Ch. 336, L. 2007, provided that this section is effective June 1, 2007.

**Case Notes**

*Failure to Preserve Issue for Appeal — Expert Testimony on Standard of Care Not Subject to Appellate Review:* In a suit against the state for negligent firefighting techniques, the state failed to object to the testimony of the plaintiffs' expert on fire suppression techniques. Additionally, the state did not move for judgment as a matter of law by arguing that the plaintiffs failed to present evidence of breach of the applicable standard of care. On appeal, the state claimed that the plaintiffs failed to establish the standard of care for wildfire suppression, breach, and causation through expert testimony, but the Supreme Court held that the state waived the opportunity to raise this issue when it failed to object in District Court. Weaver v. St., 2013 MT 247, 371 Mont. 476, 310 P.3d 495.

*Tardy Public Duty Doctrine Defense Not Allowed:* In a suit for negligent firefighting techniques, the state submitted a proposed pretrial order claiming that the public duty doctrine applied and that the state did not owe a specific duty to the plaintiff. The District Court determined that the public duty doctrine was an affirmative defense that was waived after the state failed to plead or otherwise raise it, and alternatively, even if it was not an affirmative defense it prejudiced the plaintiffs. On appeal, the Supreme Court declined to analyze whether the public duty doctrine must be raised as an affirmative defense, and it upheld the District Court on the grounds that raising the defense at such a late stage in the proceedings would unfairly prejudice the plaintiffs. Weaver v. St., 2013 MT 247, 371 Mont. 476, 310 P.3d 495.

### 76-13-116. Duties of firewardens — liability.

**Compiler's Comments**

*Effective Date:* Section 35, Ch. 336, L. 2007, provided that this section is effective June 1, 2007.

### 76-13-119. Exemption from environmental review.

**Compiler's Comments**

*Effective Date:* Section 3, Ch. 169, L. 2021, provided: "[This act] is effective on passage and approval." Approved April 8, 2021.

### 76-13-121. Permit for burning required.

**Compiler's Comments**

*2007 Amendment:* Chapter 336 in (1) substituted "wildfire" for "forest fire", after "set a" deleted "forest", near middle inserted exception clause, after "open fire" deleted "within forest lands", and before "agency" deleted "protection" and deleted former second sentence that read: "A permit is not required in order to build, set, or ignite a campfire within and upon a designated improved camping ground or upon a plot of land from which all vegetable and inflammable matter and debris have been removed to a point where it may not become ignited by the campfire or by sparks therefrom"; inserted (2) providing recreational fire exception to permit requirement for burning during wildfire season; and made minor changes in style. Amendment effective June 1, 2007.

### 76-13-122. Failure to comply with permit.

**Compiler's Comments**

*2007 Amendment:* Chapter 336 in first sentence after "fire" deleted "within forest lands during the fire protection season" and in second sentence at end substituted "subject to the penalty provided in 50-63-102 and is subject to the provisions of 50-63-103" for "guilty of a misdemeanor"; and made minor changes in style. Amendment effective June 1, 2007.

### 76-13-123. Failure to extinguish recreational fire.

**Compiler's Comments**

*2009 Amendment:* Chapter 2 near middle before "described" substituted "area" for "plot". Amendment effective October 1, 2009.

*2007 Amendment:* Chapter 336 substituted "recreational fire that the person has set" for "campfire set", substituted "in which the person has been left in charge" for "by him within any forest lands before leaving the same, who shall fail to extinguish any campfire used by him or left in his charge before leaving the same", and substituted "is subject to the penalty provided in 50-63-102 and is subject to the provisions of 50-63-103" for "shall be guilty of a misdemeanor"; and made minor changes in style. Amendment effective June 1, 2007.

### 76-13-124. Throwing lighted materials.

**Compiler's Comments**

*2007 Amendment:* Chapter 336 at beginning substituted "material or" for "cigarette, cigar, ashes, or other" and substituted "is subject to the penalty provided in 50-63-102 and is subject to the provisions of 50-63-103" for "in or near any forest material is guilty of a misdemeanor". Amendment effective June 1, 2007.

### 76-13-125. Spark arresters required.

**Compiler's Comments**

*2007 Amendment:* Chapter 336 substituted "wildland" for "forest lands" and after "spark arrester" deleted "and with modern, efficient devices"; and made minor changes in style. Amendment effective June 1, 2007.

### 76-13-126. Restrictions on mill waste.

**Compiler's Comments**

*2007 Amendment:* Chapter 336 in (1) at beginning substituted "wildfire" for "forest fire"; and made minor changes in style. Amendment effective June 1, 2007.

### 76-13-136. Cooperative agreements with owners and lessees of land for fire protection and conservation.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 in (1), near middle, substituted "department of natural resources and conservation" for "department of state lands"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1981 Amendment:* Changed "the department of natural resources and conservation" to "the department of state lands" in the middle of (1).

*Severability:* Section 9, Ch. 529, L. 1981, was a severability section.

### 76-13-140. Legal representation for state firefighters.

**Compiler's Comments**

*Effective Date:* Section 5, Ch. 464, L. 2007, provided that this section is effective on passage and approval. Approved May 8, 2007.

### 76-13-145. Designation of wildland-urban interface parcels.

**Compiler's Comments**

*2013 Amendment:* Chapter 24 in (1) at beginning deleted "Prior to January 1, 2012, and"; deleted former (4) that read: "(4) The department shall report its progress in designating wildland-urban interface parcels to an appropriate interim legislative committee assigned to study wildland fire suppression or to the environmental quality council"; and made minor changes in style. Amendment effective February 18, 2013.

*Effective Date:* Section 4, Ch. 397, L. 2009, provided that this section is effective April 28, 2009.

### 76-13-150. Fire suppression account — fund transfer.

**Compiler's Comments**

*2023 Amendment — Coordination:* See 2023 Session Law for amendment made by sec. 4, Ch. 740, L. 2023. Amendment effective May 22, 2023.

The amendment to this section made by sec. 1, Ch. 740, L. 2023, was replaced by sec. 4, Ch. 740, L. 2023, a coordination section.

*2017 Amendment — Coordination:* (Temporary version) Chapter 429 inserted (10) providing that state treasurer may not transfer from general fund to fire suppression account. Amendment effective July 1, 2017, and terminates June 30, 2019.

(Both versions) Chapter 429 in (4) at end after "may be used only for" deleted "the purpose of paying expenses for fire prevention"; inserted (4)(e) regarding forest management projects on federal land; inserted (4)(f) regarding support for collaborative groups; inserted (4)(g) regarding road maintenance on federal lands; in (8) at end substituted "4% of all general fund appropriations in the second year of the biennium" for "$100 million"; in (9) at beginning substituted provision requiring excess balance up to $5 million to be used for certain enumerated purposes for former text that read: "Up to $5 million each biennium may be used for the purpose of fuel reduction and mitigation and forest restoration"; and made minor changes in style. Amendment effective July 1, 2017.

The amendments to this section made by sec. 1, Ch. 237, L. 2017, and sec. 6, Ch. 429, L. 2017, were rendered void by secs. 29, 30, Ch. 429, L. 2017, coordination sections.

*2017 Amendment Not Codified:* Section 5, Ch. 115, L. 2017, was not codified because of its short duration. Inserted (11) concerning authorization for governor to expend from the fire fund no more than $5 million in case of disaster or emergency, including energy emergency or invasive species emergency; and made minor changes in style. Amendment effective March 30, 2017, and terminates June 30, 2017.

*Contingent Voidness:* Section 29(1), Ch. 429, L. 2017, provided that the insertion of the words "Beginning on July 1, 2019" at the beginning of subsection (9) of the temporary version is void if "the amount of the certified unaudited state general fund revenue and transfers into the general fund received at the end of fiscal year 2017 is equal to or greater than $2,209,000,000, as determined by the state treasurer on or before August 15, 2017". On August 1, 2017, the state treasurer reported that the amount of the unaudited and unadjusted general fund revenue and transfers-in for the fiscal year ended June 30, 2017, was $2,139,414,715.40.

*Severability:* Section 33, Ch. 429, L. 2017, was a severability clause.

*2013 Amendment:* Chapter 368 in (4) substituted "fuel reduction and mitigation" for "fuel mitigation" and inserted "forest restoration"; inserted (6) through (10) regarding transfer of money to fire suppression account and providing a statutory appropriation. Amendment effective May 1, 2013.

*2011 Amendment:* Chapter 312 in (2) at end inserted "and the money in the account is subject to legislative fund transfers"; and made minor changes in style. Amendment effective May 4, 2011.

*Severability:* Section 18, Ch. 312, L. 2011, was a severability clause.

*2009 Amendment:* Chapter 441 in (2) deleted first two sentences that read: "The department of administration shall transfer from the state general fund to the account the amount necessary to achieve a $40 million fund balance. The transfer must be made at the beginning of each fiscal year"; in (4) near end following "of paying" inserted "expenses for fire prevention, including fuel mitigation, grants for the purchase of fire suppression equipment for county cooperatives, and"; deleted former (5) that read: "Beginning July 1, 2008, the money in the account is statutorily appropriated, as provided in 17-7-502, to the department for use as provided in this section"; and made minor changes in style. Amendment effective May 5, 2009.

*Termination Provision Repealed:* Section 4, Ch. 441, L. 2009, repealed sec. 6, Ch. 2, Sp. L. September 2007, which terminated this section June 30, 2009. Effective May 5, 2009.

*Effective Date:* Section 5(1), Ch. 2, Sp. L. September 2007, provided that this section is effective September 17, 2007.

*Termination:* Section 6, Ch. 2, Sp. L. September 2007, provided: "[This act] terminates June 30, 2009."

### 76-13-151. Good neighbor forestry accounts — uses.

**Compiler's Comments**

*2019 Amendment:* Chapter 376 in (3) at beginning substituted "Funds in the accounts are statutorily appropriated, as provided in 17-7-502, to the department only" for "The department may spend funds in the accounts only". Amendment effective May 8, 2019.

*Effective Date:* Section 4, Ch. 437, L. 2017, provided: "[This act] is effective on passage and approval." Approved May 22, 2017.

*Preamble:* The preamble attached to Ch. 437, L. 2017, provided: "WHEREAS, Congress passed the 2014 farm bill and established good neighbor authority to focus on forest restoration efforts and increase partnerships between the U.S. forest service and individual states; and

WHEREAS, Montana forests play a significant role in the state's economic well-being, attracting new businesses, supporting a booming tourism industry, and providing good-paying jobs in the timber industry in many smaller communities; and

WHEREAS, Governor Bullock identified more than 5 million acres of federal landscape in need of management and there are millions more acres requiring forest management work to be done to protect the state's economy and maintain a viable wood products industry; and

WHEREAS, projects already are helping sustain 1,047 jobs with a total of $60.5 million in labor and proprietor income, and $23.8 million in state and federal taxes; and

WHEREAS, future goals include using federal revenue from timber projects to fund more restoration work throughout Montana's forests and further bolster the state's economy."

### 76-13-154. Federal forest management projects — attorney general authority to intervene.

**Compiler's Comments**

*2015 Amendment:* Chapter 278 inserted (2)(b) concerning landscape-scale insect and disease area litigation; and made minor changes in style. Amendment effective April 23, 2015.

*2013 Enactment Void:* The enactment of this section by sec. 2, Ch. 401, L. 2013, and sec. 5, Ch. 403, L. 2013, was rendered void and replaced by sec. 5, Ch. 401, L. 2013, a coordination section.

*Preamble:* The preamble attached to Ch. 401, L. 2013, provided: "WHEREAS, Article II, section 3, of the Montana Constitution provides that all persons have a constitutional right to a clean and healthful environment; and

WHEREAS, sound forest management activities to reduce fire risk are critical to preventing catastrophic wildland fires that jeopardize the constitutional right to a clean and healthful environment;

WHEREAS, sound forest management activities to reduce fire risk are not occurring on some federally managed lands located within Montana's wildland-urban interface; and

WHEREAS, the state has the inherent power to enact reasonable legislation to protect the health, safety, and welfare of the public, which includes the protection of property in the wildland-urban interface from catastrophic wildland fire and the resulting devastation."

*Preamble:* The preamble attached to Ch. 403, L. 2013, provided: "WHEREAS, properly functioning watersheds are critical to Montana's economic prosperity, the health of its citizens, and the culture of the state but the management of many of these watersheds has left them impaired or at risk for not functioning properly; and

WHEREAS, the Montana Constitution provides that the waters of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law; and

WHEREAS, all persons have a constitutional right to a clean and healthful environment, which includes the protection and restoration of watersheds; and

WHEREAS, the state has inherent power to enact reasonable legislation for the health, safety, and welfare of the public, which includes the protection of drinking water supplies that originate in watersheds; and

WHEREAS, wildfires in critical watersheds and across Montana degrade the quality of our water by overloading streams with sediment and nutrients and clogging our air with pollutants from smoke, resulting last year in 88 days on which the air quality was poor because of smoke; and

WHEREAS, the 2012 fire season was severe, with suppression costs to the state topping $50 million, and comprehensive watershed restoration and protection could significantly reduce fire season costs by preventing fires."

*Effective Date:* This section is effective October 1, 2013.

## Part 2
## Provision of Fire Protection Services

**Part Case Notes**

*Extinguishment of Fires in Woods — Aerial Retardant — Public Necessity:* Actions of owner of airplane dropping aerial fire retardant on forest fire were in true character of public convenience, necessity, and safety, and no claim for relief for property damage from dropping of retardant should exist against owner as long as it reasonably appeared that action was to prevent or mitigate effects of an impending disaster. Stocking v. Johnson Flying Serv., 143 M 61, 387 P2d 312 (1963).

**Part Collateral References**

Fire and Aviation, Montana Department of Natural Resources & Conservation, https://dnrc.mt.gov/Forestry/.

### 76-13-201. Costs for protection from fire.

**Compiler's Comments**

*2015 Amendment:* Chapter 334 in (2) in first sentence increased maximum cost from $45 to $50 and increased additional cost per acre from 25 cents to 30 cents. Amendment effective April 28, 2015.

*2007 Amendment:* Chapter 336 deleted former (1) that read: "(1) An owner of land classified as forest land by the department shall protect against the starting or existence and suppress the spread of fire on that land. This protection and suppression must be in conformity with reasonable rules and standards for adequate fire protection adopted by the department"; in (1) substituted language clarifying that the owner of forest land within a wildfire district is subject to fees for fire protection for "If the owner does not provide for the protection and suppression"; in (2) near beginning of first sentence substituted "shall" for "may" and raised the fee from $30 to $45 for each landowner and from 20 cents to 25 cents per acre per year for each acre in excess of 20 acres and substituted second sentence on assessment, payment, and collection of fire protection costs in accordance with 76-13-207 for former second and third sentences that read: "The owner of the land shall pay the charge approved by the department in accordance with part 1 and this part to the department of revenue. Payments to the department of revenue are due on or before November 30 of each year"; in (3) at end inserted "in the event of a violation of 50-63-103"; and made minor changes in style. Amendment effective June 1, 2007.

*2001 Amendment:* Chapter 574 in (2) in second sentence after "pay" deleted "to the county treasurer of the county in which the land is situated" and at end inserted "to the department of revenue" and inserted third sentence concerning timing of payments; and made minor changes in style. Amendment effective July 1, 2001.

*1997 Amendment:* Chapter 27 in (1), at end, substituted "department" for "board"; and made minor changes in style. Amendment effective February 21, 1997.

*1991 Amendment:* In (2), in first sentence, increased maximum allowable assessment from not more than 17 cents per acre per year with a minimum of up to $14 per owner per year to not more than $30 for each landowner in the district and up to 20 cents per acre per year for each acre in excess of 20 acres owned by each landowner. Amendment effective April 6, 1991.

*Retroactive Applicability:* Section 2, Ch. 360, L. 1991, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to calendar years beginning after December 31, 1989."

*1985 Amendment:* In (2), in first sentence, after "not more than" substituted "17 cents per acre per year except that the department shall make a minimum assessment of up to $14" for "16 cents per acre per year and not less than $6", and at end of sentence, after "district", inserted "as necessary to yield the amount of money provided for in 76-13-207".

*Interim Study Committee Bill:* Chapter 643, L. 1985, was introduced by request of Joint Interim Subcommittee No. 2. See committee report entitled "Timber Management and Forest Fire Protection Costs in Montana", Montana Legislative Council, December 1984.

**Administrative Rules**

ARM 36.10.125 Railroads and powerlines.

ARM 36.10.161 Formula to set landowner assessments for fire protection.

### 76-13-202. Means by which department may provide protection.

**Compiler's Comments**

*2007 Amendment:* Chapter 336 substituted "wildfire" for "forest fire" and "wildlands" for "forest lands". Amendment effective June 1, 2007.

### 76-13-203. Extension of wildfire season.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 3, Ch. 662, L. 2023. Amendment effective May 19, 2023.

*2007 Amendment:* Chapter 336 substituted "76-13-102(12)" for "76-13-102(7)". Amendment effective June 1, 2007.

*Code Commissioner Correction:* The code commissioner substituted "76-13-102(11)" for "76-13-102(12)" to reflect the reoutlining of 76-13-102.

### 76-13-204. Creation, annexation of land into, and dissolution of wildland fire protection districts.

**Compiler's Comments**

*2007 Amendment:* Chapter 336 in (1) and in (3)(a) in two places substituted "wildland" for "forest"; and in (2)(a) substituted "must" for "may" and "and" for "or". Amendment effective June 1, 2007.

*1997 Amendment:* Chapter 27 in (1) and (2) substituted "department" for "board"; and in (2)(b), after "shall", substituted "consider" for "report to the board" and after "change" substituted "in making a determination under this section" for "and shall make a recommendation to the board". Amendment effective February 21, 1997.

*1993 Amendment:* Chapter 147 at beginning of (1) inserted "in accordance with the provisions of subsections (2) and (3)" and after "create" inserted "annex land to, or dissolve"; in (2), after "created", inserted "land is annexed into a district, or a district is dissolved" and at end substituted "land affected by the proposed change is located" for "the proposed district or a part thereof is included"; in (2)(a), at end of first sentence, substituted "change" for "district" and in second sentence, before "certified", deleted "registered or" and after "mail" inserted "to each affected property owner"; inserted (2)(b) requiring a Department report and recommendation; in (3)(a), after "created", inserted "or dissolved" and near end, before "forest", substituted "affected" for "proposed"; inserted (3)(b) requiring landowner approval prior to annexation; inserted (4) prohibiting removal of annexed land from the district unless the district is dissolved; and made minor changes in style.

### 76-13-205. Determination of boundaries of district.

**Compiler's Comments**

*2007 Amendment:* Chapter 336 substituted "wildland" for "forest" and after "districts" deleted "covering forest lands". Amendment effective June 1, 2007.

*1997 Amendment:* Chapter 27 near middle substituted "department" for "board". Amendment effective February 21, 1997.

### 76-13-206. What constitutes compliance with duty to protect against fire.

**Compiler's Comments**

*2007 Amendment:* Chapter 336 near beginning substituted "lands" for "forest lands", in two places substituted "wildland" for "forest", and at end substituted "76-13-212" for "76-13-201"; and made minor changes in style. Amendment effective June 1, 2007.

### 76-13-207. Determination and collection of costs of fire protection.

**Compiler's Comments**

*2007 Amendment:* Chapter 336 in (1) in third sentence before "land" deleted "classified forest" and inserted reference to 76-13-105; in (2) substituted "first Tuesday in September" for "second Tuesday in August", near middle before "lands" deleted "forest", and near end substituted "wildland" for "forest"; and made minor changes in style. Amendment effective June 1, 2007.

*1993 Special Session Amendment:* Chapter 27 in (2) and (3) substituted "department of revenue" for "county assessor"; and made minor changes in style. Amendment effective January 1, 1994.

*Applicability:* Section 171(2), Ch. 27, Sp. L. November 1993, provided that the amendments to this section apply to tax years after December 31, 1993.

*1985 Amendment:* In (1) near end, after "total amount received" substituted "from such landowners to no greater than one-third of the amount specified in the appropriation" for "to the amount specified in the approved plan".

*Interim Study Committee Bill:* Chapter 643, L. 1985, was introduced by request of Joint Interim Subcommittee No. 2. See committee report entitled "Timber Management and Forest Fire Protection Costs in Montana", Montana Legislative Council, December 1984.

**Administrative Rules**

ARM 36.10.161 Formula to set landowner assessments for fire protection.

### 76-13-208. Nature of assessments for wildland fire protection.

**Compiler's Comments**

*2007 Amendment:* Chapter 336 substituted "landowners" for "owners of forest lands"; and made minor changes in style. Amendment effective June 1, 2007.

### 76-13-209. Disposition of assessments.

**Compiler's Comments**

*2007 Amendment:* Chapter 336 after "collected" inserted "by the county treasurer" and substituted "remitted to the state for deposit" for "promptly deposited"; and made minor changes in style. Amendment effective June 1, 2007.

*1989 Amendment:* Near end substituted "state" for "other"; and made minor changes in grammar. Amendment effective July 1, 1989.

*1983 Amendment:* Substituted "other special revenue funds" for "federal and private revenue fund".

### 76-13-210. Payment under protest.

**Compiler's Comments**

*2007 Amendment:* Chapter 336 in first sentence near beginning substituted "wildland fire" for "forest" and in last sentence before "the department" deleted "the board and"; and made minor changes in style. Amendment effective June 1, 2007.

### 76-13-211. Amount due for protection treated as lien.

**Compiler's Comments**

*2009 Amendment:* Chapter 2 in (2) at end of first sentence substituted "wildland or timber" for "lands" and near beginning of second sentence substituted "wildland or timber" for "land". Amendment effective October 1, 2009.

*2007 Amendment:* Chapter 336 in (1) substituted "wildland forest protection" for "forest protection during a forest fire season" and in two places substituted references to wildland for references to forest land; in (2) in second sentence near end before "landowner" deleted "forest"; and made minor changes in style. Amendment effective June 1, 2007.

*1987 Amendment:* At end of (2) deleted sentence that read: "The complaint and all subsequent proceedings in the action shall conform as nearly as practicable to those provided by 15-16-502."

### 76-13-212. Duty of landowner to protect against fire.

**Compiler's Comments**

*Effective Date:* Section 35, Ch. 336, L. 2007, provided that this section is effective June 1, 2007.

### 76-13-213. Formula to set landowner assessments for fire protection.

**Compiler's Comments**

*2009 Amendment:* Chapter 173 inserted (2)(c) establishing a minimum assessment fee for fire protection for persons who own a share of property and an individual unit on the property. Amendment effective May 1, 2009.

*Effective Date:* Section 35, Ch. 336, L. 2007, provided that this section is effective June 1, 2007.

### 76-13-214. Obstruction of aerial wildfire suppression activities — penalty — exceptions.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 4, Ch. 662, L. 2023. Amendment effective May 19, 2023.

*Effective Date:* This section is effective October 1, 2017.

## Part 3

## Control of Forest Diseases and Insect Pests

**Part Collateral References**

Forest Pest Management, Montana Department of Natural Resources & Conservation, https://dnrc.mt.gov/Forestry/Forest-Management/forest-insects-and-diseases.

## 76-13-301. Policy.

### Compiler's Comments

*2013 Amendment:* Chapter 403 in (1)(b) after "Montana" inserted language regarding restoring affected watersheds; and made minor changes in style. Amendment effective October 1, 2013.

*Preamble:* The preamble attached to Ch. 403, L. 2013, provided: "WHEREAS, properly functioning watersheds are critical to Montana's economic prosperity, the health of its citizens, and the culture of the state but the management of many of these watersheds has left them impaired or at risk for not functioning properly; and

WHEREAS, the Montana Constitution provides that the waters of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law; and

WHEREAS, all persons have a constitutional right to a clean and healthful environment, which includes the protection and restoration of watersheds; and

WHEREAS, the state has inherent power to enact reasonable legislation for the health, safety, and welfare of the public, which includes the protection of drinking water supplies that originate in watersheds; and

WHEREAS, wildfires in critical watersheds and across Montana degrade the quality of our water by overloading streams with sediment and nutrients and clogging our air with pollutants from smoke, resulting last year in 88 days on which the air quality was poor because of smoke; and

WHEREAS, the 2012 fire season was severe, with suppression costs to the state topping $50 million, and comprehensive watershed restoration and protection could significantly reduce fire season costs by preventing fires."

## 76-13-302. Definitions.

### Compiler's Comments

*1995 Amendment:* Chapter 418 in definition of Department substituted "department of natural resources and conservation provided for in Title 2, chapter 15, part 33" for "department of state lands provided for in Title 2, chapter 15, part 32". Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1993 Amendment:* Chapter 285 inserted definition of salvage; and made minor changes in style.

*1981 Amendment:* Changed the definition of "Department" from "the department of natural resources and conservation, provided for in Title 2, chapter 15, part 33" to "the department of state lands, provided for in Title 2, chapter 15, part 32".

*Severability:* Section 9, Ch. 529, L. 1981, was a severability section.

## 76-13-303. Creation of zone of infestation.

### Compiler's Comments

*2013 Amendment:* Chapter 403 in (1) at beginning substituted "The department shall annually produce a list of areas where" for "Whenever the department determines that"; inserted (1)(b) regarding infestation in watersheds; in (2) after "department" substituted "present the list annually to the board" for "with the approval of the board", after "commissioners" substituted "to determine if" for "declare the existence of", after "infestation" inserted "exists and, if so", and after "identify" substituted "each zone" for "the zone"; and made minor changes in style. Amendment effective October 1, 2013.

*Preamble:* The preamble attached to Ch. 403, L. 2013, provided: "WHEREAS, properly functioning watersheds are critical to Montana's economic prosperity, the health of its citizens, and the culture of the state but the management of many of these watersheds has left them impaired or at risk for not functioning properly; and

WHEREAS, the Montana Constitution provides that the waters of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law; and

WHEREAS, all persons have a constitutional right to a clean and healthful environment, which includes the protection and restoration of watersheds; and

WHEREAS, the state has inherent power to enact reasonable legislation for the health, safety, and welfare of the public, which includes the protection of drinking water supplies that originate in watersheds; and

WHEREAS, wildfires in critical watersheds and across Montana degrade the quality of our water by overloading streams with sediment and nutrients and clogging our air with pollutants from smoke, resulting last year in 88 days on which the air quality was poor because of smoke; and

WHEREAS, the 2012 fire season was severe, with suppression costs to the state topping $50 million, and comprehensive watershed restoration and protection could significantly reduce fire season costs by preventing fires."

*1981 Amendment:* Substituted "the board of land commissioners" for "the board of natural resources and conservation".

*Severability:* Section 9, Ch. 529, L. 1981, was a severability section.

**76-13-304. Suppression and eradication of infestation.**

**Compiler's Comments**

*2007 Amendment:* Chapter 115 inserted (3) concerning controlled burning or logging as suppression or eradication methods. Amendment effective April 2, 2007.

*Preamble:* The preamble attached to Ch. 115, L. 2007, provided: "WHEREAS, the mountain pine beetle poses a serious threat to the health of Montana forests and the economic benefits and recreational opportunities that those forests provide; and

WHEREAS, years of fire suppression and drought have made Montana forests especially susceptible to mountain pine beetles;

WHEREAS, in 2006, the mountain pine beetle infected about 881,000 acres in western Montana and northern Idaho, killing more than 2.4 million trees; and

WHEREAS, controlled burning or logging may help control beetle infestations as well as reduce wildfire danger created by large stands of trees killed by beetles; and

WHEREAS, students at Butte High School have studied beetle infestations and concluded that Montana should consider controlled burning or logging to attack mountain pine beetles and preserve the state's forests."

## Part 4
## Control of Timber Slash and Debris

**Part Administrative Rules**

Title 36, chapter 11, subchapter 2, ARM Control of timber slash and debris.

**Part Collateral References**

Logging Slash Reduction, Montana Department of Natural Resources & Conservation, https://dnrc.mt.gov/Forestry/Forest-Management/logging-slash-reduction.

**76-13-401. Definitions.**

**Compiler's Comments**

*2001 Amendment:* Chapter 234 inserted definition of minimum slash hazard; and made minor changes in style. Amendment effective October 1, 2001.

*1999 Amendment:* Chapter 279 deleted former definition of board that read: ""Board" means the board of land commissioners provided for in Article X, section 4, of the Montana constitution"; substituted "certificate of clearance" for "certification of clearance" as defined term; inserted definitions of exemption certificate and private forest lands; at end of definition of fire hazard reduction agreement and in definition of fire hazard reduction or management inserted "on private forest lands"; and made minor changes in style. Amendment effective July 1, 1999.

*Severability:* Section 10, Ch. 279, L. 1999, was a severability clause.

*Applicability:* Section 12, Ch. 279, L. 1999, provided: "[This act] applies to any existing fire hazard agreement when violations of the existing fire hazard agreement have been identified by the department."

*1995 Amendment:* Chapter 418 in definition of Department substituted "department of natural resources and conservation provided for in Title 2, chapter 15, part 33" for "department of state lands provided for in Title 2, chapter 15, part 32". Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1989 Amendment:* Inserted definitions of certification of clearance, contractor, fire hazard, fire hazard reduction agreement, fire hazard reduction or management, forest product, master fire hazard reduction agreement, and purchaser; and made minor change in phraseology. Amendment effective July 1, 1989.

*1981 Amendment:* Changed the definition of "Board" from "the board of natural resources and conservation, provided for in 2-15-3302" to "the board of land commissioners provided for in Article X, section 4, of the Montana constitution"; and changed the definition of "Department" from "the department of natural resources and conservation, provided for in Title 2, chapter 15, part 33" to "the department of state lands provided for in Title 2, chapter 15, part 32."

*Severability:* Section 9, Ch. 529, L. 1981, was a severability section.

## 76-13-402. Basis for management of fire hazards.

**Compiler's Comments**

*2009 Amendment:* Chapter 2 near middle after "effective" deleted "forest"; and made minor changes in style. Amendment effective October 1, 2009.

*1989 Amendment:* At beginning substituted "fire hazard reduction or management" for "reduction or management of fire hazards"; near middle, after "department", deleted "and the state fire wardens"; after "practices and" deleted "more"; and after "effective" substituted "forest fire protection" for "fire control". Amendment effective July 1, 1989.

## 76-13-403. Supervision by department.

**Compiler's Comments**

*1999 Amendment:* Chapter 279 at beginning substituted "shall" for "may", after "rules" inserted "by October 1, 2000", after "private" substituted "forest lands" for "land", and after "state" inserted "recognizing the benefits of slash retention". Amendment effective July 1, 1999.

*Severability:* Section 10, Ch. 279, L. 1999, was a severability clause.

*Applicability:* Section 12, Ch. 279, L. 1999, provided: "[This act] applies to any existing fire hazard agreement when violations of the existing fire hazard agreement have been identified by the department."

*1997 Amendment:* Chapter 27 near beginning, after "department", deleted "under rules adopted by the board" and after "may" inserted "adopt and enforce rules to". Amendment effective February 21, 1997.

*1989 Amendment:* Near beginning, before "reduction", inserted "fire hazard"; near end substituted "forest products harvesting, timber stand improvement, and right-of-way clearing" for "the cutting of any forest product"; and made minor changes in phraseology. Amendment effective July 1, 1989.

## 76-13-405. Contracts with fire protection agencies.

**Compiler's Comments**

*2009 Amendment:* Chapter 2 near middle after "contracts with" deleted "forest". Amendment effective October 1, 2009.

*1989 Amendment:* Near beginning, after "forest", substituted "fire protection" for "protective"; and made minor changes in phraseology. Amendment effective July 1, 1989.

## 76-13-406. Limitation on liability.

**Compiler's Comments**

*2009 Amendment:* Chapter 2 near beginning and near middle after "recognized" deleted "forest". Amendment effective October 1, 2009.

*1989 Amendment:* Near beginning, after "department", deleted "state firewardens"; substituted "other recognized forest fire protection agencies" for "recognized forest protective agencies"; near middle, after "official", substituted "or employee of the department or other recognized forest fire protection agency is" for "of such agency shall"; after "provisions of" substituted "this part, the rules adopted under 76-13-403, and the fire hazard reduction agreement" for "76-13-402 through 76-13-405 and 76-13-411(1)"; after "when" substituted "reasonable" for "all requisite"; and made minor changes in phraseology. Amendment effective July 1, 1989.

## 76-13-407. Reduction of slash and debris along right-of-way.

**Compiler's Comments**

*1989 Amendment:* Near beginning of (2), before "burning", substituted "excluding" for "including", after "method" deleted "of disposal", and at end after "progresses" deleted "however, upon application to the department, it may grant a permit extending the time within which the burning must be done in compliance with this chapter relating to burning permits during the closed season"; and made minor changes in phraseology. Amendment effective July 1, 1989.

### 76-13-408. Fire hazard reduction agreement and bond — bond release and penalty — exemption.

**Compiler's Comments**

*2003 Amendment:* Chapter 242 in (4) in third sentence after "affidavit" deleted "and relevant site photographs" and in fourth sentence after "affidavit" deleted "or photographs" and made minor changes in style. Amendment effective April 7, 2003.

*2001 Amendment:* Chapter 234 in (1) near middle after "fire hazard to be created" inserted "except where a minimum slash hazard would exist"; and inserted (5) exempting activity regarding the creation of a minimum slash hazard from the provisions of Title 76, chapter 13, part 4. Amendment effective October 1, 2001.

*1999 Amendment:* Chapter 279 in middle of (1) before "thinning" inserted "precommercial", after "private" inserted "forest", after "work" inserted "must be issued an exemption certificate by the department or"; inserted second, third, fourth, and fifth sentences in (2) regarding master fire hazard reduction agreement bond amounts, administration of bonds, annual review of bond amounts, and bond adjustment according to timber harvested volume and level of bond compliance; deleted former (3) that read: "(3) Either the person conducting the work or the purchaser, as provided in 76-13-409(2), shall pay 15 cents for each 1,000 board feet (log scale) or equivalent measure if forest products other than logs are cut. The assessment may not exceed $20,000 a year. The full amount of this money must be deposited in the forestry extension service account provided for in 76-13-415"; inserted second, third, and fourth sentences in (4) requiring partial release of certain cash bonds, authorizing department to inspect sites on which release is requested, and providing for revocation of agreement or denial of future agreement in addition to penalty for submission of fraudulent affidavit or photographs; and made minor changes in style. Amendment effective July 1, 1999.

*Severability:* Section 10, Ch. 279, L. 1999, was a severability clause.

*Applicability:* Section 12, Ch. 279, L. 1999, provided: "[This act] applies to any existing fire hazard agreement when violations of the existing fire hazard agreement have been identified by the department."

*1997 Amendment:* Chapter 27 in (1), at end, and in (4)(b), at end, substituted "under this part" for "by the board". Amendment effective February 21, 1997.

*1991 Amendment:* Inserted (3) requiring payment of assessment for cutting certain forest products; and made minor changes in style. Amendment effective April 23, 1991.

*1991 Statement of Intent:* The statement of intent attached to Ch. 577, L. 1991, provided: "The legislature has committed the state of Montana to a course of voluntary compliance with best management practices for forestry. The educational programs and expertise of the Montana state university [now Montana state university-Bozeman] forestry extension program are critical to the effectiveness and success of this approach. However, the forestry extension program requires the addition of a second extension forester to serve the needs of the state's commercial and 11,000 nonindustrial private forest landowners and to ensure protection of water quality and proper management of the state's forested lands.

The legislature believes that the extension service and the forest products industry should be equal partners in the continuation and the expansion of the forestry extension program. The forest products industry, as provided in 76-13-408 and 76-13-414, has committed $60,000 annually for the purpose of funding one additional extension forester position and one administrative position. This additional funding is intended to supplement the existing federal funding for extension forestry, and the legislature strongly urges the Montana state university [now Montana state university-Bozeman] extension program to match these commitments by earmarking $54,000 annually for the extension service's forestry and natural resources program."

*Applicability:* Section 5, Ch. 577, L. 1991, provided: "[This act] applies to forest products cut after June 30, 1991."

*1989 Amendments:* Chapter 423 near beginning of (1) inserted "constructing or reconstructing any road in contemplation of forest product cutting"; and made minor changes in phraseology. Amendment effective January 1, 1990.

Chapter 513 near beginning of (1) inserted "constructing or reconstructing any road in contemplation of cutting any forest product" and near middle, after "agreement", substituted "or a master fire hazard reduction agreement with the department providing for the" for "with the department and by posting a bond to the state in such form and for such amount as may be prescribed by the department, conditioned upon"; inserted (2) requiring posting of a bond; inserted (3) setting out provisions of an agreement; at end of (4) substituted "the issuance of the certificate of clearance" for "completion of the work done in compliance with the terms of the agreement"; and made minor changes in phraseology. Amendment effective July 1, 1989.

*Integration of 1989 Amendments:* Although the amendments made to this section by Ch. 423, L. 1989, were not effective until January 1, 1990, the amendments were substantively identical to amendments made by Ch. 513, L. 1989, effective July 1, 1989. The Code Commissioner has therefore integrated both amendments into a single version, effective July 1, 1989.

*Applicability:* Section 8, Ch. 423, L. 1989, provided: "[This act] applies to timber sales that begin after December 31, 1989."

### 76-13-409. Duty of purchaser to ensure compliance — statement — bond.

**Compiler's Comments**

*1999 Amendment:* Chapter 279 in (1) near beginning after "private" inserted "forest" and near end after "agreement" inserted "or that the person has been issued an exemption certificate"; and made minor changes in style. Amendment effective July 1, 1999.

*Severability:* Section 10, Ch. 279, L. 1999, was a severability clause.

*Applicability:* Section 12, Ch. 279, L. 1999, provided: "[This act] applies to any existing fire hazard agreement when violations of the existing fire hazard agreement have been identified by the department."

*1989 Amendment:* At end of (1) substituted "by entering into a fire hazard reduction agreement as provided in 76-13-408" for "thus created, as provided in this part"; at beginning of (2) deleted "When the hazard reduction agreement provides that", after "purchaser" deleted "of forest products", after "withhold" substituted "sufficient money to meet the requirements of the bond provided for in 76-13-408 plus the fees for administration, inspection, and enforcement by the department as provided in the hazard reduction agreement" for "moneys to insure faithful compliance with this part", near beginning of second sentence substituted "money and fees" for "moneys", after "withheld" inserted "and a report of volumes of products purchased", after "15th day of" substituted "the following" for "each", and near end substituted "money, fees, and product volumes" for "moneys"; substituted present (3) concerning report of no receipts or purchases for former (3) that read: "(3) Upon the department making the determination that faithful compliance with this part has been achieved, the department shall return to the owner thereof all such withheld money with the exception of 4% for inspection, administration, enforcement, and smoke management"; inserted (4) relating to posting of a bond; and made minor changes in phraseology. Amendment effective July 1, 1989.

**Administrative Rules**

ARM 36.11.221 Purpose of control of timber slash and debris law and this subchapter.

### 76-13-410. Failure to comply.

**Compiler's Comments**

*2021 Amendment:* Chapter 193 inserted (4)(b) concerning depositing revenue from forfeited performance bonds required by 76-13-408 and 76-13-409 into the fire reduction fund; and made minor changes in style. Amendment effective April 14, 2021.

*2011 Amendment:* Chapter 61 inserted (4)(b) requiring deposit of revenue into fire hazard reduction fund; and made minor changes in style. Amendment effective July 1, 2011, and terminates June 30, 2019.

*2001 Amendment:* Chapter 234 inserted (2) applying hazard reduction requirements if a department inspection determines that a minimum slash hazard does not exist; and made minor changes in style. Amendment effective October 1, 2001.

*1999 Amendment:* Chapter 279 in (3) in middle of second sentence substituted "15 days" for "10 days" and after "demand" inserted language regarding automatic forfeiture of bond to cover cost and expenses of reducing or managing fire hazard plus penalty and in third sentence at beginning inserted "If the bond is insufficient to cover the cost, expenses, and penalty", after "department" substituted "may" for "shall", and at end substituted "cost, expenses, and penalty" for "debt"; inserted (4) authorizing department to require showing of cause why agreement or exemption certificate should not be withheld; inserted (5) authorizing department to withhold agreement or exemption certificate for 3 years for insufficient showing of cause; and made minor changes in style. Amendment effective July 1, 1999.

*Severability:* Section 10, Ch. 279, L. 1999, was a severability clause.

*Applicability:* Section 12, Ch. 279, L. 1999, provided: "[This act] applies to any existing fire hazard agreement when violations of the existing fire hazard agreement have been identified by the department."

*1989 Amendment:* In first sentence of (1), after "properly", substituted "reduce or manage the fire hazard" for "dispose of slash", after "76-13-408" deleted "and is engaged or is about to engage, either for himself or for another, in cutting timber or other forest products and thereby creates a fire hazard", and after "further" substituted "cutting, clearing, and construction" for "timber harvesting"; near beginning of (2), after "76-13-408", deleted "and has cut any forest products", near middle, after "authorize the", substituted "fire hazard reduction or management" for "disposal of the slash", after "expense" inserted "of the contractor or", and near end, before "fire", substituted "unabated" for "undisposed of"; near beginning of first sentence of (3) substituted "fire hazard reduction or management work" for "disposal", after "expense of the" substituted "work" for "disposal", and at end inserted "and upon the real and personal property of the contractor"; and made minor change in phraseology. Amendment effective July 1, 1989.

## 76-13-411. Certificate of clearance.

### Compiler's Comments

*1999 Amendment:* Chapter 279 in middle before "hazard" inserted "fire" and after "issued" substituted "a certificate of clearance" for "a certification of clearance". Amendment effective July 1, 1999.

*Severability:* Section 10, Ch. 279, L. 1999, was a severability clause.

*Applicability:* Section 12, Ch. 279, L. 1999, provided: "[This act] applies to any existing fire hazard agreement when violations of the existing fire hazard agreement have been identified by the department."

*1989 Amendment:* Substituted language concerning Department determination of compliance for former section that read: "(1) A person who has entered into a contract with the department for the reduction or management of any fire hazard, upon payment of the contract price in accordance with the terms of the contract and the full compliance with the terms of the contract by the person, shall be granted a certification of clearance by the department and be relieved of any and all further liability and responsibility for the removal or reduction of the fire hazard. The department may require that a cash bond, equivalent to the contract price and conditioned upon the faithful performance of the contract, be deposited by the person with the department.

(2) The department shall not file for record any lien against the property of any person who has been issued a certification of compliance with 76-13-408 and 76-13-409 covering the property." Amendment effective July 1, 1989.

## 76-13-412. Violations.

### Compiler's Comments

*1999 Amendment:* Chapter 279 in middle inserted "except 76-13-408(4)". Amendment effective July 1, 1999.

*Severability:* Section 10, Ch. 279, L. 1999, was a severability clause.

*Applicability:* Section 12, Ch. 279, L. 1999, provided: "[This act] applies to any existing fire hazard agreement when violations of the existing fire hazard agreement have been identified by the department."

## 76-13-413. Failure to submit withholding — remedy.

### Compiler's Comments

*2009 Amendment:* Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

*1989 Amendment:* Near beginning of first sentence of (1), after "money", inserted "and required reports", after "15th day of" substituted "the following" for "each", near middle, after "notified by", deleted "registered or", and near end, after "money", inserted "and reports" and in second sentence, after "department", inserted "may initiate a lien upon the real property of the purchaser and" and at end substituted "and all required reports are submitted" for "or satisfactory arrangements for payments are made"; near beginning of (2), after "payment", substituted "and reports are not received by the department" for "is not made", after "5% of the" inserted "payment", and in middle of second sentence, after "amount due", inserted "or the reports"; inserted (3) relating to consideration of withheld money as excise taxes; and made minor changes in phraseology. Amendment effective July 1, 1989.

*1981 Amendment:* Changed "76-13-407" to "76-13-409" near the beginning of (1).

### Administrative Rules

ARM 36.11.221 Purpose of control of timber slash and debris law and this subchapter.

## 76-13-414. Fees.

**Compiler's Comments**

*2019 Amendment:* Chapter 18 in (2)(b) increased fee from 60 cents to 85 cents; and in (2)(c) increased fee from 15 cents to 30 cents. Amendment effective February 26, 2019.

*Applicability:* Section 3, Ch. 18, L. 2019, provided: "[This act] applies to fire hazard reduction agreements or master fire hazard reduction agreements with the department of natural resources and conservation entered into on or after [the effective date of this act]." Effective February 26, 2019.

*1999 Amendment:* Chapter 279 inserted (1)(c) requiring payment by person conducting work or purchaser if forest products other than logs are cut, prohibiting assessment exceeding $20,000 a year, and requiring deposit of money in forestry extension service account; in middle of (3)(a) before "administration" inserted "direct" and after "shall" inserted "submit a detailed bill"; at end of second sentence in (3)(b) substituted "agreement" for "attachment"; and made minor changes in style. Amendment effective July 1, 1999.

*Severability:* Section 10, Ch. 279, L. 1999, was a severability clause.

*Applicability:* Section 12, Ch. 279, L. 1999, provided: "[This act] applies to any existing fire hazard agreement when violations of the existing fire hazard agreement have been identified by the department."

*1997 Amendment:* Chapter 27 in (3)(c), in second sentence and in two places in third sentence, substituted "department" for "board"; and made minor changes in style. Amendment effective February 21, 1997.

*1991 Amendment:* In (3)(a), after "master fire", inserted "hazard"; inserted (3)(b) and (3)(c) requiring annual payment of assessment for cutting certain forest products; and made minor changes in style. Amendment effective April 23, 1991.

*1991 Statement of Intent:* The statement of intent attached to Ch. 577, L. 1991, provided: "The legislature has committed the state of Montana to a course of voluntary compliance with best management practices for forestry. The educational programs and expertise of the Montana state university [now Montana state university-Bozeman] forestry extension program are critical to the effectiveness and success of this approach. However, the forestry extension program requires the addition of a second extension forester to serve the needs of the state's commercial and 11,000 nonindustrial private forest landowners and to ensure protection of water quality and proper management of the state's forested lands.

The legislature believes that the extension service and the forest products industry should be equal partners in the continuation and the expansion of the forestry extension program. The forest products industry, as provided in 76-13-408 and 76-13-414, has committed $60,000 annually for the purpose of funding one additional extension forester position and one administrative position. This additional funding is intended to supplement the existing federal funding for extension forestry, and the legislature strongly urges the Montana state university [now Montana state university-Bozeman] extension program to match these commitments by earmarking $54,000 annually for the extension service's forestry and natural resources program."

*Applicability:* Section 5, Ch. 577, L. 1991, provided: "[This act] applies to forest products cut after June 30, 1991."

*Effective Date:* Section 16, Ch. 513, L. 1989, provided that this section is effective July 1, 1989.

## 76-13-415. Forestry extension service account — purpose — appropriation.

**Compiler's Comments**

*1999 Amendment:* Chapter 279 in (2)(a) substituted "76-13-414(2)(c)" for "76-13-408(3)"; and made minor changes in style. Amendment effective July 1, 1999.

*Severability:* Section 10, Ch. 279, L. 1999, was a severability clause.

*Applicability:* Section 12, Ch. 279, L. 1999, provided: "[This act] applies to any existing fire hazard agreement when violations of the existing fire hazard agreement have been identified by the department."

*1995 Amendment:* Chapter 418 in (2)(c), after "department", deleted "of state lands". Amendment effective July 1, 1995.

*Name Change — Directions to Code Commissioner:* Pursuant to sec. 36, Ch. 308, L. 1995, in this section the Code Commissioner changed "university of Montana" to "university of Montana-Missoula" and "Montana state university" to "Montana state university-Bozeman".

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1991 Statement of Intent:* The statement of intent attached to Ch. 577, L. 1991, provided: "The legislature has committed the state of Montana to a course of voluntary compliance with best management practices for forestry. The educational programs and expertise of the Montana state university [now Montana state university-Bozeman] forestry extension program are critical to the effectiveness and success of this approach. However, the forestry extension program requires the addition of a second extension forester to serve the needs of the state's commercial and 11,000 nonindustrial private forest landowners and to ensure protection of water quality and proper management of the state's forested lands.

The legislature believes that the extension service and the forest products industry should be equal partners in the continuation and the expansion of the forestry extension program. The forest products industry, as provided in 76-13-408 and 76-13-414, has committed $60,000 annually for the purpose of funding one additional extension forester position and one administrative position. This additional funding is intended to supplement the existing federal funding for extension forestry, and the legislature strongly urges the Montana state university [now Montana state university-Bozeman] extension program to match these commitments by earmarking $54,000 annually for the extension service's forestry and natural resources program."

*Effective Date:* Section 4, Ch. 577, L. 1991, provided that this section is effective on passage and approval. Approved April 23, 1991.

*Applicability:* Section 5, Ch. 577, L. 1991, provided: "[This act] applies to forest products cut after June 30, 1991."

### 76-13-417. Fire hazard reduction fund.

**Compiler's Comments**

*Effective Date:* Section 5, Ch. 193, L. 2021, provided: "[This act] is effective on passage and approval." Approved April 14, 2021.

### 76-13-418. Fire hazard reduction agreement — slash burning.

**Compiler's Comments**

*Effective Date:* Section 3, Ch. 478, L. 2023, provided: "[This act] is effective on passage and approval." Approved May 8, 2023.

*2023 Code Commissioner Correction:* In (1) the Code Commissioner inserted the bracketed reference to fire to reflect the defined term "fire hazard reduction agreement" in 76-13-401.

### 76-13-420. Notification prior to forest practices — department response.

**Compiler's Comments**

*Effective Date:* Section 9, Ch. 423, L. 1989, provided that this section is effective January 1, 1990.

*Applicability:* Section 8, Ch. 423, L. 1989, provided: "[This act] applies to timber sales that begin after December 31, 1989."

### 76-13-421. Onsite consultation.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 in (3), in second sentence, substituted "department of environmental quality" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*Effective Date:* Section 9, Ch. 423, L. 1989, provided that this section is effective January 1, 1990.

*Applicability:* Section 8, Ch. 423, L. 1989, provided: "[This act] applies to timber sales that begin after December 31, 1989."

### 76-13-422. Purpose of onsite consultation — department responsibility.

**Compiler's Comments**

*Effective Date:* Section 9, Ch. 423, L. 1989, provided that this section is effective January 1, 1990.

*Applicability:* Section 8, Ch. 423, L. 1989, provided: "[This act] applies to timber sales that begin after December 31, 1989."

### 76-13-423. When additional notification required.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

*Effective Date:* Section 9, Ch. 423, L. 1989, provided that this section is effective January 1, 1990.

*Applicability:* Section 8, Ch. 423, L. 1989, provided: "[This act] applies to timber sales that begin after December 31, 1989."

### 76-13-424. Emergency forest practices.

**Compiler's Comments**

*Effective Date:* Section 9, Ch. 423, L. 1989, provided that this section is effective January 1, 1990.

*Applicability:* Section 8, Ch. 423, L. 1989, provided: "[This act] applies to timber sales that begin after December 31, 1989."

## Part 6
## Transportation of Coniferous Trees

### 76-13-601. Unlawful transportation of trees and boughs.

**Compiler's Comments**

*2005 Amendment:* Chapter 366 in (4) near end substituted "designated or appointed as a peace officer under 61-10-154 or 61-12-201" for "as appointed under 61-12-201". Amendment effective October 1, 2005.

*1995 Amendment:* Chapter 418 at end of (4) substituted "department of natural resources and conservation" for "department of state lands"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1991 Amendment:* Substituted references to Department of Transportation for references to Department of Highways. Amendment effective July 1, 1991.

*1989 Amendment:* In (4) changed "patrolman" to "patrol officer".

*1987 Amendment:* Inserted (4) requiring bill of sale or written authorization for transport of trees to be exhibited upon request of law enforcement officials, game warden, Department of Highways employee, or Department of State Lands agent.

*1983 Amendment:* In (1), near beginning changed "highways of this state" to "ways of this state", and decreased number of trees that may be transported from 10 to 5; and inserted (3) prohibiting transport on ways of state of more than 200 pounds of boughs from coniferous trees without written authorization of boughs owner; (5), defining ways of this state, was enacted as a separate section but codified as part of this section.

## Part 7
## Sustainable Management of Public Forests

**Part Compiler's Comments**

*Preamble:* The preamble attached to Ch. 409, L. 2007, provided: "WHEREAS, Montana's public forests are important environmental, economic, and recreational resources; and

WHEREAS, fire suppression and lack of active management on some public forests has led to overstocked stands, unnatural distribution of tree species and age classes, and an increased susceptibility of forests to insect and disease epidemics and uncharacteristic wildfires that threaten Montana communities and watersheds; and

WHEREAS, two-thirds of the forests in Montana are managed by the federal government and include some of the most important environmental, economic, and recreational resources in the state; and

WHEREAS, innovative partnerships between traditional adversaries in federal forest management demonstrate that consensus-based solutions can be reached on landscape level projects on federal lands that integrate active forest management, restoration, and stewardship; and

WHEREAS, the Department of Natural Resources and Conservation is uniquely situated to provide expertise and guidance on the management of public forests in Montana."

*Effective Date:* This part is effective October 1, 2007.

**76-13-701. Findings and policy.**

**Compiler's Comments**

*2013 Amendment:* Chapter 403 inserted (4) regarding legislative findings pertaining to watersheds; and made minor changes in style. Amendment effective October 1, 2013.

*Preamble:* The preamble attached to Ch. 403, L. 2013, provided: "WHEREAS, properly functioning watersheds are critical to Montana's economic prosperity, the health of its citizens, and the culture of the state but the management of many of these watersheds has left them impaired or at risk for not functioning properly; and

WHEREAS, the Montana Constitution provides that the waters of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law; and

WHEREAS, all persons have a constitutional right to a clean and healthful environment, which includes the protection and restoration of watersheds; and

WHEREAS, the state has inherent power to enact reasonable legislation for the health, safety, and welfare of the public, which includes the protection of drinking water supplies that originate in watersheds; and

WHEREAS, wildfires in critical watersheds and across Montana degrade the quality of our water by overloading streams with sediment and nutrients and clogging our air with pollutants from smoke, resulting last year in 88 days on which the air quality was poor because of smoke; and

WHEREAS, the 2012 fire season was severe, with suppression costs to the state topping $50 million, and comprehensive watershed restoration and protection could significantly reduce fire season costs by preventing fires."

**76-13-702. Duties — authority.**

**Compiler's Comments**

*2013 Amendment:* Chapter 403 inserted (6) regarding advocating the inclusion of Montana in federal legislation establishing good neighbor policy; in (9)(b) at end inserted "or to hamper watershed restoration and protection"; and made minor changes in style. Amendment effective October 1, 2013.

*Preamble:* The preamble attached to Ch. 403, L. 2013, provided: "WHEREAS, properly functioning watersheds are critical to Montana's economic prosperity, the health of its citizens, and the culture of the state but the management of many of these watersheds has left them impaired or at risk for not functioning properly; and

WHEREAS, the Montana Constitution provides that the waters of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law; and

WHEREAS, all persons have a constitutional right to a clean and healthful environment, which includes the protection and restoration of watersheds; and

WHEREAS, the state has inherent power to enact reasonable legislation for the health, safety, and welfare of the public, which includes the protection of drinking water supplies that originate in watersheds; and

WHEREAS, wildfires in critical watersheds and across Montana degrade the quality of our water by overloading streams with sediment and nutrients and clogging our air with pollutants from smoke, resulting last year in 88 days on which the air quality was poor because of smoke; and

WHEREAS, the 2012 fire season was severe, with suppression costs to the state topping $50 million, and comprehensive watershed restoration and protection could significantly reduce fire season costs by preventing fires."

*2009 Amendments — Composite Section:* Chapter 58 in (5) near end after "status" inserted "and coordination"; inserted (6) allowing the department to assist local government entities in establishing cooperative agency status and coordination with federal agencies; and made minor changes in style. Amendment effective March 25, 2009.

Chapter 115 inserted (8)(b) relating to fuel-loading conditions considered significant threat to public health; and made minor changes in style. Amendment effective April 1, 2009.

# CHAPTER 14
# RANGELAND RESOURCES

## Part 1
## Rangeland Management

**Part Collateral References**

Montana Sage Grouse Habitat Conservation Program, Montana Department of Natural Resources & Conservation, https://sagegrouse.mt.gov.

### 76-14-102. Purpose.

**Administrative Rules**

ARM 36.17.614 Projects eligible for categorical exclusion from Montana Environmental Policy Act (MEPA) review.

### 76-14-103. Definitions.

**Compiler's Comments**

*2007 Amendment:* Chapter 44 deleted former definition of grazeable woodlands that read: ""Grazeable woodlands" means forest land on which the understory includes, as an integral part of the forest plant community, plants that can be grazed without significantly impairing other forest values"; substituted tame pastureland for tame pasture as defined term; in definition of users of rangeland near middle after "farmers" substituted "hunters, anglers" for "sportsmen"; and made minor changes in style. Amendment effective October 1, 2007.

*1983 Amendment:* Inserted definitions of person, range condition, and tame pasture.

**Administrative Rules**

ARM 36.17.614 Projects eligible for categorical exclusion from Montana Environmental Policy Act (MEPA) review.

### 76-14-105. Role of state coordinator.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 76-14-106. Duties of rangeland resources committee.

**Compiler's Comments**

*1985 Amendment:* Inserted (2) authorizing Committee to consult with state and federal agencies and University System in performance of duties.

**Collateral References**

Rangeland Resource Program, Montana Department of Natural Resources & Conservation, https://dnrc.mt.gov/Conservation/Conservation-Programs/Rangeland-Resources/.

### 76-14-111. Rangeland improvement loan program.

**Administrative Rules**

ARM 36.17.614 Projects eligible for categorical exclusion from Montana Environmental Policy Act (MEPA) review.

**Collateral References**

Range Improvement Loan Program, Montana Department of Natural Resources & Conservation, https://dnrc.mt.gov/Conservation/Conservation-Programs/Rangeland-Resources/.

### 76-14-112. Rangeland improvement loan special revenue account.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 1, Ch. 437, L. 2023. Amendment effective October 1, 2023.

*1991 Amendment:* Near beginning of (2), after "account", deleted "$185,000 for the biennium ending June 30, 1989, from the renewable resource development account created in 90-2-125".

*1987 Amendment:* In (2) substituted "$185,000 for the biennium ending June 30, 1989, from the renewable resource development account created in 90-2-125" for "15% of the total amount of renewable resource development grants and loans as provided by 90-2-113".

*1983 Amendment:* In (1), substituted "special revenue account" for "earmarked account" and substituted "state special revenue fund" for "earmarked revenue fund".

### 76-14-113. Eligibility for loans.

**Compiler's Comments**

*1997 Amendment:* Chapter 42 in (3), at end, substituted "natural resources conservation service" for "soil conservation service". Amendment effective March 12, 1997.

**Administrative Rules**

ARM 36.17.614 Projects eligible for categorical exclusion from Montana Environmental Policy Act (MEPA) review.

### 76-14-114. Criteria for evaluation of loan applications.

**Administrative Rules**

ARM 36.17.614 Projects eligible for categorical exclusion from Montana Environmental Policy Act (MEPA) review.

### 76-14-115. Selection of loan recipients.

**Administrative Rules**

ARM 36.17.614 Projects eligible for categorical exclusion from Montana Environmental Policy Act (MEPA) review.

### 76-14-116. Rules.

**Compiler's Comments**

*Statement of Intent:* The statement of intent attached to HB 486 (Ch. 171, L. 1983) provided: "A statement of intent is required for this bill because it delegates rulemaking authority to the Board of Natural Resources and Conservation [functions now transferred to Department of Natural Resources and Conservation] in Section 7 [76-14-116].

The intent is to provide the Department with the authority to adopt those rules necessary to administer the Rangeland Improvement Loan Program. This authority is limited by Section 7 to adopting rules prescribing the form and content of applications for loans and the required conservation plan; to adopting rules governing the application, implementation, and interpretation of the criteria for awarding loans and of the procedure for the review of applications by conservation district supervisors, the committee, and the department; to adopting rules providing for the servicing of loans including arrangements for obtaining security interests and the establishment of reasonable fees or charges to be made; to adopting rules providing for the confidentiality of financial statements submitted; and, to adopting rules describing the terms and conditions for making loans."

# CHAPTER 15
# CONSERVATION DISTRICTS

**Chapter Compiler's Comments**

*Short Title Not Codified:* Section 76-101, R.C.M. 1947, a short title for an act, was not codified because of multiple changes in the original act. The section was not repealed and is valid law. Citation may be made to sec. 1, Ch. 72, L. 1939, as amended by sec. 1, Ch. 73, L. 1961.

*Implied Repealer Not Codified:* Section 76-116, R.C.M. 1947, purporting to repeal all provisions of law inconsistent with this act, was not codified. The section was not repealed and is valid law. Citation may be made to sec. 17, Ch. 72, L. 1939.

**Chapter Administrative Rules**

Title 36, chapter 6, ARM Soil conservation districts.

**Chapter Collateral References**

Assuming Dredge-and-Fill Permits: A Water Policy Interim Committee Report to the 65th Legislature, Mont. Leg. Serv. Div. (2016).

## Part 1
## General Provisions

### 76-15-101. Legislative determinations.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

**Attorney General's Opinions**

*Extent of Conservation District Implementation of Land Use Regulations Regarding Coal Bed Methane Wastewater Operations:* The Legislature did not intend that the listing in 76-15-706 of measures necessary to protect soil and water limit the flexibility of conservation districts to devise means to control the adverse effects of coal bed methane runoff. Thus, a conservation district has authority under 76-15-706, following a referendum by the voters, to implement land use regulations in order to implement reasonable measures to conserve soils, protect soil structure from coal bed methane water, and conserve the water resources of the conservation district. 50 A.G. Op. 9 (2004).

### 76-15-103. Definitions.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 deleted definition of Board that read: ""Board" means the board of natural resources and conservation provided for in 2-15-3302"; in definition of United States substituted "natural resource conservation service" for "soil conservation service"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

**Case Notes**

*Scope of Writ of Prohibition — Writ Inappropriate to Stop Conservation District From Making Initial Determination of Whether Body of Water Considered Natural Perennial Flowing Stream When Other Remedies Exist:* After unsuccessfully attempting to have the Department of Natural Resources and Conservation, the Department of Fish, Wildlife, and Parks, and the Department of Environmental Quality make the determination as to whether a slough east of Victor was a perennial flowing stream and thus subject to The Natural Streambed and Land Preservation Act of 1975, the county conservation district decided to use a public hearing process to make the determination. Plaintiffs sought a writ of prohibition to stop the conservation district from determining the status of the slough. After the writ was denied in District Court, plaintiffs submitted it to the Supreme Court. A writ of prohibition serves to stop an entity exercising judicial functions from acting when the proceedings are beyond that entity's jurisdiction and are clearly unlawful, but should not replace an appeal or perform the function of a writ of review. A writ of prohibition is justified only by extreme necessity when the grievance cannot be redressed by ordinary proceedings at law, in equity, or by appeal. The existence of another remedy, even if inconvenient or indirect, prevents a party from seeking a writ of prohibition. In the interest of both judicial economy and agency efficiency, an exhaustion of administrative remedies allows a governmental agency to make a factual record and to correct its own errors within its specific expertise before a court interferes. After noting that the Act does not specifically authorize a conservation district or any other entity with the power to classify bodies of water as streams, the Supreme Court found that the conservation district was simply attempting to apply the Legislature's articulated requirement of a natural perennial flowing stream and declined to interfere with the conservation district's ability to initially determine the scope of its jurisdiction and exercise its expertise to decide whether the slough was in fact a stream. Further, once the status of the slough was determined, there was nothing to prevent plaintiffs from seeking judicial review of the conservation district's declaratory rulings. Because extreme necessity and lack of redress did not exist, a writ of prohibition was inappropriate to stop the conservation district from making the initial ruling on the status of the slough, so the writ was denied. Bitterroot River Protection Ass'n, Inc. v. Bitterroot Conserv. District, 2002 MT 66, 309 M 207, 45 P3d 24 (2002), followed in Paulson v. Flathead Conserv. District, 2004 MT 136, 321 M 364, 91 P3d 569 (2004).

**Attorney General's Opinions**

*Cost of Election — Conservation District Supervisor:* Conservation district supervisors were public officers within the meaning of 13-12-213 (now repealed). The county in which voting for a conservation district supervisor election occurs was responsible for paying the expenses incurred by the election. 38 A.G. Op. 25 (1979).

### 76-15-106. Conservation district account.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 2, Ch. 119, L. 2023. Amendment effective April 18, 2023.

*2021 Amendment:* Chapter 138 inserted (2) regarding transfers to the conservation district account; and made minor changes in style. Amendment effective July 1, 2021, and terminates June 30, 2023.

*Effective Date:* Section 20(1), Ch. 351, L. 2017, provided: "(1) Except as provided in subsection (2), [this act] is effective July 1, 2017."

*Severability:* Section 19, Ch. 351, L. 2017, was a severability clause.

### 76-15-107. Exemption from environmental review.

**Compiler's Comments**

*Effective Date:* This section is effective October 1, 2023.

### 76-15-108. Conservation district fund — conservation district special revenue account.

**Compiler's Comments**

*Effective Date:* Section 8, Ch. 717, L. 2023, provided: "[This act] is effective July 1, 2023."

## Part 2

## Creation of Conservation Districts

**Part Attorney General's Opinions**

*Effect of Unification of City-County Government Upon Existing Conservation District:* The geographical territory of the city of Butte was not incorporated into the Mile High Conservation District by approval of a consolidated form of local government for Butte and the county of Silver Bow. If Butte is to be included, the appropriate statutory procedure must be followed. 37 A.G. Op. 20 (1977).

### 76-15-201. Petition to create conservation district.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 in four places substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1985 Amendment:* At beginning of (1) substituted "Any 10% of the qualified electors" for "Any 10 qualified electors".

### 76-15-203. Hearing procedure if additional territory to be included.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 in two places substituted "department" for "board" and after "hearing and" deleted "the department"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

### 76-15-204. Determination of need for district.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 in two places substituted "department" for "board"; near middle of (1), after "available", deleted "to the department or the board"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

### 76-15-205. Criteria for determining need.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 near beginning substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

### 76-15-206. Determination of administrative practicability of district.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 near beginning substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

### 76-15-207. Referendum on question of creating district.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 near beginning of (1) and near end of (2) substituted "department" for "board"; near middle of (1), before "finding", deleted "board's"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

**Administrative Rules**

ARM 36.6.101 Conduct of referendum.

### 76-15-208. Administration of hearings and referenda.

**Administrative Rules**

ARM 36.6.101 Conduct of referendum.

### 76-15-209. Procedure following referendum.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 in (1), after "referendum, and", deleted "the board"; near beginning of (2) and two places in (3) substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

**Administrative Rules**

ARM 36.6.101 Conduct of referendum.

### 76-15-210. Criteria for determining administrative practicability.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 near beginning of (1) and near beginning of (2) substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

### 76-15-211. Appointment of supervisors.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 near beginning substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

### 76-15-212. Submission of application by appointed supervisors.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 near end of (1)(a), near beginning of (3)(a)(ii), near end of (3)(a)(iv), and at end of (3)(b) substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

### 76-15-213. Processing of application by secretary of state.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 in (2), at end of first sentence, substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

### 76-15-215. District as governmental subdivision and public body.

**Attorney General's Opinions**

*Soil Conservation District Employees as County Employees:* Although soil conservation districts are distinct governmental entities covering more than one county and the statutes governing the districts do not expressly designate district personnel as county employees to be included on the county payroll, if a county does include district personnel on its payroll, giving them the same benefits received by other county employees, to that extent district personnel must be considered county employees. 39 A.G. Op. 38 (1981).

*Conflict With Powers of Conservation Districts:* Title 75, ch. 7, on lakeshore protection does not conflict with the statutory powers of conservation districts. 36 A.G. Op. 97 (1976).

*Jurisdiction Over State Waters:* State conservation districts do not have jurisdiction over state waters. 36 A.G. Op. 97 (1976).

### 76-15-216. Limitation on territory included in district.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 near middle substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

**Attorney General's Opinions**

*Effect of Unification of City-County Government Upon Existing Conservation District:* The geographical territory of the city of Butte was not incorporated into the Mile High Conservation District by approval of a consolidated form of local government for Butte and the county of Silver Bow. If Butte is to be included, the appropriate statutory procedure must be followed. 37 A.G. Op. 20 (1977).

## Part 3

## Administration of Conservation Districts

### 76-15-301. Establishment of supervisor areas and reorganization of district governing bodies.

**Compiler's Comments**

*2011 Amendment:* Chapter 162 in (1)(b) deleted second and third sentences that read: "If provided by ordinance of the conservation district, a supervisor shall reside in the supervisor area represented. A certified copy of the ordinance must be submitted to the election administrator in each affected county"; in (2)(a) substituted current language for "In a district containing no incorporated municipalities, the department may reorganize the district into seven supervisor areas"; inserted (2)(b) limiting supervisor areas in reorganized districts; inserted (3) regarding supervisor's residence; and made minor changes in style. Amendment effective April 8, 2011.

*1995 Amendment:* Chapter 418 in (2) substituted "department" for "board". Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1985 Amendment:* In (1)(b) inserted second and third sentences requiring that certified copy of ordinance be submitted to affected county election administrator and that sufficient supervisors-at-large be elected if less than five supervisor areas are established.

*1983 Amendments:* Chapter 173 enacted (2), allowing Board to reorganize district into seven supervisor areas in district containing no incorporated municipalities, as a separate section. The Code Commissioner codified it as a subsection.

Chapter 473, in (1)(a), before "five", inserted "no more than"; and inserted (1)(b) concerning representation of supervisor areas.

## 76-15-303. Election of supervisors — election by acclamation — appointment.

### Compiler's Comments

*2015 Amendment:* Chapter 49 inserted (1) referencing Title 13, chapter 1, part 5; in (3) at beginning deleted "Except as provided in subsection (5)" and before "election" inserted "general"; in (4) at beginning deleted "In the general election" and substituted "candidates" for "individuals nominated"; deleted former (4) and (5) (see 2015 Session Law for former text); and made minor changes in style. Amendment effective November 4, 2015.

*2003 Amendment:* Chapter 414 in (3) substituted "arranged on ballots as prescribed in 13-12-205" for "printed, as provided under 13-12-205, upon ballots, with a square before each name and a direction to insert an "X" mark in the square before any three names to indicate the elector's preference". Amendment effective October 1, 2003.

*1999 Amendment:* Chapter 254 inserted third sentence in (5)(c) regarding term of office for supervisor elected by acclamation or appointed; and made minor changes in style. Amendment effective October 1, 1999.

*1995 Amendment:* Chapter 184 in (2), at beginning, inserted exception clause; inserted (5) relating to situations in which the number of candidates is equal to or less than the number of positions to be elected, when the governing body may require an election to be held, and what happens if an election is not held; and made minor changes in style.

*1985 Amendments:* Chapter 76 at beginning of (2), substituted "The candidate or, if more than one supervisor position is to be filled by the general election, the candidates" for "The three candidates"; near beginning of (3) substituted "the" for "all" before "individuals" and after "nominated" deleted "by petition (if six or fewer) or by election"; and in (4) at end of first sentence substituted "if necessary" for "in which more than four candidates are nominated".

Chapter 576 in (3) after "shall be printed", deleted "arranged in a rotating order of the surnames".

*Compliance With Act:* Section 4, Ch. 18, L. 1977, read: "For the purposes of bringing existing districts into compliance with this act by the time of the 1978 general elections the terms of office for all supervisors shall expire upon passage and approval of this act. However, each supervisor shall remain in office until his successor has been elected and has qualified in accordance with this act. For purposes of the 1978 general election three supervisors shall be elected for a 4-year term and the remaining two supervisors elected for a 2-year term. No action or undertaking of a district may be invalidated or voided for failure to comply with the amendatory provisions of this act prior to January 1, 1979."

### Attorney General's Opinions

*Cost of Election — Conservation District Supervisor:* Conservation District Supervisors were public officers within the meaning of 13-12-213 (now repealed). The county in which voting for a Conservation District Supervisor election occurs was responsible for paying the expenses incurred by the election. 38 A.G. Op. 25 (1979).

*Conservation District Elections:* Candidates for Supervisor must run at large in the entire district in both elections, each qualified elector voting for 10 candidates in the nominating election and five candidates in the general election when all five Supervisors will be elected. Ten candidates may be nominated to run in the general election when five Supervisors will be elected, and a reasonable method of determining recipients of 4-year terms must be chosen by the registrar and made available to candidates and electors prior to election. 37 A.G. Op. 137 (1978).

*Election of Conservation District Supervisors to Be by Separate Ballot:* Since there are no partisan designations in a Conservation District Supervisor election, a separate ballot is necessary if the nominating election is held in conjunction with the state primary election. A separate ballot would also be necessary in a general election if the registrar determines that within his jurisdiction some of the qualified electors in the general election are ineligible to vote in the Supervisor election. A Supervisor, incidentally, must reside in the district wherein he is nominated and elected. 37 A.G. Op. 131 (1978).

*Filing Fees:* Filing fees are not required for election to the office of Conservation District Supervisor. 37 A.G. Op. 131 (1978).

## 76-15-304. Election of supervisors.

### Compiler's Comments

*2015 Amendment:* Chapter 49 in (2) substituted current language referencing Title 13, chapter 1, part 5, for former (2) that read: "(2) Nominations for the election of supervisors shall be made as provided under 76-15-302 except that a nominating election shall be held if more than four candidates are nominated by petition when two supervisors are to be elected." Amendment effective November 4, 2015.

**Attorney General's Opinions**

*Election in Even-Numbered Years:* Officers of conservation districts shall be elected at the general election held in November of even-numbered years. 38 A.G. Op. 74 (1980).

*Cost of Election — Conservation District Supervisor:* Conservation District Supervisors were public officers within the meaning of 13-12-213 (now repealed). The county in which voting for a Conservation District Supervisor election occurs was responsible for paying the expenses incurred by the election. 38 A.G. Op. 25 (1979).

*Conservation District Elections:* Candidates for Supervisor must run at large in the entire district in both elections, each qualified elector voting for 10 candidates in the nominating election and five candidates in the general election when all five Supervisors will be elected. Ten candidates may be nominated to run in the general election when five Supervisors will be elected, and a reasonable method of determining recipients of 4-year terms must be chosen by the registrar and made available to candidates and electors prior to election. 37 A.G. Op. 137 (1978).

*Election of Conservation District Supervisors to Be by Separate Ballot:* Since there are no partisan designations in a Conservation District Supervisor election, a separate ballot is necessary if the nominating election is held in conjunction with the state primary election. A separate ballot would also be necessary in a general election if the registrar determines that within his jurisdiction some of the qualified electors in the general election are ineligible to vote in the Supervisor election. A Supervisor, incidentally, must reside in the district wherein he is nominated and elected. 37 A.G. Op. 131 (1978).

*Filing Fees:* Filing fees are not required for election to the office of Conservation District Supervisor. 37 A.G. Op. 131 (1978).

## 76-15-305. Transition to seven supervisors.

**Compiler's Comments**

*2015 Amendment:* Chapter 49 deleted former (3) through (5) that read: "(3) Nominations for the election of supervisors in a district having seven supervisors must be made as provided in 76-15-302.

(4) The term of each elected supervisor is 4 years.

(5) The election administrator in each county having a seven-supervisor district shall conduct the election for that district in a manner similar to elections conducted for a district having five supervisors." Amendment effective November 4, 2015.

*1995 Amendment:* Chapter 418 near end of (1) substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

## 76-15-311. Governing body of district.

**Compiler's Comments**

*2015 Amendment:* Chapter 49 in (2)(a) deleted last sentence that read: "The term of office of the appointed supervisors is 3 years." Amendment effective November 4, 2015.

*2011 Amendment:* Chapter 162 in (1), (2), and (2)(b) inserted "that are completely"; in (2)(a) deleted second sentence that read: "The two appointed supervisors must be residents of municipalities within the district"; in (2)(b) substituted "two or more" for "more than two" and inserted last sentence requiring that legislative bodies agree on appointed supervisors; inserted (3) regarding transition to seven-member board; inserted (4) regarding residence of supervisors; inserted (5) requiring supervisor to reside in district; and made minor changes in style. Amendment effective April 8, 2011.

*1983 Amendments:* Chapter 173, at end of (1), added clause referring to reorganization of conservation district.

Chapter 473 inserted (3) authorizing appointment of associate supervisors necessary to advise board of supervisors on operation of conservation district.

*Implementation:* The provisions that the term of office of appointed Supervisors be 3 years (in subsection (2)(a)) and that the term of office of each Supervisor be 4 years (in the first sentence of 76-15-312) so appeared in the 1977 act.

Section 4, Ch. 18, L. 1977, provided for the expiration of present directors' terms of office and for the election of directors in 1978 to bring existing districts into compliance with 1977 amendment.

## 76-15-312. Term of office and vacancies.

**Compiler's Comments**

*2015 Amendment:* Chapter 49 in (1)(a) substituted "as provided in subsection (1)(b)" for "that"; in (1)(b) after "who are" deleted "first", after "department" inserted "pursuant to 76-15-305", after "appointment" inserted "after which the offices must be filled by election", and inserted last sentence regarding term of an appointed supervisor; in (4) in middle before "election" deleted "regular" and inserted last sentence referencing Title 13, chapter 1, part 5; and made minor changes in style. Amendment effective November 4, 2015.

*2011 Amendment:* Chapter 162 in (2)(f) substituted "reside in the district" for "be a resident of the district". Amendment effective April 8, 2011.

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

*1989 Amendment:* Inserted (2) listing events that create a vacancy in office; and inserted (3) relating to method for excusing attendance at a meeting.

*Implementation:*

The provisions that the term of office of appointed Supervisors be 3 years (in 76-15-311(2)(a)) and that the term of office of each Supervisor be 4 years (in the first sentence of this section) so appeared in the 1977 act.

Section 4, Ch. 18, L. 1977, provided for the expiration of present directors' terms of office and for the election of directors in 1978 to bring existing districts into compliance with 1977 amendment.

## 76-15-313. Operation of supervisors.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

*1983 Amendment:* In (2), inserted "except as otherwise specifically provided"; and in (3) in first sentence, substituted language concerning compensation for "Except for special projects in which funds are available, a supervisor may not receive compensation for his services, but he is entitled to expenses, including travel expenses as provided for in 2-18-501 through 2-18-503, incurred in the discharge of his duties.", and inserted last sentence prohibiting compensation for regularly scheduled board of supervisors' meeting.

## 76-15-314. Removal of a supervisor.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 near middle substituted "department" for "board". Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1989 Amendment:* Near beginning, after "board", inserted reference to a vacancy.

## 76-15-315. Administrative functions of supervisors.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

## 76-15-319. Legal assistance.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 at end of (2), after "department", deleted "of natural resources and conservation"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1983 Amendment:* In (2), after "because of" deleted "lack of staff or".

**Attorney General's Opinions**

*County Attorney to Provide Legal Services:* Sections 7-4-2711 and 76-15-319 require the County Attorney to provide upon request such legal services as the conservation district may require. 38 A.G. Op. 73 (1980).

*State Conservation Districts — Legal Representation:* The Attorney General is responsible for civil legal representation upon request of a state conservation district, but private counsel may be employed as Special Assistant Attorneys General. The compensation may be set by the Supervisors and becomes a district obligation. County Attorneys' duty to represent districts extends only to giving their opinion in writing to the officers of the district on matters pertaining to their offices. (Opinion rendered prior to 1979 amendment.) 37 A.G. Op. 76 (1977).

### 76-15-320. Legal status of district — immunity.

**Compiler's Comments**

*1999 Amendment:* Chapter 23 inserted (1)(b) relating to satisfaction of judgment or settlement; inserted (1)(e) concerning implementation of Title 75, chapter 7, part 1; inserted (2) concerning immunity from suit and exceptions; and made minor changes in style. Amendment effective February 18, 1999.

*Retroactive Applicability:* Section 7, Ch. 23, L. 1999, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to all occurrences prior to [the effective date of this act] [effective February 18, 1999] for which a cause of action has not been filed and served upon a conservation district."

**Attorney General's Opinions**

*Conflict With Powers of Conservation Districts:* Title 75, ch. 7, on lakeshore protection does not conflict with the statutory powers of conservation districts. 36 A.G. Op. 97 (1976).

*Jurisdiction Over State Waters:* State conservation districts do not have jurisdiction over state waters. 36 A.G. Op. 97 (1976).

### 76-15-321. Rulemaking authority.

**Attorney General's Opinions**

*Conflict With Powers of Conservation Districts:* Title 75, ch. 7, on lakeshore protection does not conflict with the statutory powers of conservation districts. 36 A.G. Op. 97 (1976).

*Jurisdiction Over State Waters:* State conservation districts do not have jurisdiction over state waters. 36 A.G. Op. 97 (1976).

### 76-15-324. Minutes.

**Compiler's Comments**

*Effective Date:* Sec. 25, Ch. 262, L. 2015, provided that this section is effective July 1, 2015.

*Code Commissioner Correction:* To reflect the repeal of Title 2, chapter 6, part 4, and the enactment of similar provisions in Title 2, chapter 6, part 12, by Ch. 348, L. 2015, the code commissioner substituted "Title 2, chapter 6, part 12" for "Title 2, chapter 6, part 4".

## Part 4
## Operation of Conservation Districts

### 76-15-403. Operation of projects and works.

**Compiler's Comments**

*1999 Amendment:* Chapter 23 in (3) at end inserted language of proviso regarding conditions supervisors consider necessary; inserted (9) concerning execution of district duties to implement Title 75, chapter 7, part 1; inserted (10) concerning execution of projects for specified purposes; and made minor changes in style. Amendment effective February 18, 1999.

*Retroactive Applicability:* Section 7, Ch. 23, L. 1999, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to all occurrences prior to [the effective date of this act] [effective February 18, 1999] for which a cause of action has not been filed and served upon a conservation district."

### 76-15-407. Selection and acquisition of water storage sites.

**Compiler's Comments**

*Severability Clause:* Section 5, Ch. 418, L. 1977, was a severability clause.

### 76-15-408. Funding of storage reservoirs.

**Compiler's Comments**

*2009 Amendment:* Chapter 2 at end of first sentence substituted "natural resources projects state special revenue account" for "renewable resource fund". Amendment effective October 1, 2009.

*1995 Amendment:* Chapter 418 in second sentence, after "department", deleted "of natural resources and conservation". Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*Severability Clause:* Section 5, Ch. 418, L. 1977, was a severability clause.

### 76-15-409. Purposes of off-stream storage.

**Compiler's Comments**

*Severability Clause:* Section 5, Ch. 418, L. 1977, was a severability clause.

### 76-15-410. Disposition of excess water.

**Compiler's Comments**

*Severability Clause:* Section 5, Ch. 418, L. 1977, was a severability clause.

## Part 5

## Financial Aspects of Conservation Districts

## Loan Program

**Part Attorney General's Opinions**

*Soil Conservation District Employees as County Employees:* Although soil conservation districts are distinct governmental entities covering more than one county and the statutes governing the districts do not expressly designate district personnel as county employees to be included on the county payroll, if a county does include district personnel on its payroll, giving them the same benefits received by other county employees, to that extent district personnel must be considered county employees. 39 A.G. Op. 38 (1981).

*Election in Even-Numbered Years:* Officers of conservation districts shall be elected at the general election held in November of even-numbered years, since conservation districts may be multicounty districts and 13-1-104(1) provides that elections in multicounty districts be held in even-numbered years. 38 A.G. Op. 74 (1980).

### 76-15-501. Financial management.

**Compiler's Comments**

*1999 Amendments — Composite Section:* Chapter 23 inserted (7) regarding funds, grants, and loans; and made minor changes in style. Amendment effective February 18, 1999.

Chapter 584 in (4) inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

Style changes were slightly different in the chapters. In each case, the codifier chose appropriate text.

*Retroactive Applicability:* Section 7, Ch. 23, L. 1999, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to all occurrences prior to [the effective date of this act] [effective February 18, 1999] for which a cause of action has not been filed and served upon a conservation district."

Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

*Severability:* Section 172, Ch. 584, L. 1999, was a severability clause.

*1983 Amendment:* Inserted (6) authorizing supervisors of conservation district to establish conservation practice loan program.

**Attorney General's Opinions**

*Mandatory Duty of Board of County Commissioners to Levy Assessment to Support District:* Despite the fact that 76-15-516 purports to grant the Board of County Commissioners permissive authority to levy an assessment on the taxable property within a conservation district in order to support the operations of the district, the duty of the Commissioners under 76-15-516 must be read in conjunction with other statutes pertaining to the financing of district operations and construed to require the Commissioners to levy an assessment sufficient to raise the amount reported by the District Supervisors. 39 A.G. Op. 5 (1981).

### 76-15-502. Allocation of state funds among districts.

**Compiler's Comments**

*1985 Amendment:* In (2) after "76-15-503", deleted "and 76-15-504".

*1983 Amendment:* At end of (1), deleted "in accordance with the procedure specified in subsections (2) and (3) of this section"; and deleted former (2), which read: "(a) Seventy-five percent of all money which may be appropriated to pay the administrative and other expenses of conservation districts shall be allocated by the department among all the districts organized or to be organized within the ensuing biennial fiscal period under this chapter in direct proportion to the total acreage of land within each district.

(b) The remaining 25% of the money shall be allocated by the department among the districts on such basis of allocation as is fair, reasonable, and in the public interest, giving due consideration to the greater relative expense of carrying on operations within the particular districts because of such factors as unusual topography, unusual severity of erosion, special difficulty of carrying on operations, special volume of work to be done, and the special importance of instituting erosion control operations immediately."

### 76-15-505. Authorization to borrow money — limitations.

**Compiler's Comments**

*2001 Amendment:* Chapter 574 at beginning of (2) inserted "Subject to 15-10-420"; and made minor changes in style. Amendment effective July 1, 2001.

*1995 Amendment:* Chapter 418 in two places in (1) and in (2), after "board", inserted "of supervisors"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

**Attorney General's Opinions**

*Mandatory Duty of Board of County Commissioners to Levy Assessment to Support District:* Despite the fact that 76-15-516 purports to grant the Board of County Commissioners permissive authority to levy an assessment on the taxable property within a conservation district in order to support the operations of the district, the duty of the Commissioners under 76-15-516 must be read in conjunction with other statutes pertaining to the financing of district operations and construed to require the Commissioners to levy an assessment sufficient to raise the amount reported by the District Supervisors. 39 A.G. Op. 5 (1981).

### 76-15-506. Bonds authorized — election.

**Compiler's Comments**

*2015 Amendment:* Chapter 49 in (2) substituted "an election to be held in accordance with Title 13, chapter 1, part 5" for "a special election to vote upon the proposition of issuing the bonds or may submit the proposition as a special question at a regular or general election"; in (4) substituted "issuance of bonds must" for "authorization of such undertaking, the form, and content shall", after "7-7-4426" deleted "7-7-4427", after "use of" inserted "the bond", and after "refunding" inserted "of the bonds"; and made minor changes in style. Amendment effective November 4, 2015.

**Attorney General's Opinions**

*Mandatory Duty of Board of County Commissioners to Levy Assessment to Support District:* Despite the fact that 76-15-516 purports to grant the Board of County Commissioners permissive authority to levy an assessment on the taxable property within a conservation district in order to support the operations of the district, the duty of the Commissioners under 76-15-516 must be read in conjunction with other statutes pertaining to the financing of district operations and construed to require the Commissioners to levy an assessment sufficient to raise the amount reported by the District Supervisors. 39 A.G. Op. 5 (1981).

### 76-15-507. Investment of funds.

**Compiler's Comments**

*1983 Amendment:* Substituted "debt service fund" for "sinking fund" in two places.

### 76-15-508. Management of surplus funds.

**Compiler's Comments**

*1991 Amendment:* Near beginning of first sentence, after "funds of the district", deleted "except county tax funds". Amendment effective July 1, 1991.

### 76-15-512. Expenses to be covered by estimate.

**Compiler's Comments**

*1983 Amendment:* After "expenses of the district" inserted last clause relating to loan program.

### 76-15-515. Regular assessment.

**Compiler's Comments**

*2009 Amendment:* Chapter 36 at beginning of first sentence deleted "Except as provided in 76-15-531 and 76-15-532" and at end substituted "is subject to 15-10-420" for "may not exceed 1 ½ mills on the dollar of total taxable valuation or real property within the district"; and made minor changes in style. Amendment effective March 20, 2009.

*1993 Amendment:* Chapter 573 at beginning inserted exception clause; and made minor changes in style. Amendment effective July 1, 1993.

*1983 Amendment:* At end of first sentence, deleted ", except that cities that voted to be included in a district prior to July 1, 1971, shall be excluded from the district by a majority vote of the council."

**Attorney General's Opinions**

*Conservation Assessments Subject to Property Tax Limitations:* Regular and special assessments by conservation districts are subject to the property tax limitations in Title 15, ch. 10, part 4. 42 A.G. Op. 73 (1988).

*Mandatory Duty of Board of County Commissioners to Levy Assessment to Support District:* Despite the fact that 76-15-516 purports to grant the Board of County Commissioners permissive authority to levy an assessment on the taxable property within a conservation district in order to support the operations of the district, the duty of the Commissioners under 76-15-516 must be read in conjunction with other statutes pertaining to the financing of district operations and construed to require the Commissioners to levy an assessment sufficient to raise the amount reported by the District Supervisors. 39 A.G. Op. 5 (1981).

*Taxation — Definition of Real Property:* "Real property" for purposes of taxation means both real estate and improvements. 37 A.G. Op. 76 (1977).

**76-15-516. Levy of regular and special assessments.**

**Compiler's Comments**

*2001 Amendment:* Chapter 574 in (3) near end of first sentence after "assessment" substituted "on the taxable value of all taxable property located" for "not to exceed 3 mills on the taxable real property". Amendment effective July 1, 2001.

*1999 Amendment:* Chapter 584 in three places inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

*Severability:* Section 172, Ch. 584, L. 1999, was a severability clause.

*Retroactive Applicability:* Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

*1993 Amendment:* Chapter 573 inserted (2) relating to a conservation district special administrative assessment on taxable real property; and made minor changes in style. Amendment effective July 1, 1993.

*1983 Amendment:* In (1), at end of first sentence, deleted ", except that cities that voted to be included in a district prior to July 1, 1971, shall be excluded from the district by a majority vote of the council".

**Attorney General's Opinions**

*Mandatory Duty of Board of County Commissioners to Levy Assessment to Support District:* Despite the fact that this section purports to grant the Board of County Commissioners permissive authority to levy an assessment on the taxable property within a conservation district in order to support the operations of the district, the duty of the Commissioners under 76-15-516 must be read in conjunction with other statutes pertaining to the financing of district operations and construed to require the Commissioners to levy an assessment sufficient to raise the amount reported by the District Supervisors. 39 A.G. Op. 5 (1981).

**76-15-518. Certification of assessment to department of revenue — entry on property tax record.**

**Compiler's Comments**

*1999 Amendment:* Chapter 584 inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

*Severability:* Section 172, Ch. 584, L. 1999, was a severability clause.

*Retroactive Applicability:* Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

*1993 Special Session Amendment:* Chapter 27 in second sentence substituted "department of revenue" for "county assessor of each of the respective counties" and "property tax record of each county" for "assessment roll"; and made minor changes in style. Amendment effective January 1, 1994.

*Applicability:* Section 171(2), Ch. 27, Sp. L. November 1993, provided that the amendments to this section apply to tax years after December 31, 1993.

**76-15-523. Depository of district funds.**

**Compiler's Comments**

*1983 Amendment:* Inserted last sentence authorizing district to receive upon demand all or portion of county district funds for deposit in bank or financial account deemed appropriate by board of supervisors for district operation and administration.

**76-15-524. Receipt and crediting of district funds — responsibility on bond.**

**Compiler's Comments**

*1997 Amendment:* Chapter 141 near middle of first sentence substituted "for conservation practice loan repayments, including principal, interest, if any, administrative fees or charges for loans, and interest paid and collected on deposits or investments" for "for all loan repayments and administrative fees or charges"; and made minor changes in style. Amendment effective March 25, 1997.

*Retroactive Applicability:* Section 5, Ch. 141, L. 1997, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to all loans issued before [the effective date of this act] [effective March 25, 1997] and to all funds that are on deposit in a conservation practice loan account."

*1983 Amendment:* In first sentence, inserted "and for all loan repayments and administrative fees or charges under a conservation practice loan program".

**76-15-526. Treasurer's reports.**

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

**76-15-527. Purpose of expenditures.**

**Compiler's Comments**

*2017 Amendment:* Chapter 71 deleted reference to 76-15-517. Amendment effective March 2, 2017.

*1993 Amendment:* Chapter 573 inserted "76-15-531, and 76-15-532" and at end substituted "Title 76, chapter 15" for "76-15-502 and 76-15-503 and for an established conservation practice loan program"; and made minor changes in style. Amendment effective July 1, 1993.

*1983 Amendment:* Inserted last clause relating to loan program.

**76-15-530. Conservation district appropriations — administration.**

**Compiler's Comments**

*1995 Amendments:* Chapter 418 in (1), in two places, in (2), and in (4), after "department", deleted "of natural resources and conservation"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 509 in (1), at beginning, deleted "There is a conservation district account in the state special revenue fund of the state treasury. Money is paid into this account under 15-35-108" and after "from" substituted "appropriations of allocations authorized as provided under 15-35-108" for "this account"; in (2), in first sentence, substituted "appropriations referred to in subsection (1)" for "account" and in second sentence, after "distributed", deleted "from the account"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1983 Amendment:* Substituted reference to state special revenue fund for reference to earmarked revenue fund.

*Preamble:* The preamble to HB 223 (Ch. 479, L. 1981) provided: "WHEREAS, Montana's Conservation Districts are legal subdivisions of state government responsible under law to develop and carry out long-range programs that will result in the conservation and improvement of the soil and water resources, to provide assistance in the planning and application of conservation measures, and to encourage maximum participation of the general public and all local public and private agencies to fulfill this purpose; and

WHEREAS, Montana's Conservation Districts represent about 14,500 cooperators totaling 43,550,000 acres of farmland and ranchland within their boundaries; and

WHEREAS, districts in urban and developing areas provide soil surveys, water inventories, assistance with waste disposal, and other services to builders, contractors, planning commissions, municipal officials, schools, hospitals, industries, and smaller landowners; and

WHEREAS, two concepts gaining support and understanding are the desirability of decentralized government and the limits of natural resources. In combination, these ideas and the demands on their services have resulted in tremendously magnified responsibilities for conservation districts."

*Statement of Intent:* The statement of intent attached to HB 223 (Ch. 479, L. 1981) provided: "Because HB 223 directs the Department of Natural Resources and Conservation to adopt rules establishing the form and content of applications and the criteria, terms, and conditions for making grants to conservation districts from the funds appropriated to the conservation districts earmarked revenue account from the allocation of 1% of the coal severance tax, the House Committee on Taxation issues this statement of intent for the purpose of clarifying that authority.

Section 2 of HB 223 provides rulemaking authority in the Department of Natural Resources and Conservation. It is contemplated the rules should address the following:

(a) the form of an application for a grant to a conservation district;

(b) the content that must be included in an application, including but not limited to:

(1) the name of the district;

(2) a statement that the maximum statutory mill levage [sic] has been levied;

(3) the sources of funding the conservation district is receiving that the grant is intended to supplement;

(4) the special project or purpose, including administrative purposes, which must be a recognized purpose for which conservation districts are authorized by law;

(5) a statement of the need for the grant; and

(6) an authorized signature

(c) the criteria under which the department may grant funds, including but not limited to:

(1) the basis of the need for a grant;

(2) the availability of other funding sources;

(3) the type of project or purpose; and

(4) the maximum amount of funding

(d) such terms and conditions that would insure that the grant funds are used for the purposes specified by statute;

(e) such rules as may be necessary to monitor and account for the disbursement and expending of any grant funds."

## 76-15-531. Special administrative assessment permitted — voter approval.

**Compiler's Comments**

*2001 Amendments — Composite Section:* Chapter 495 in (1)(a) after "for administrative costs and expenses of the district if" deleted "at a regularly scheduled election or special election" and at end inserted "at an election held as provided in 15-10-425". Amendment effective October 1, 2001.

Chapter 574 in (1)(a) near middle after "assessment" deleted "not to exceed the amount determined under subsection (1)(b) each year", after "district if" deleted "at a regularly scheduled election or special election", and at end inserted "at an election held as provided in 15-10-425"; deleted former (1)(b) that read: "(b) The annual levy authorized by this section may not exceed the difference between the amount raised by the annual mill levy authorized under 76-15-515 and $20,000"; and made minor changes in style. Amendment effective July 1, 2001.

*Effective Date:* Section 8, Ch. 573, L. 1993, provided that this section is effective July 1, 1993.

## 76-15-532. Limitations — reduction or repeal of special administrative assessment.

**Compiler's Comments**

*Effective Date:* Section 8, Ch. 573, L. 1993, provided that this section is effective July 1, 1993.

## 76-15-541. Conservation practice loan program — definition.

**Compiler's Comments**

*1997 Amendment:* Chapter 42 in (3), at end, substituted "natural resources conservation service" for "soil conservation service". Amendment effective March 12, 1997.

## 76-15-542. Conservation practice loan account.

**Compiler's Comments**

*1997 Amendment:* Chapter 141 in (2), near middle of first sentence after "interest", inserted "if any" and inserted second sentence directing crediting of interest to certain accounts; in (3) inserted second sentence allowing use of interest for general operations of a conservation district; and made minor changes in style. Amendment effective March 25, 1997.

*Retroactive Applicability:* Section 5, Ch. 141, L. 1997, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to all loans issued before [the effective date of this act] [effective March 25, 1997] and to all funds that are on deposit in a conservation practice loan account."

### 76-15-543. Application for loan.

**Compiler's Comments**

*1997 Amendment:* Chapter 42 in (2), at end, substituted "natural resources conservation service" for "soil conservation service". Amendment effective March 12, 1997.

### 76-15-546. Terms and conditions of loan.

**Compiler's Comments**

*1997 Amendments:* Chapter 42 in (4) substituted "natural resources conservation service" for "soil conservation service"; and made minor changes in style. Amendment effective March 12, 1997.

Chapter 141 in (3), in middle of second sentence after "closing", deleted "other than administrative costs of the district"; in (4) substituted "United States natural resources conservation service" for "United States soil conservation service"; and made minor changes in style. Amendment effective March 25, 1997.

*Retroactive Applicability:* Section 5, Ch. 141, L. 1997, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to all loans issued before [the effective date of this act] [effective March 25, 1997] and to all funds that are on deposit in a conservation practice loan account."

### 76-15-547. Rules for loan program.

**Compiler's Comments**

*1997 Amendment:* Chapter 141 in introductory clause, after "rules", deleted "in accordance with the Montana Administrative Procedure Act"; and in (6) inserted "if any". Amendment effective March 25, 1997.

*Retroactive Applicability:* Section 5, Ch. 141, L. 1997, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to all loans issued before [the effective date of this act] [effective March 25, 1997] and to all funds that are on deposit in a conservation practice loan account."

*Statement of Intent:* The statement of intent attached to HB 349 (Ch. 473, L. 1983) provided: "A statement of intent is required for this bill because it delegates rulemaking authority in section 17 [76-15-547] to conservation districts that elect to establish conservation practice loan programs.

The intent is to provide conservation districts with the authority to adopt those rules necessary to administer conservation practice loan programs. This authority is limited by section 17 [76-15-547] to adopting rules: prescribing the form and content of applications for loans and plans for the resource conservation practice; governing the application, implementation, and interpretation of the criteria and preferences for awarding loans; providing for the servicing of loans, including arrangements for obtaining security interests and the establishment of reasonable fees or charges; providing for the confidentiality of financial statements submitted; prescribing the conditions for making loans; establishing the interest rate for the loans; and determining the type and amount of security interest in real estate that will be accepted and any conditions to be made upon the security interest."

## Part 6
## Project Areas

### 76-15-604. Protest procedure.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 76-15-605. Board decision.

**Compiler's Comments**

*2015 Amendment:* Chapter 49 in (4) inserted last sentence referencing Title 13, chapter 1, part 5; and made minor changes in style. Amendment effective November 4, 2015.

### 76-15-606. Election procedure.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 76-15-623. Administration of special assessment.

**Compiler's Comments**

*2001 Amendment:* Chapter 574 in (1) near middle after "project area" substituted "may" for "shall", after "special assessment" substituted "on the taxable value of all taxable property" for "of the taxable real property", and after "area" deleted "not to exceed 3 mills"; and made minor changes in style. Amendment effective July 1, 2001.

*1999 Amendment:* Chapter 584 at beginning of (1) inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

*Severability:* Section 172, Ch. 584, L. 1999, was a severability clause.

*Retroactive Applicability:* Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

**Attorney General's Opinions**

*Conservation Assessments Subject to Property Tax Limitations:* Regular and special assessments by conservation districts are subject to the property tax limitations in Title 15, ch. 10, part 4. 42 A.G. Op. 73 (1988).

## Part 7
## Land Use Regulations

### 76-15-701. Adoption of land use regulations.

**Attorney General's Opinions**

*Extent of Conservation District Implementation of Land Use Regulations Regarding Coal Bed Methane Wastewater Operations:* The Legislature did not intend that the listing in 76-15-706 of measures necessary to protect soil and water limit the flexibility of conservation districts to devise means to control the adverse effects of coal bed methane runoff. Thus, a conservation district has authority under 76-15-706, following a referendum by the voters, to implement land use regulations in order to implement reasonable measures to conserve soils, protect soil structure from coal bed methane water, and conserve the water resources of the conservation district. 50 A.G. Op. 9 (2004).

*Supervisors' Review of Impact on Land Between Stream Crossings:* District Supervisors do not have authority under The Natural Streambed and Land Preservation Act of 1975 (Title 75, ch. 7, part 1) to review the route of a proposed pipeline within the county at places other than stream crossings. This is true even though a lawful review of several stream crossings may amount to a review of the land between the crossings, since the Act and the standards adopted by the Board of Natural Resources and Conservation (functions now transferred to Department of Natural Resources and Conservation) make clear that the review applies only to the stream sites themselves. However, the Supervisors may formulate regulations under this section to address the issue of land use in their jurisdiction. 39 A.G. Op. 2 (1981).

### 76-15-706. Contents of land use regulations.

**Compiler's Comments**

*2015 Amendment:* Chapter 194 inserted (2) concerning establishment of board of adjustment; and made minor changes in style. Amendment effective April 8, 2015.

**Attorney General's Opinions**

*Extent of Conservation District Implementation of Land Use Regulations Regarding Coal Bed Methane Wastewater Operations:* The Legislature did not intend that the listing in this section of measures necessary to protect soil and water limit the flexibility of conservation districts to devise means to control the adverse effects of coal bed methane runoff. Thus, a conservation district has authority under this section, following a referendum by the voters, to implement land use regulations in order to implement reasonable measures to conserve soils, protect soil structure from coal bed methane water, and conserve the water resources of the conservation district. 50 A.G. Op. 9 (2004).

## 76-15-710. Court procedure after petition is filed.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

*1985 Amendment:* Near end of (3) and (4) increased interest rate from 5% to 10%.

## 76-15-721. Board of adjustment.

**Compiler's Comments**

*2015 Amendment:* Chapter 194 deleted former (1) that read: "(1) When the supervisors of a district adopt an ordinance prescribing land use regulations in accordance with 76-15-701 through 76-15-707, they shall further provide by ordinance for the establishment of a board of adjustment"; in (1) substituted current text for "The board of adjustment consists of three members, each to be appointed for a term of 3 years, except that the members first appointed must be appointed for terms of 1, 2, and 3 years, respectively"; substituted (2)(a) concerning appointment by department and term of board for "The members of each board of adjustment must be appointed by the department with the advice and approval of the supervisors of the district for which the board has been established"; in (3) at end after "original appointments" deleted "and are for the unexpired term of the member whose term becomes vacant"; and made minor changes in style. Amendment effective April 8, 2015.

*1995 Amendment:* Chapter 418 at beginning of fourth sentence of (3) deleted "Members of the board of natural resources and conservation"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1985 Amendment:* In (5) increased compensation from $4 to $25 per day.

## 76-15-722. Operation of board of adjustment.

**Compiler's Comments**

*2015 Amendment:* Chapter 194 in (2) after "The board shall" deleted "annually". Amendment effective April 8, 2015.

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

## 76-15-723. Petition for variance.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

## 76-15-725. Board decision.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 near beginning of (1) and (2), after "board", inserted "of adjustment"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

## 76-15-726. Appeal to district court from board decision.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 in two places in (1) and in three places in (2), after "board", inserted "of adjustment"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

## 76-15-727. Court proceedings.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 at end of (1), near beginning and end of (2), and in three places in (3), after "board", inserted "of adjustment"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

## Part 8
## Alteration and Termination of Conservation Districts

### 76-15-803. Combination or division of districts.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 in (1), in seventh sentence near beginning, substituted "department shall determine from the hearing record" for "board of natural resources and conservation upon the record of the hearing shall determine"; in (1), in eighth sentence, and in (2), in three places, substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

### 76-15-804. Petition to discontinue all or part of district.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 in (1), near middle, substituted "requesting the termination of" for "praying that the board terminate"; in (2), after "it", deleted "and the board"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1983 Amendment:* In (1), before "qualified electors", changed "any 10" to "10% or more of the".

### 76-15-806. Decision in case of petition for discontinuance of entire district.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 in (1), (2), and (3) substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

### 76-15-807. Decision in case of petition for discontinuance of portion of district.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 in (1), after "referendum and", deleted "the board"; in (2) and (3) substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

### 76-15-808. Criteria for decision on discontinuance.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 near beginning of (1) and (2) substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

### 76-15-809. Procedure to terminate district.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 at beginning of (1) substituted "Upon certification of the department that the department" for "Upon receipt from the department of a certification of the board that the board"; in (3), in two places in first sentence, substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

## Part 9
## Coal Bed Methane Protection

**Part Compiler's Comments**

*Contingent Effective Date:* Section 9, Ch. 531, L. 2001, provided: "[This act] is effective on July 1 immediately following the date that the governor by executive order certifies to the secretary of state that the resource indemnity trust fund balance has reached $100 million. The secretary of state shall notify the department of revenue, the department of administration, the code commissioner, and the legislative fiscal division of this certification." On February 27, 2002, the Governor certified that the balance in the resource indemnity trust fund had reached $100 million.

**Part Attorney General's Opinions**

*Extent of Conservation District Implementation of Land Use Regulations Regarding Coal Bed Methane Wastewater Operations:* The Legislature did not intend that the listing in 76-15-706 of measures necessary to protect soil and water limit the flexibility of conservation districts to devise means to control the adverse effects of coal bed methane runoff. Thus, a conservation district has authority under 76-15-706, following a referendum by the voters, to implement land use regulations in order to implement reasonable measures to conserve soils, protect soil structure from coal bed methane water, and conserve the water resources of the conservation district. 50 A.G. Op. 9 (2004).

**Part Law Review Articles**

Coal's Plateau and Energy Horizon?, Kalen, 34 Pub. Land & Resources L. Rev. 145 (2013).

### 76-15-904. Coal bed methane protection account — use.

**Compiler's Comments**

*2011 Amendment:* Chapter 312 in (3) inserted reference to (5); in (5) at beginning inserted "Subject to legislative fund transfers"; and made minor changes in style. Amendment effective May 4, 2011.

*Severability:* Section 18, Ch. 312, L. 2011, was a severability clause.

*2003 Amendment:* Chapter 522 in (2) at beginning deleted "At the beginning of each fiscal year", after "account" deleted "a total of $400,000 of", and at end substituted "15-36-331" for "15-36-324"; and made minor changes in style. Amendment effective April 26, 2003.

*Saving Clause:* Section 19, Ch. 522, L. 2003, was a saving clause.

*Retroactive Applicability:* Section 21, Ch. 522, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to tax revenue derived from oil and natural gas production occurring after December 31, 2002."

*Termination:* Section 10, Ch. 531, L. 2001, provided that subsection (2) of this section terminates June 30, 2011.

## Part 10
## Procurement and Competitive Bidding

**Part Compiler's Comments**

*Preamble:* The preamble attached to Ch. 155, L. 2015, provided: "WHEREAS, procurement laws governing conservation districts should be clarified and made as consistent as possible among the various conservation districts; and

WHEREAS, laws governing public procurement of services, materials, supplies, and construction contracts should be codified within the conservation district laws; and

WHEREAS, conservation district procurement procedures must provide for confidence in the public procurement process and foster effective, broad-based competition within the free enterprise system."

*Severability:* Section 9, Ch. 155, L. 2015, was a severability clause.

*Effective Date:* Section 11, Ch. 155, L. 2015, provided that this part is effective July 1, 2015.

# CHAPTER 16
# GRAZING DISTRICTS

## Part 1
## General Provisions

### 76-16-101. Short title.

**Case Notes**

*Constitutionality:*

This act is not in violation of the Due Process Clauses of the state or federal constitutions. Thompson v. Tobacco Root Co-op St. Grazing District, 121 M 445, 193 P2d 811 (1948).

Reasonable regulation of the grazing of livestock is proper under the police power of the state. Thompson v. Tobacco Root Co-op St. Grazing District, 121 M 445, 193 P2d 811 (1948).

This act is not a local or special law in violation of Art. V, sec. 26, 1889 Mont. Const. (now Art. V, sec. 12, 1972 Mont. Const.). Thompson v. Tobacco Root Co-op St. Grazing District, 121 M 445, 193 P2d 811 (1948).

The privilege of grazing livestock on property not belonging to the owner of the cattle is not a vested property right but a revocable license. Thompson v. Tobacco Root Co-op St. Grazing District, 121 M 445, 193 P2d 811 (1948).

This act does not treat nonmembers differently from members under like circumstances. Thompson v. Tobacco Root Co-op St. Grazing District, 121 M 445, 193 P2d 811 (1948).

This act does not violate the 14th amendment to the United States Constitution by discriminating against small landowners, by denying equal protection of the laws to nonmembers owning land in the district, by denying equal protection of the laws to operators owning land outside the district, or in being unreasonably discriminatory in providing for the cost of constructing and maintaining fences. Thompson v. Tobacco Root Co-op St. Grazing District, 121 M 445, 193 P2d 811 (1948).

### 76-16-102. Purpose.

**Compiler's Comments**

*2001 Amendment:* Chapter 31 near beginning after "nonprofit" substituted "state districts" for "grazing districts" and at end after "commensurate" deleted "ranch"; and made minor changes in style. Amendment effective March 13, 2001.

*Federal Statute:* The Taylor Grazing Act referred to in this section is codified at 43 U.S.C. 315 through 315r.

**Case Notes**

*Grazing District Not Required to Purchase or Substitute Lands to Allow Full Exercise of Grazing Preferences:* The statutory language authorizing a grazing district to purchase or substitute lands in order to provide sufficient land under district control upon which members can exercise their grazing preferences is clearly discretionary, and the failure of a district to do so does not in itself constitute an abuse of discretion or breach of a fiduciary duty. The proper method for remedying such a loss of land is found in 76-16-403. Prairie County Co-op St. Grazing District v. Kalfell Ranch, Inc., 269 M 117, 887 P2d 241, 51 St. Rep. 1488 (1994).

### 76-16-103. Definitions.

**Compiler's Comments**

*2001 Amendment:* Chapter 31 at end of definition of animal unit month after "local" substituted "state district" for "grazing district"; in definition of dependent commensurate property in (c) after "range" deleted "for a period of any 3 years or for any 2 consecutive years in the 5-year period immediately preceding June 28, 1934, or in the case of districts organized after March 15, 1945" and substituted "state district" for "districts"; inserted definition of directors; near end of definition of grazing preference after "interest in" substituted "state district assets" for "grazing district assets"; in definition of range after "within a" substituted "state district" for "grazing district"; and made minor changes in style. Amendment effective March 13, 2001.

*1999 Amendment:* Chapter 401 inserted definition of animal unit month; inserted definition of commission; in definition of grazing preference in first sentence inserted "expressed in animal unit months" and inserted second sentence regarding member's proportionate interest in grazing district assets; inserted definition of secretary; and made minor changes in style. Amendment effective July 1, 1999.

*1997 Amendment Uncodified — Early Termination — Section Uncodified:* Section 2, Ch. 244, L. 1997, inserted new (1) that provided: "(1) "Advisory committee" means the Montana grass conservation advisory committee created in [section 1] [not codified]"; and made minor changes in style. Section 5, Ch. 244, L. 1997, provided: "[This act] terminates January 1, 1999." Because of the early termination date, the Code Commissioner has determined not to codify the amendment made by sec. 2, Ch. 244, L. 1997, and [section 1]. Section 1 provided: "Section 1. Montana grass conservation advisory committee established. (1) There is a Montana grass conservation advisory committee.

(2) The director of the department, giving equal consideration to both large and small operators, shall appoint six people to serve on the advisory committee and shall serve as an ex officio member of the committee. The committee must include:

(a) two members, one member who must be a member of the board of directors of the Montana association of state grazing districts and one member who is either an officer or serves on the board of directors of a state district;

(b) two members who hold active preference rights within state districts; and

(c) two members who are secretaries for state districts.

(3) The advisory committee shall:

(a) elect from its membership a presiding officer and a vice-presiding officer;

(b) convene meetings as the members consider appropriate and solicit comments and suggestions from state district boards of directors, district members, and the public;

(c) provide notices of all meetings to the state district secretaries at least 14 days before the meeting;

(d) analyze issues regarding the function of state grazing districts and identify services that the districts may need to assist them in functioning effectively; and

(e) analyze Title 76, chapter 16, governing grazing districts and other laws that may affect grazing districts, and submit a report discussing findings and recommendations for changes to existing laws on or before October 1, 1998, to the director and the 1999 legislature.

(4) The members of the advisory committee serve for no salary but must be compensated for mileage and per diem as provided in 2-18-501 through 2-18-512 in fulfilling their duties as provided in this section.

(5) The term of office for each member is from [the effective date of this act] to January 1, 1999."

*1995 Amendment:* Chapter 418 deleted definition of Board that read: ""Board" means the board of natural resources and conservation provided for in 2-15-3302, except where the term is used in connection with the board of directors of a state district"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

**Case Notes**

*Nonprofit Corporation:* Under subsection (11) of this section, a grazing district is a nonprofit corporation rather than a subdivision of the state, so its powers are not necessarily limited to those expressly granted. Appeal of Two Crow Ranch, Inc., 159 M 16, 494 P2d 915 (1972).

### 76-16-104. Role of the commission.

**Compiler's Comments**

*2001 Amendment:* Chapter 31 at beginning of (1) substituted "commission" for "department" and near end after "operation of" substituted "state districts" for "districts"; and at beginning of (2) substituted "commission" for "department". Amendment effective March 13, 2001.

*1997 Amendment Uncodified — Early Termination — Section Uncodified:* Section 3, Ch. 244, L. 1997, at the end of (1) inserted "and support the advisory committee established in [section 1] [not codified]"; and made minor changes in style. Section 5, Ch. 244, L. 1997, provided: "[This act] terminates January 1, 1999." Because of the early termination date, the Code Commissioner has determined not to codify the amendment made by sec. 3, Ch. 244, L. 1997, and [section 1]. Section 1 provided: "Section 1. Montana grass conservation advisory committee established. (1) There is a Montana grass conservation advisory committee.

(2) The director of the department, giving equal consideration to both large and small operators, shall appoint six people to serve on the advisory committee and shall serve as an ex officio member of the committee. The committee must include:

(a) two members, one member who must be a member of the board of directors of the Montana association of state grazing districts and one member who is either an officer or serves on the board of directors of a state district;

(b) two members who hold active preference rights within state districts; and

(c) two members who are secretaries for state districts.

(3) The advisory committee shall:

(a) elect from its membership a presiding officer and a vice-presiding officer;

(b) convene meetings as the members consider appropriate and solicit comments and suggestions from state district boards of directors, district members, and the public;

(c) provide notices of all meetings to the state district secretaries at least 14 days before the meeting;

(d) analyze issues regarding the function of state grazing districts and identify services that the districts may need to assist them in functioning effectively; and

(e) analyze Title 76, chapter 16, governing grazing districts and other laws that may affect grazing districts, and submit a report discussing findings and recommendations for changes to existing laws on or before October 1, 1998, to the director and the 1999 legislature.

(4) The members of the advisory committee serve for no salary but must be compensated for mileage and per diem as provided in 2-18-501 through 2-18-512 in fulfilling their duties as provided in this section.

(5) The term of office for each member is from [the effective date of this act] to January 1, 1999."

*1995 Amendment:* Chapter 418 in (1), at beginning after "department", deleted "of natural resources and conservation" and after "advisory capacity with the" deleted "department of state lands"; in (2), after "advisory capacity to the", deleted "department of state lands"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

## 76-16-106. Commission fees.

### Compiler's Comments

*2001 Amendment:* Chapter 31 in (1) near beginning after "state" deleted "grazing", after "districts" deleted "of the state", after "month of" inserted "grazing", and near middle after "for which the" inserted "state"; and in (3) near beginning after "after the" inserted "state". Amendment effective March 13, 2001.

*1999 Amendment:* Chapter 401 throughout section substituted "commission" for "department"; in (1) changed fee from "15 cents per animal unit" to "10 cents per animal unit month of preference" and substituted "animal unit months" for "animal units"; in (2) inserted "operation and" and substituted "commission" for "department's functions"; and made minor changes in style. Amendment effective July 1, 1999.

*1983 Amendment:* Substituted reference to state special revenue fund for reference to earmarked revenue fund.

*1981 Amendment:* Increased the fee from 10 cents to 15 cents per animal unit.

## 76-16-107. Range for wild game animals.

### Compiler's Comments

*2001 Amendment:* Chapter 31 at end of first sentence before "district" inserted "state". Amendment effective March 13, 2001.

*1999 Amendment:* Chapter 401 in second sentence near beginning substituted "commission" for "department" and deleted former third sentence that read: "The department shall encourage the transfer of beaver from streams where they are doing damage to other streams where they are needed"; and made minor changes in style. Amendment effective July 1, 1999.

## 76-16-108. Nature of rights.

### Compiler's Comments

*2001 Amendment:* Chapter 31 in (1) at beginning inserted "Grazing", after "creation of the" inserted "state", after "AUMs of" inserted "grazing", and near end after "controlled by the" inserted "state". Amendment effective March 13, 2001.

*1999 Amendment:* Chapter 401 in (1) substituted "based on AUMs of preference" for "or preferences"; and made minor changes in style. Amendment effective July 1, 1999.

## 76-16-109. Appeal procedure.

**Compiler's Comments**

*2001 Amendment:* Chapter 31 throughout section substituted "state district" for "district"; and made minor changes in style. Amendment effective March 13, 2001.

*1999 Amendment:* Chapter 401 throughout (2) substituted "commission" for "department". Amendment effective July 1, 1999.

*1995 Amendment:* Chapter 418 in (1) and in second sentence of (2), before "certified mail", deleted "registered or"; in (2), in four places, substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

**Case Notes**

*Grazing District and Board of Natural Resources and Conservation (Now Abolished) Required to Comply With Administrative Procedure Act:* In the conduct of proceedings pursuant to the Grass Conservation Act, both the grazing district and the Board of Natural Resources and Conservation (now abolished) are required to comply with the requirements of the Montana Administrative Procedure Act. Prairie County Co-op St. Grazing District v. Kalfell Ranch, Inc., 269 M 117, 887 P2d 241, 51 St. Rep. 1488 (1994).

*Scope of Review by District Court:* On appeal to the District Court, the court should limit its inquiry to determining whether upon the evidence and the law the Commission's action is based upon an error of law or is wholly unsupported by the evidence or is clearly arbitrary or capricious. Langen v. Badlands Co-op St. Grazing District, 125 M 302, 234 P2d 467 (1951), followed in N. Fork Preservation Ass'n v. Dept. of State Lands, 238 M 451, 778 P2d 862, 46 St. Rep. 1409 (1989).

## 76-16-111. What constitutes receipt of notice.

**Compiler's Comments**

*2001 Amendment:* Chapter 31 near beginning after "chapter by" deleted "registered or" and near end before "district" inserted "state"; and made minor changes in style. Amendment effective March 13, 2001.

*1999 Amendment:* Chapter 401 at end substituted "commission" for "department"; and made minor changes in style. Amendment effective July 1, 1999.

## 76-16-112. Creation of Montana grass conservation commission — membership — meetings — compensation.

**Compiler's Comments**

*2015 Amendment:* Chapter 114 in (4)(a) substituted "in Montana at a place determined by the presiding officer" for "at the main offices of the department in Helena"; and made minor changes in style. Amendment effective March 24, 2015.

*2001 Amendment:* Chapter 31 in (1) deleted former third sentence that read: "Beginning on January 1, 2000, one member shall serve a 1-year term and two members shall serve 2-year terms, with assignment of terms based on a random drawing"; in (2)(a)(i) after "state" deleted "grazing"; in (2)(a)(ii) after "active" inserted "grazing" and after "state" deleted "grazing"; in (2)(a)(iii) after "state" deleted "grazing"; in (4) in second sentence substituted "7 days' written notice" for "14 days' written notice"; and made minor changes in style. Amendment effective March 13, 2001.

*Effective Date:* Section 36, Ch. 401, L. 1999, provided that this section is effective July 1, 1999.

## 76-16-113. Powers of commission.

**Compiler's Comments**

*2001 Amendment:* Chapter 31 in (1) in two places after "state" deleted "grazing"; near middle of (2) before "state" deleted "cooperative" and after "state" deleted "grazing"; in (3) after "state" deleted "grazing" and after "historical" inserted "grazing"; inserted (4) regarding state district forms; inserted (5) regarding issuing citations; inserted (6) regarding submission of records; inserted (7) regarding furnishing financial reports; inserted (8) regarding cooperating and entering into agreements; and made minor changes in style. Amendment effective March 13, 2001.

*Effective Date:* Section 36, Ch. 401, L. 1999, provided that this section is effective July 1, 1999.

## Part 2
## Establishment of Districts

### 76-16-201. Procedure to incorporate state district.

**Compiler's Comments**

*2001 Amendment:* Chapter 31 in (3) near middle substituted "state district" for "district"; and made minor changes in style. Amendment effective March 13, 2001.

*1999 Amendment:* Chapter 401 throughout section substituted "commission" for "department". Amendment effective July 1, 1999.

**Case Notes**

*Constitutionality:*

The Legislature may provide for grazing districts applicable to the entire state or only to certain designated counties or portions if there be a reasonable ground for such classification and if the action is not arbitrary or capricious. Thompson v. Tobacco Root Co-op St. Grazing District, 121 M 445, 193 P2d 811 (1948).

Although the law permits three or more persons to initiate proceedings, the discretion to create the district rests in the Commission and there is no unconstitutional delegation of powers. Thompson v. Tobacco Root Co-op St. Grazing District, 121 M 445, 193 P2d 811 (1948).

### 76-16-202. Notice and hearing on question of incorporation.

**Compiler's Comments**

*2001 Amendment:* Chapter 31 in (1) near beginning of first sentence after "state" deleted "grazing"; and made minor changes in style. Amendment effective March 13, 2001.

*1999 Amendment:* Chapter 401 in (1) near middle and in (2) near beginning substituted "commission" for "department". Amendment effective July 1, 1999.

*1995 Amendment:* Chapter 418 in (2), at beginning after "department", deleted "for and on behalf of the board" and deleted second sentence that read: "The record taken upon the hearing, together with the report of the department, shall be submitted to the board." Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

### 76-16-203. Certificate of approval.

**Compiler's Comments**

*2001 Amendment:* Chapter 31 near end substituted "state district" for "district". Amendment effective March 13, 2001.

*1999 Amendment:* Chapter 401 substituted "commission" for "department". Amendment effective July 1, 1999.

*1995 Amendment:* Chapter 418 near end substituted "department" for "board". Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

### 76-16-204. Articles of incorporation.

**Compiler's Comments**

*1999 Amendment:* Chapter 401 in (2) substituted "commission" for "department"; deleted former (2)(d) that read: "(d) the term for which the state district is incorporated, which may not exceed 40 years"; and made minor changes in style. Amendment effective July 1, 1999.

### 76-16-206. Amending articles of incorporation.

**Compiler's Comments**

*2001 Amendment:* Chapter 31 in (1) at end of second sentence before "district" inserted "state"; and in (2) near middle before "district" inserted "state". Amendment effective March 13, 2001.

*1999 Amendment:* Chapter 401 throughout (1) substituted "commission" for "department"; and made minor changes in style. Amendment effective July 1, 1999.

*Section Not Codified:* The last sentence of subsection (8), 46-2310, R.C.M. 1947, providing that amendments to articles of incorporation of grazing districts may be filed with the Secretary of State without charge, was not codified in the MCA, as it is redundant with provision in 76-16-206. The language was not repealed and is still valid law. Citation may be made to sec. 10, Ch. 208, L. 1939.

### 76-16-207. Filing of map or plat of state district.

**Compiler's Comments**

*1999 Amendment:* Chapter 401 in first sentence near beginning inserted "commission and the" and after "state district" inserted language regarding individual and common allotments, allotment names, and lands used as base properties; in second sentence substituted "commission" for "department" and inserted "and with the commission" and "revised"; and made minor changes in style. Amendment effective July 1, 1999.

*1995 Amendment:* Chapter 418 near end substituted "by the department after a hearing" for "by the board after a hearing thereon before the department". Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

### 76-16-208. Adoption of bylaws and periodic review — annual report.

**Compiler's Comments**

*2001 Amendment:* Chapter 31 in (1) in third sentence after "incorporated" inserted "state" and deleted former fourth sentence that read: "The first review and update must be completed no later than January 1, 2001"; in (2) at end of first sentence before "district" inserted "state" and in second sentence after "allocation of" inserted "grazing"; and made minor changes in style. Amendment effective March 13, 2001.

*1999 Amendment:* Chapter 401 in (1) in first and second sentences at end substituted "commission" for "department" and inserted third through fifth sentences regarding review and update of district bylaws; inserted (2) regarding annual reports; and made minor changes in style. Amendment effective July 1, 1999.

### 76-16-209. Alteration of state district.

**Compiler's Comments**

*2001 Amendment:* Chapter 31 in (1) after "boundaries of the" inserted "state". Amendment effective March 13, 2001.

*1999 Amendment:* Chapter 401 in (2)and (3) substituted "commission" for "department". Amendment effective July 1, 1999.

*1995 Amendment:* Chapter 418 at end of (2) and (3) substituted "by the department after a hearing" for "by the board after a hearing thereon before the department". Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

### 76-16-210. Request for dissolution of state district.

**Compiler's Comments**

*1999 Amendment:* Chapter 401 in first sentence substituted "commission" for "department" and inserted "subject to the preferences of this chapter"; and inserted second sentence requiring commission to establish dissolution procedures. Amendment effective July 1, 1999.

*1995 Amendment:* Chapter 418 near end substituted "department" for "board of natural resources and conservation". Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

### 76-16-211. Dissolution of state district.

**Compiler's Comments**

*2001 Amendment:* Chapter 31 in five places before "district" inserted "state". Amendment effective March 13, 2001.

*1999 Amendment:* Chapter 401 throughout section substituted "commission" for "department"; and in (1) in first sentence inserted "in accordance with its bylaws and this chapter" and substituted "the majority of members of" for "those who own or control more than 50% of the lands included in". Amendment effective July 1, 1999.

*1995 Amendment:* Chapter 418 in (1), in two places, substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

### 76-16-212. Distribution of state district assets.

**Compiler's Comments**

*2001 Amendment:* Chapter 31 in (2) at beginning of second sentence inserted "State"; and made minor changes in style. Amendment effective March 13, 2001.

*1999 Amendment:* Chapter 401 in (1) in three places substituted "commission" for "department"; in (2) in first sentence inserted "or through another competitive bidding procedure" and inserted second sentence regarding opportunity to meet highest bid; and made minor changes in style. Amendment effective July 1, 1999.

### 76-16-213. Final report on dissolution proceedings.

**Compiler's Comments**

*2001 Amendment:* Chapter 31 in two places substituted "commission" for "department". Amendment effective March 13, 2001.

*1995 Amendment:* Chapter 418 in second sentence substituted "report, the department" for "report by the department, the board"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

## Part 3
## Organization, Administration, and Operation

**Part Attorney General's Opinions**

*Annual Corporate Report Not Required:* A state grazing district organized under Title 76, ch. 16, is not required to file an annual corporation report with the Secretary of State. 36 A.G. Op. 15 (1975).

### 76-16-301. Powers and duties of directors.

**Compiler's Comments**

*2001 Amendment:* Chapter 31 near end after "regulation of the" substituted "commission" for "department". Amendment effective March 13, 2001.

### 76-16-302. Membership in state district.

**Compiler's Comments**

*2001 Amendment:* Chapter 31 in six places throughout section before "district" inserted "state"; in (3) near middle before "preference" inserted "grazing"; and made minor changes in style. Amendment effective March 13, 2001.

*1999 Amendment:* Chapter 401 in (3) at beginning substituted language regarding certain livestock producers who held preferences for "All members who possessed preferential grazing permits" and after "grazing season or" deleted "who possess such a permit"; and made minor changes in style. Amendment effective July 1, 1999.

**Case Notes**

*Constitutionality:* Even if membership in the district would confer special privileges or immunities over nonmembers, still no constitutional right is involved since small owners are privileged to become members of the district. Thompson v. Tobacco Root Co-op St. Grazing District, 121 M 445, 193 P2d 811 (1948).

**Attorney General's Opinions**

*Withdrawal of Membership:* An individual shall withdraw from a grazing district if he is no longer eligible for membership. The directors of the district should then determine, with the approval of the Department of Natural Resources and Conservation, the rights and interests involved. A member may withdraw from membership in a district if the district's articles of incorporation or bylaws provide conditions and procedures for voluntary withdrawal. If a member of a district continues to be engaged in the livestock business and owns or leases forage-producing land and the district's articles of incorporation and bylaws do not provide for voluntary withdrawal, a member may not unilaterally withdraw from the district. 42 A.G. Op. 127 (1988).

## 76-16-303. Voting rights.

**Compiler's Comments**

*2001 Amendment:* Chapter 31 in first and fourth sentences before "district" inserted "state". Amendment effective March 13, 2001.

*1999 Amendment:* Chapter 401 in first sentence near beginning inserted "in good standing as set forth in the district bylaws"; inserted second sentence prohibiting individuals and certain livestock producers from voting; in fourth sentence at end inserted exception clause; and made minor changes in style. Amendment effective July 1, 1999.

## 76-16-304. Effect of transfer of land.

**Compiler's Comments**

*1999 Amendment:* Chapter 401 at end substituted "commission" for "department"; and made minor changes in style. Amendment effective July 1, 1999.

## 76-16-305. Acquisition and disposal of property.

**Case Notes**

*Grazing District Not Required to Purchase or Substitute Lands to Allow Full Exercise of Grazing Preferences:* The statutory language authorizing a grazing district to purchase or substitute lands in order to provide sufficient land under district control upon which members can exercise their grazing preferences is clearly discretionary, and the failure of a district to do so does not in itself constitute an abuse of discretion or breach of a fiduciary duty. The proper method for remedying such a loss of land is found in 76-16-403. Prairie County Co-op St. Grazing District v. Kalfell Ranch, Inc., 269 M 117, 887 P2d 241, 51 St. Rep. 1488 (1994).

## 76-16-306. Management of grazing lands.

**Case Notes**

*Classification of Lands:* For purposes of determining whether a grazing permittee has increased his commensurate rating by additions and improvements, a state grazing district may classify lands as self-furnished grazing lands, even though they are cultivated and not used for grazing. Burke v. S. Phillips County Co-op St. Grazing District, 135 M 209, 339 P2d 491 (1959).

*Mandamus:* Where the action of a grazing district in classifying owners of grazing preferences was a clear violation of the grazing act and no question of administrative discretion was involved, a proceeding in mandamus was proper as against contention that the court was taking over the duties of the district. State ex rel. Engle v. District Court, 119 M 319, 174 P2d 582 (1946).

## 76-16-307. Leasing of state lands.

**Compiler's Comments**

*2001 Amendment:* Chapter 31 in three places before "district" substituted "state" for "grazing" and in third sentence after "directors of a" deleted "cooperative". Amendment effective March 13, 2001.

*1999 Amendment:* Chapter 401 in first sentence after "under this chapter" substituted language regarding lease that is in accordance with laws and department regulations and second sentence authorizing board to assist members in acquiring and administering lease for former text that read: "and that is not otherwise disposed of by the department must be leased by the grazing district at a reasonable rental when offered for lease to the officers of the grazing district by the department. However, the officers of the grazing district may appear or submit evidence in writing before the department and show reason and cause for a change in the rental. If there is cause, the department may reappraise the land in question"; in last sentence substituted "commission" for "department"; and made minor changes in style. Amendment effective July 1, 1999.

*1995 Amendment:* Chapter 418 in first, second, and third sentences, after "department", deleted "of state lands"; in fourth sentence, after "department", deleted "of natural resources and conservation"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

**Case Notes**

*State Grazing District Not Allowed Lease Preference Right for State Land:* The exercise of a preference right, whereby lessees of state-owned land are preferred and may renew their leases by meeting the highest bid submitted, by a grazing district which does not use the land itself and thus cannot further the policy of sustained yield, is an unconstitutional application of the preference right statute. Grazing districts may obtain state leases only by pure competitive bidding. Jerke v. St. Dept. of Lands, 182 M 294, 597 P2d 49 (1979).

### 76-16-308. Regulation of stock grazing in state district.

**Compiler's Comments**

*1999 Amendment:* Chapter 401 deleted former (3) that read: "(3) impose sanitary provisions, regulations, and practices"; and made minor changes in style. Amendment effective July 1, 1999.

### 76-16-309. Knowledge of state district boundaries responsibility of livestock owner.

**Compiler's Comments**

*2001 Amendment:* Chapter 31 at end before "district" inserted "state". Amendment effective March 13, 2001.

### 76-16-310. Permit required to run livestock in state district.

**Compiler's Comments**

*2001 Amendment:* Chapter 31 in (2) near middle of first sentence after "from the" inserted "state" and at end inserted "that are a result of the person's unpermitted use of the state district", in second sentence in three places before "district" inserted "state", and at end of third sentence after "damages" substituted "that are caused by the trespassing livestock" for "sustained thereby to the party entitled thereto"; and made minor changes in style. Amendment effective March 13, 2001.

### 76-16-311. Control of trespassing livestock.

**Compiler's Comments**

*1999 Amendment:* Chapter 401 in (2) in second sentence increased allowable charge from 50 cents to $2 per animal unit per day; in (4) after "owners, or person in charge" deleted "thereof, by leaving said notice at his usual place of residence with some member of his family over the age of 14 years"; and made minor changes in style. Amendment effective July 1, 1999.

**Case Notes**

*Assessments:* In view of 76-16-321, grazing district was not limited to the remedies permitted by this section in case of trespassing livestock but could provide by its bylaws for assessments against its members controlling trespassing livestock. Appeal of Two Crow Ranch, Inc., 159 M 16, 494 P2d 915 (1972).

*Constitutionality:*

Contention that since statute makes no provision as to who shall determine sufficiency of bond it must of necessity be for the district to determine and that the statute is therefore unconstitutional cannot be raised by one who has not been adversely affected by the approval of the bond by the district. Thompson v. Tobacco Root Co-op St. Grazing District, 121 M 445, 193 P2d 811 (1948).

This statute is not unconstitutional as denying due process in the matter of ascertaining the amount of damages and costs due and also in ascertaining whether the statute applies in a particular case since all these issues can be determined judicially by depositing bond as security in lieu of the livestock taken. Thompson v. Tobacco Root Co-op St. Grazing District, 121 M 445, 193 P2d 811 (1948).

*Land Not Controlled by District:* Subsections (1) and (2) apply only when the grazing is done upon land owned or controlled by the district, without regard to whether or not the land is fenced or whether the animals merely stray thereon or are driven upon it; where animals trespass upon unfenced land of a nonmember or permittee of a grazing district and there is no evidence that they were herded upon the land or of overstocking of neighboring land and consequent trespass upon lands of others, the open range law applies. McKee v. Clark, 115 M 438, 144 P2d 1000 (1943).

### 76-16-312. Impoundment of trespassing livestock.

**Case Notes**

*Impoundment Power:* The owner of unfenced ranch lands located within the exterior boundaries of a state grazing district, who is neither a member nor a permittee of the district and upon whose property livestock trespassed, has no right to impound the animals or to recover damages for the trespass and compensation for their care and feed during the time impounded, in his action to foreclose the lien upon the animals granted by 81-4-217, this chapter giving the right to impound to the district, not to an individual placed as was plaintiff. McKee v. Clark, 115 M 438, 144 P2d 1000 (1943).

**76-16-315. Procedure upon inability to locate person responsible for trespassing livestock.**

**Compiler's Comments**

*1999 Amendment:* Chapter 401 near middle inserted reference to 76-16-311, after "livestock was taken" inserted "into possession or to the nearest state livestock inspector", and at end substituted reference to 76-16-311 for "addition thereto, he shall mail, by prepaid registered or certified mail, a copy of said statement addressed to the nearest state livestock inspector"; and made minor changes in style. Amendment effective July 1, 1999.

**Case Notes**

*Constitutionality:* Whether or not this section is unconstitutional as denying due process of law to those owners who cannot be found cannot be raised by persons who do not fall in that class. Thompson v. Tobacco Root Co-op St. Grazing District, 121 M 445, 193 P2d 811 (1948).

**76-16-316. Sale of trespassing livestock.**

**Compiler's Comments**

*2001 Amendment:* Chapter 31 in first sentence of (2) before "district" inserted "state"; and made minor changes in style. Amendment effective March 13, 2001.

*1999 Amendment:* Chapter 401 in (2) in first sentence substituted "in a newspaper of general circulation" for "in three public places" and at end after "county" deleted "one of which shall be within the district"; and made minor changes in style. Amendment effective July 1, 1999.

**76-16-317. Disposition of sale proceeds.**

**Compiler's Comments**

*2001 Amendment:* Chapter 31 in (1) in middle of third sentence after "designated state" deleted "grazing" and at end before "district" inserted "state" and in fourth sentence after "each" substituted "state district" for "of said districts"; in (3) at end deleted "at the expiration of said period"; and made minor changes in style. Amendment effective March 13, 2001.

**76-16-318. Unlawful recovery of trespassing livestock.**

**Compiler's Comments**

*2001 Amendment:* Chapter 31 near beginning after "state" deleted "grazing"; and made minor changes in style. Amendment effective March 13, 2001.

**76-16-319. No liability for official acts.**

**Compiler's Comments**

*1999 Amendment:* Chapter 401 in first sentence in two places substituted "commission" for "department". Amendment effective July 1, 1999.

*1995 Amendment:* Chapter 418 in first sentence, in two places, substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

**76-16-320. Maintenance of fences.**

**Compiler's Comments**

*2001 Amendment:* Chapter 31 at beginning of (1) deleted "Regarding fences within the external boundaries of state districts"; in (2) near end after "members of the" inserted "state"; and made minor changes in style. Amendment effective March 13, 2001.

**Case Notes**

*Fence Costs:* Fact that the grazing district is exempted from building or paying for any part of partition fences is a matter falling within legislative discretion. Thompson v. Tobacco Root Co-op St. Grazing District, 121 M 445, 193 P2d 811 (1948).

**76-16-321. Construction of trespass and fence provisions.**

**Case Notes**

*Assessments:* This section preserved grazing district's power to provide in its bylaws for assessments against members controlling trespassing livestock, despite the fact that 76-16-310 through 76-16-321 provide other remedies against trespass. Appeal of Two Crow Ranch, Inc., 159 M 16, 494 P2d 915 (1972).

## 76-16-322. Fence-out requirement.

### Compiler's Comments

*2015 Amendment:* Chapter 249 near middle substituted "81-4-101" for "81-4-101(1)"; and made minor changes in style. Amendment effective April 17, 2015.

## 76-16-323. State district finances.

### Compiler's Comments

*2001 Amendment:* Chapter 31 in (3) at end before "district" inserted "state". Amendment effective March 13, 2001.

*1999 Amendment:* Chapter 401 in (1) near middle substituted "a grazing preference" for "an animal unit"; and in (3) substituted "commission" for "department". Amendment effective July 1, 1999.

### Case Notes

*Assessments:* Grazing district bylaw providing for assessment against members owning or in control of livestock trespassing on district land was valid implementation of power granted to grazing district by 76-16-306. Appeal of Two Crow Ranch, Inc., 159 M 16, 494 P2d 915 (1972).

## 76-16-325. Compliance with commission orders required.

### Compiler's Comments

*2001 Amendment:* Chapter 31 near end of (1) in two places before "district" inserted "state"; and in (2) near end of first sentence before "district" inserted "state". Amendment effective March 13, 2001.

*1999 Amendment:* Chapter 401 throughout (1) and (2) substituted "commission" for "department". Amendment effective July 1, 1999.

*1995 Amendment:* Chapter 418 in (1), in two places, substituted "department" for "board"; in (2), near end of first sentence, substituted "removed from office by the department" for "removed by the board from office"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

# Part 4

## Grazing Permit System

## 76-16-401. Distribution of grazing preferences.

### Compiler's Comments

*2001 Amendment:* Chapter 31 in (2) at end before "preference" inserted "grazing"; in (3) near middle after "members" deleted "preferring those that have used the range for any 3 years or any 2 consecutive years in the 5-year period immediately preceding June 28, 1934, or in the case of districts organized after March 15, 1945" and at end substituted "the state district" for "such districts"; and made minor changes in style. Amendment effective March 13, 2001.

### Case Notes

*Discriminatory Action:* Action of grazing district in classifying all owners of classes 1 and 2 grazing preferences as temporary permittees and issuing 1946 grazing permits on that basis, so that plaintiffs who had a class 1 preference appurtenant to their land for the grazing of 206 animal units were granted only a temporary permit for grazing of 152 animal units for 1946, was a clear violation of the grazing act. State ex rel. Engle v. District Court, 119 M 319, 174 P2d 582 (1946).

## 76-16-402. Conversion of temporary permittee lands to dependent commensurate property.

### Compiler's Comments

*2001 Amendment:* Chapter 31 in (1) in three places before "district" inserted "state" and near end before "preference" inserted "grazing"; in (2) in two places before "preference" inserted "grazing" and near end before "district" inserted "state"; and made minor changes in style. Amendment effective March 13, 2001.

### Case Notes

*Discriminatory Action:* Action of grazing district in classifying all owners of classes 1 and 2 grazing preferences as temporary permittees and issuing 1946 grazing permits on that basis, so that plaintiffs who had a class 1 preference appurtenant to their land for the grazing of 206 animal units were granted only a temporary permit for grazing of 152 animal units for 1946, was a clear violation of the grazing act. State ex rel. Engle v. District Court, 119 M 319, 174 P2d 582 (1946).

### 76-16-403. Procedure if reduction in grazing privileges necessary.

**Compiler's Comments**

*2001 Amendment:* Chapter 31 in (2) after "directors of a" deleted "cooperative" and after "holder of the" inserted "grazing". Amendment effective March 13, 2001.

*1999 Amendment:* Chapter 401 in (1) after "will be reduced" deleted "first" and at end inserted "prior to reduction to any holder of grazing preference" and deleted former second sentence that read: "When the extent of reduction of privileges exceeds that of temporary permits, then the rights of operators with both dependent commensurate property and commensurate property shall be reduced together on a proportionate basis"; inserted (2) regarding reductions of grazing preference; and made minor changes in style. Amendment effective July 1, 1999.

**Case Notes**

*Inability to Exercise Grazing Preference Because of District Loss of Land — Statutory Applicability:* A grazing district lost control of about 50,000 acres upon which members could exercise assigned grazing preferences. The district tendered monetary compensation to the 26 affected permittees pursuant to 76-16-414, based on the loss of grazing preferences. Twenty-five of the members accepted the offer, but Kalfell Ranch did not, arguing that under this section, a proportionate reduction of all members' grazing rights was proper and that the district directors had breached their fiduciary duty by failing to purchase the land that was subsequently lost, failing to prohibit competitive bidding, and failing to collect the value of and compensate for improvements made to the land prior to sale. The Board of Natural Resources and Conservation found that the applicable statute was this section and that the district was thus required to proportionally reduce all grazing preferences, but rejected the claim that the district was required to purchase the land or other grazing land sufficient to meet the assigned grazing preferences. The District Court affirmed the Board's decision and determined that the Board's failure to address Kalfell's other claims constituted an implied denial of those issues, a denial that the court agreed with on the merits. On appeal, the Supreme Court found that under the plain language of 76-16-414, Kalfell did not lose any grazing preferences or permits, but rather merely became unable to exercise its preferences because the district lost access to the lands. Therefore, under this section, reductions in grazing privileges became necessary and should have been reduced proportionately. Kalfell's other claims were properly rejected based on clear statutory language and the district's discretionary powers. Prairie County Co-op St. Grazing District v. Kalfell Ranch, Inc., 269 M 117, 887 P2d 241, 51 St. Rep. 1488 (1994). (Kalfell I), followed in In re Kalfell Ranch, Inc. v. Prairie County Co-op St. Grazing District (Kalfell II), 2000 MT 317, 302 M 492, 15 P3d 888, 57 St. Rep. 1340 (2000).

*Discriminatory Action:* Action of grazing district in classifying all owners of classes 1 and 2 grazing preferences as temporary permittees and issuing 1946 grazing permits on that basis, so that plaintiffs who had a class 1 preference appurtenant to their land for the grazing of 206 animal units were granted only a temporary permit for grazing of 152 animal units for 1946, was a clear violation of the grazing act. State ex rel. Engle v. District Court, 119 M 319, 174 P2d 582 (1946).

### 76-16-404. Application for grazing preferences.

**Compiler's Comments**

*2001 Amendment:* Chapter 31 near beginning of first sentence after "state" deleted "grazing", near middle before "district" inserted "state", and at end before "preference" inserted "grazing"; and made minor changes in style. Amendment effective March 13, 2001.

*Temporary Provision Not Codified:* The first sentence of 46-2321, R.C.M. 1947, was not codified but has not been repealed and is still valid law. Citation may be made to sec. 21, Ch. 208, L. 1939.

**Case Notes**

*Provisions Mandatory:* The provisions of this section are mandatory. Langen v. Badlands Co-op St. Grazing District, 125 M 302, 234 P2d 467 (1951).

## 76-16-405. Grazing preferences appurtenant to dependent commensurate property and commensurate property.

**Case Notes**

*Purchaser of Deteriorated Ranch:* Where the present owner purchased ranch lands formerly having preference rights of 97 animal units but which, just prior to the sale, had been rated at only 43 animal units due to deterioration in ranch, he could not later object to such rating as a violation of this section. Burke v. S. Phillips County Co-op St. Grazing District, 135 M 209, 339 P2d 491 (1959).

## 76-16-406. Transfer of grazing preferences.

**Compiler's Comments**

*2001 Amendment:* Chapter 31 in (1) in three places before "preference" inserted "grazing". Amendment effective March 13, 2001.

*1999 Amendment:* Chapter 401 in (1) in first sentence and in (2) at end substituted "commission" for "department"; and made minor changes in style. Amendment effective July 1, 1999.

**Case Notes**

*Purchaser of Deteriorated Ranch:* Where the present owner purchased ranch lands formerly having preference rights of 97 animal units but which, just prior to the sale, had been rated at only 43 animal units due to deterioration in ranch, he could not later object to such rating as a violation of this section. Burke v. S. Phillips County Co-op St. Grazing District, 135 M 209, 339 P2d 491 (1959).

## 76-16-407. Processing of application for transfer.

**Compiler's Comments**

*2001 Amendment:* Chapter 31 in (1) in first sentence after "secretary" inserted "of the state district", at end of second sentence before "district" inserted "state", and at end of third sentence before "district" inserted "state"; and made minor changes in style. Amendment effective March 13, 2001.

## 76-16-408. Effect of transfer of grazing preference.

**Compiler's Comments**

*2001 Amendment:* Chapter 31 near end before "preference" inserted "grazing". Amendment effective March 13, 2001.

## 76-16-409. Transfer of underlying property.

**Compiler's Comments**

*2001 Amendment:* Chapter 31 in (1) in two places before "preference" inserted "grazing"; and near middle of (2) before "preferences" inserted "grazing". Amendment effective March 13, 2001.

## 76-16-410. Compensation to state district for range improvements.

**Compiler's Comments**

*2001 Amendment:* Chapter 31 at end of fourth sentence substituted "commission" for "department"; and made minor changes in style. Amendment effective March 13, 2001.

**Case Notes**

*Compensation to Grazing District for Improvements in Which District Involved:* Under this section, subsequent owners of land must compensate a grazing district for the value of range improvements constructed with the consent of the owner upon lands leased by the district. However, this section applies only to improvements in which the district itself is involved and does not require a district to collect those funds for payment to a previous lessee. Prairie County Co-op St. Grazing District v. Kalfell Ranch, Inc., 269 M 117, 887 P2d 241, 51 St. Rep. 1488 (1994).

## 76-16-411. Grazing permits to owners of land not controlled by state district.

**Compiler's Comments**

*2001 Amendment:* Chapter 31 in (1) near beginning of first sentence before "district" inserted "state"; and made minor changes in style. Amendment effective March 13, 2001.

**Case Notes**

*Constitutionality:* Chapter 208, L. 1939, does not unreasonably discriminate against nonmembers who have lands in the district since they have ample opportunity to protect themselves and their rights. Thompson v. Tobacco Root Co-op St. Grazing District, 121 M 445, 193 P2d 811 (1948).

### 76-16-412. Revocation of grazing preferences upon failure to obtain permits, pay fees, or obey rules.

**Compiler's Comments**

*2001 Amendment:* Chapter 31 in (1) and (2) near middle of first sentence before "certified" deleted "registered or" and before "preference" inserted "grazing" and in second sentence before "preference" inserted "grazing"; in (2) near end of first sentence before "district" inserted "state"; and made minor changes in style. Amendment effective March 13, 2001.

**Case Notes**

*Competitive Bidding — Revocation of Grazing Preferences and Permit Cancellation Discretionary:* Decisions to revoke grazing preferences or to cancel grazing permits are entirely discretionary with the grazing district. Further, a district rule prohibiting competitive bidding against another district member for the lease of grazing lands in the district did not apply in this instance when the land in question was sold rather than leased. Prairie County Co-op St. Grazing District v. Kalfell Ranch, Inc., 269 M 117, 887 P2d 241, 51 St. Rep. 1488 (1994).

### 76-16-413. Effect of revocation.

**Compiler's Comments**

*2001 Amendment:* Chapter 31 in (1) in two places before "preference" inserted "grazing". Amendment effective March 13, 2001.

*1999 Amendment:* Chapter 401 in (1) inserted second sentence concerning revocation. Amendment effective July 1, 1999.

### 76-16-414. Equalization of state district assets.

**Compiler's Comments**

*2001 Amendment:* Chapter 31 in (1) near middle before "district" inserted "state"; and in (3) in two places before "preference" inserted "grazing". Amendment effective March 13, 2001.

*1999 Amendment:* Chapter 401 in (2) in first sentence inserted "or any portion of a grazing preference" and inserted second sentence regarding valuation of reserves and assets; in (3) in second sentence inserted "as prescribed by the bylaws of the state district"; and made minor changes in style. Amendment effective July 1, 1999.

**Case Notes**

*Inability to Exercise Grazing Preference Because of District Loss of Land — Statutory Applicability:* A grazing district lost control of about 50,000 acres upon which members could exercise assigned grazing preferences. The district tendered monetary compensation to the 26 affected permittees pursuant to this section, based on the loss of grazing preferences. Twenty-five of the members accepted the offer, but Kalfell Ranch did not, arguing that under 76-16-403, a proportionate reduction of all members' grazing rights was proper and that the district directors had breached their fiduciary duty by failing to purchase the land that was subsequently lost, failing to prohibit competitive bidding, and failing to collect the value of and compensate for improvements made to the land prior to sale. The Board of Natural Resources and Conservation found that the applicable statute was 76-16-403 and that the district was thus required to proportionally reduce all grazing preferences, but rejected the claim that the district was required to purchase the land or other grazing land sufficient to meet the assigned grazing preferences. The District Court affirmed the Board's decision and determined that the Board's failure to address Kalfell's other claims constituted an implied denial of those issues, a denial that the court agreed with on the merits. On appeal, the Supreme Court found that under the plain language of this section, Kalfell did not lose any grazing preferences or permits, but rather merely became unable to exercise its preferences because the district lost access to the lands. Therefore, under 76-16-403, reductions in grazing privileges became necessary and should have been reduced proportionately. Kalfell's other claims were properly rejected based on clear statutory language and the district's discretionary powers. Prairie County Co-op St. Grazing District v. Kalfell Ranch, Inc., 269 M 117, 887 P2d 241, 51 St. Rep. 1488 (1994).

# CHAPTER 17
# PUBLIC LAND ACCESS

**Chapter Collateral References**

Roads, Land, and Big Game Harvest, Mont. Leg. Serv. Div. (2016).

## Part 1
## Public Land Access Network Grant Program

**Part Compiler's Comments**

*Effective Date:* Section 9, Ch. 374, L. 2017, provided: "[This act] is effective July 1, 2017."

*Termination:* Section 10, Ch. 374, L. 2017, provided: "[This act] terminates June 30, 2027."

### 76-17-102. Montana public land access network grant program — donations — rulemaking.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 4, Ch. 507, L. 2023. Amendment effective July 1, 2023.

*2019 Amendment:* Chapter 221 in (2)(a) after "87-2-202" deleted "or the price of a combination license that includes a conservation license". Amendment effective March 1, 2020.

# CHAPTER 25
# MONTANA LAND USE PLANNING ACT

**Chapter Compiler's Comments**

*Effective Date:* Section 41, Ch. 500, L. 2023, provided: "[This act] is effective on passage and approval." Approved May 17, 2023.

*Applicability:* Section 42, Ch. 500, L. 2023, provided: "[This act] applies to local governments that currently meet the population thresholds in [section 5] [76-25-105]."

## Part 1
## General Provisions

**Part Compiler's Comments**

*Effective Date:* Section 41, Ch. 500, L. 2023, provided: "[This act] is effective on passage and approval." Approved May 17, 2023.

*Applicability:* Section 42, Ch. 500, L. 2023, provided: "[This act] applies to local governments that currently meet the population thresholds in [section 5] [76-25-105]."

## Part 2
## Land Use Plan

**Part Compiler's Comments**

*Effective Date:* Section 41, Ch. 500, L. 2023, provided: "[This act] is effective on passage and approval." Approved May 17, 2023.

*Applicability:* Section 42, Ch. 500, L. 2023, provided: "[This act] applies to local governments that currently meet the population thresholds in [section 5] [76-25-105]."

## Part 3
## Zoning

**Part Compiler's Comments**

*Effective Date:* Section 41, Ch. 500, L. 2023, provided: "[This act] is effective on passage and approval." Approved May 17, 2023.

*Applicability:* Section 42, Ch. 500, L. 2023, provided: "[This act] applies to local governments that currently meet the population thresholds in [section 5] [76-25-105]."

## Part 4
## Subdivision Regulations

**Part Compiler's Comments**

*Effective Date:* Section 41, Ch. 500, L. 2023, provided: "[This act] is effective on passage and approval." Approved May 17, 2023.

*Applicability:* Section 42, Ch. 500, L. 2023, provided: "[This act] applies to local governments that currently meet the population thresholds in [section 5] [76-25-105]."

## Part 5
## Fees, Variances, Appeals, Enforcement, and Penalties

**Part Compiler's Comments**

*Effective Date:* Section 41, Ch. 500, L. 2023, provided: "[This act] is effective on passage and approval." Approved May 17, 2023.

*Applicability:* Section 42, Ch. 500, L. 2023, provided: "[This act] applies to local governments that currently meet the population thresholds in [section 5] [76-25-105]."

# TITLE 77
# STATE LANDS

## CHAPTER 1
## ADMINISTRATION OF STATE LANDS

### Part 1
### General Provisions

**Part Law Review Articles**

Going Once, Going Twice, Sold: Implications for Leasing State Trust Lands to Environmental Organizations and Other High Bidders, Allison, 25 Pub. Land & Resources L. Rev. 39 (2004).

**77-1-101. Definitions.**

**Compiler's Comments**

*2011 Amendment:* Chapter 93 in definition of distributable revenue in (a) inserted exception clause, in (b) at beginning deleted "95% of", and in (c) near beginning inserted "interest and"; inserted definition of state trust land; and made minor changes in style. Amendment effective July 1, 2011.

*Saving Clause:* Section 3, Ch. 93, L. 2011, was a saving clause.

*2009 Amendment:* Chapter 465 inserted definition of distributable revenue; and made minor changes in style. Amendment effective July 1, 2009.

*2007 Amendment:* Chapter 164 inserted definitions of noxious weeds or weeds and weed management or control; and made minor changes in style. Amendment effective October 1, 2007.

*Severability:* Section 7, Ch. 164. 2007, was a severability clause.

*1997 Amendment:* Chapter 32 in definition of state land, in (b)(iv) after "through", deleted "foreclosure of any", after "investments" deleted "purchased", and at end substituted "17-6-201" for "17-6-211"; and made minor changes in style.

*1995 Amendments:* Chapter 370 in definition of state land or lands inserted (b)(iii) providing that certain lands that the Board of Regents is authorized to dispose of are not considered state land; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 418 deleted definition of Commissioner that read: ""Commissioner" means the commissioner of state lands provided for in 2-15-3202"; in definition of Department substituted "natural resources and conservation provided for in Title 2, chapter 15, part 33" for "state lands provided for in Title 2, chapter 15, part 32"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1991 Amendment:* Inserted definitions of commercial or concentrated recreational use, general recreational use, and legally accessible state lands. Amendment effective March 1, 1992.

*Applicability:* Section 22, Ch. 609, L. 1991, provided: "On passage and approval of [this act], the board of land commissioners shall commence proceedings to adopt rules to be effective March 1, 1992. The department of state lands and the department of fish, wildlife, and parks shall commence proceedings and arrangements necessary to establish a recreational use license to be effective March 1, 1992." Approved April 24, 1991.

*1987 Amendment:* In introduction inserted "and except for the definition of state land in 77-1-701".

**Case Notes**

*State Allowed Compensation for Hydroelectric Use of Riverbeds — No Preemption by Federal Law:* Plaintiff PPL sought a declaratory judgment that the state was precluded from seeking compensation for the use of riverbeds at PPL's federally licensed hydroelectric dams on the Missouri, Clark Fork, and Madison Rivers. PPL asserted that the state law regulating the use of riverbeds was preempted by federal law and by the federal navigational servitude, which is the power of the U.S. Congress to ensure that navigable rivers remain open to interstate and foreign commerce. The state denied that federal law or the servitude preempted the state Hydroelectric Resources Act (HRA), Title 77, ch. 4, part 2, and counterclaimed for compensation for PPL's past and ongoing use of state riverbeds, as well as damages under theories of uncompensated use of state land, unjust enrichment, trespass, and negligence. The District Court agreed with the state, holding that the Federal Power Act (FPA) recognized the property rights of parties whose land is affected by federally licensed hydroelectric projects and specifically prohibits the use of private property without compensation, so the state was allowed to seek compensation. The court also concluded that the FPA explicitly permits the operation of state law regarding proprietary rights affected by a federally licensed facility, so the HRA was not preempted by the FPA. PPL Mont., LLC v. St., 2010 MT 64, 355 Mont. 402, 229 P.3d 421.

Following the Montana Supreme Court's decision, PPL appealed to the United States Supreme Court. The United States Supreme Court reversed the Montana court's ruling in part, holding that the Montana court had not properly considered the rivers in question on a segment-by-segment basis and had not determined whether they were navigable in fact at the time of statehood. The United States Supreme Court remanded the case for proceedings consistent with its opinion. PPL Montana, LLC v. Montana, 565 US 576, 132 S Ct 1215 (2012).

*Department's Definition of Recreational Use and Application of Rule Prohibiting Travel Across State Land Rejected:* The Weitzs owned a ranch, and within the boundaries of their land was state land that they leased. The Weitzs were using roads on their leased land to spot game and were traveling across the leased land on existing roads to get to their own property to hunt. The Department of Natural Resources and Conservation concluded that the defendants were engaged in recreational use of state lands and were in violation of a Department rule prohibiting vehicle travel across state lands. The Supreme Court upheld the District Court's decision that noted that the hearings examiner had acknowledged that no elk or deer had been killed, shot at, or pursued on leased state land by the defendants and therefore reversed the hearings examiner's decision as being based upon faulty reasoning, conjecture, and speculation. The Supreme Court also upheld the lower court's ruling that the Department's application of the rule prohibiting travel across state lands by a lessee to conduct activity elsewhere was an overbroad and unlawful application of the rule. Weitz v. Dept. of Natural Resources and Conservation, 284 M 130, 943 P2d 990, 54 St. Rep. 807 (1997).

## 77-1-102. Ownership of certain islands and riverbeds.

### Compiler's Comments

*2013 Amendment:* Chapter 210 deleted former (1)(a) that read: "(a) all lands lying and being in and forming a part of the abandoned bed of any navigable stream or lake in this state and lying between the meandered lines of the stream or lake as shown by the United States survey of the stream or lake"; in (1)(b) after "lake" deleted "except those lands that are occupied by and belong to the adjacent landowners as accretions"; inserted (2) regarding nonapplicability for accretions; and made minor changes in style. Amendment effective April 15, 2013.

*Applicability:* Section 6, Ch. 210, L. 2013, provided: "[This act] applies to avulsions occurring on or after [the effective date of this act]." Effective April 15, 2013.

*2011 Amendment:* Chapter 371 in (1) inserted introductory language; in (1)(c) at end after "accretions" deleted "belong to the state of Montana to be held in trust for the benefit of the public schools of the state"; inserted (2) regarding state-owned riverbeds; and made minor changes in style. Amendment effective July 1, 2011.

### Case Notes

*Accreted Islands in River Held to Be School Trust Lands — Restitution Improper Absent Unjust Enrichment Claim — State Entitled to Costs:* The state filed an action to quiet title to three islands in the Missouri River that had formed from sedimentary accretions on the riverbed. The District Court ruled that under the equal footing doctrine, the state held title to the disputed lands as public trust land, which could not be acquired by the defendants through adverse possession. The District Court also ruled, relying on PPL Mont., LLC v. St., 2010 MT 64, 355 Mont. 402, 229 P.3d 421, that these lands were not school trust lands. The District Court then ruled sua sponte that under the doctrine of unjust enrichment, the state was required to reimburse the defendants for all property taxes and improvements made on the land and ordered each party to pay its own costs and fees. The Supreme Court disagreed and held that under 77-1-102, these lands were school trust lands and that because the defendants never asserted an unjust enrichment claim, the state was not on notice and had no opportunity to oppose the reimbursements ordered by the District Court. Finally, the court held that under 25-10-101, the state as the prevailing party was entitled to recover certain costs. The court reversed the District Court's judgment and remanded the case to the District Court to determine and award the appropriate amount for costs. Dept. of Natural Resources and Conservation v. Abbco Investments, LLC, 2012 MT 187, 366 Mont. 120, 285 P.3d 532.

### 77-1-103. Administration of lands.

**Compiler's Comments**

*2015 Amendment:* Chapter 55 in (4) near middle substituted "77-1-102(3)" for "77-1-102(2)"; and made minor changes in style. Amendment effective October 1, 2015.

*2011 Amendment:* Chapter 371 in (1) near beginning after "shall" deleted "lease or", substituted "77-1-102(1)" for "77-1-102", and at end before "sold" deleted "leased and"; in (2) near beginning after "sell" inserted "the lands under 77-1-102(1)" and after "lands" inserted "under 77-1-102"; in (3) after "lands" inserted "under 77-1-102"; inserted (4) regarding the deposit of income received; and made minor changes in style. Amendment effective July 1, 2011.

### 77-1-104. Survey of lands.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 77-1-106. Setting of rates or fees — rules.

**Compiler's Comments**

*2003 Amendment:* Chapter 596 in (1) and (2) near beginning after "rental rates" inserted "agreement rates"; in (2) and (3) inserted reference to 77-1-815; and made minor changes in style. Amendment effective March 1, 2004.

*Preamble:* The preamble attached to Ch. 596, L. 2003, provided: "WHEREAS, the Department of Natural Resources and Conservation presently authorizes the public to use state school trust land through individual recreational use licenses; and

WHEREAS, the primary recreational uses of state school trust land are hunting and fishing; and

WHEREAS, the Department of Natural Resources and Conservation and the Department of Fish, Wildlife, and Parks wish to provide a more efficient system for authorizing public recreational use for hunting, fishing, and trapping on state trust land and concurrently provide greater benefit to the institutional beneficiaries of the trust; and

WHEREAS, the Department of Fish, Wildlife, and Parks has the discretionary authority in section 87-1-209, MCA, to enter into an agreement to compensate state trust land beneficiaries for the use and impacts associated with hunting, fishing, and trapping on legally accessible state trust land as defined by department of natural resources and conservation rule; and

WHEREAS, the Department of Fish, Wildlife, and Parks needs additional revenue to offset the cost of an agreement with the Department of Natural Resources and Conservation to compensate state trust land beneficiaries for the use and impacts associated with hunting, fishing, and trapping on legally accessible state trust land; and

WHEREAS, the Department of Natural Resources and Conservation and the Department of Fish, Wildlife, and Parks have reached an agreement that, given the legislative authority, they intend to enter into an agreement for the recreational use of school trust land parcels for hunting, fishing, and trapping purposes."

*Severability:* Section 11, Ch. 596, L. 2003, was a severability clause.

*Effective Date:* Section 18, Ch. 586, L. 1993, provided: "[This act] is effective July 1, 1993."

### 77-1-107. Purchase of historic easement across state land for benefit of private land.

**Compiler's Comments**

*Contingent Effective Date:* Section 6(2), Ch. 107, L. 1999, provided: "If the Montana Supreme Court invalidates subsection (4)(a) of 77-1-130, [section 1] [77-1-107] is effective on the date of the decision. If the Montana Supreme Court does not invalidate subsection (4)(a) of 77-1-130, then [section 1] [77-1-107] is void." On November 2, 1999, the Montana Supreme Court held this section unconstitutional in Montanans for Responsible Use of School Trust v. State ex rel. Bd. of Land Comm'rs, 1999 MT 263, 296 M 402, 989 P2d 800 (1999).

### 77-1-108. Trust land administration account — administrative costs — appropriation.

**Compiler's Comments**

*2009 Amendment:* Chapter 465 in (1) inserted second sentence providing that the cost of administering state trust lands includes cost of managing assets; substituted (2) regarding appropriations from account for former (2) that read: "Appropriations from the account for each fiscal year may not exceed the sum of 1⅛% of the book value balance in the permanent funds administered by the department, other than the fund containing proceeds derived from land granted to the state pursuant to the Morrill Act of 1862, 7 U.S.C. 301 through 308, and the

Morrill Act of 1890, 7 U.S.C. 321 through 329, on the first day of January preceding the new biennium and 10% of the revenue deposited in the capitol building land grant trust fund in the last-completed fiscal year prior to the new biennium"; inserted (3) regarding administrative costs; substituted (4)(a) concerning transfer of unreserved distributable revenue for "Except as provided in subsection (4), unreserved funds remaining in the account at the end of the fiscal year must be transferred to each of the permanent funds in proportionate shares to each fund's contribution to the account as calculated in 77-1-109(3)"; inserted (4)(b) providing for distribution of unreserved funds; in (5)(b) inserted last sentence regarding general fund loan; and made minor changes in style. Amendment effective July 1, 2009.

*2007 Amendment:* Chapter 247 in (2) near beginning before "permanent funds" deleted "nine" and near middle after "department" inserted "other than the fund containing proceeds derived from land granted to the state pursuant to the Morrill Act of 1862, 7 U.S.C. 301 through 308, and the Morrill Act of 1890, 7 U.S.C. 321 through 329"; in (3) at beginning inserted exception clause; inserted (4) providing for an $80,000 transfer from the general fund each biennium to a special revenue account for the purposes of administering the land granted to the state pursuant to the Morrill Act of 1862 and the Morrill Act of 1890 and requiring the department to pay from the account an amount calculated to be the cost of administering the investment of the fund derived from the trust containing proceeds derived from land granted to the state pursuant to the Morrill Act of 1862 and the Morrill Act of 1890; and made minor changes in style. Amendment effective April 26, 2007.

*2001 Amendment:* Chapter 34 near beginning of (2) after "nine" substituted "permanent funds" for "nonexpendable trust funds"; and in (3) near middle after "each of the" substituted "permanent funds" for "nonexpendable trust funds" and before "contribution" substituted "fund's" for "trust's". Amendment effective July 1, 2001.

*Effective Date:* Section 9, Ch. 122, L. 1999, provided: "[This act] is effective July 1, 1999."

### 77-1-109. Deposits of proceeds in trust land administration account.

**Compiler's Comments**

*2013 Amendment:* Chapter 17 in (3) in first sentence after "lands" deleted "and other than those purchased pursuant to 17-6-340" and deleted former third sentence that read: "Royalty payments purchased pursuant to 17-6-340 must be used as provided in that section and 20-9-622." Amendment effective July 1, 2013.

*2009 Amendment:* Chapter 465 inserted (1) providing maximum amount of money that may be deposited into trust land administration account; in (2)(a) substituted introductory clause for "The department shall, until the deposit equals the amount appropriated for the fiscal year pursuant to 77-1-108, deposit into the land trust administration account created by 77-1-108 the following"; inserted (2)(a)(i) including distributable revenue; deleted former (2)(a)(iii) that read: "5% of the interest and income annually credited to the public school fund in accordance with 20-9-341"; inserted (2)(b) regarding identification of deposits; in (3) in first sentence at end substituted "deposited in accordance with 17-3-1003, 18-2-107, and 20-9-341(2)" for "deposited in the appropriate permanent fund and the capitol building land grant trust fund"; deleted former (3) that read: "(3) The amount of money that is deposited into the trust land administration account may not exceed 1⅛% of the book value balance in each of the permanent funds, other than the fund containing proceeds derived from lands granted to the state pursuant to the Morrill Act of 1862, 7 U.S.C. 301 through 308, and the Morrill Act of 1890, 7 U.S.C. 321 through 329, administered by the department on the first day of January preceding the new biennium and 10% of the previous fiscal year revenue deposited into the capitol building land grant trust fund"; and made minor changes in style. Amendment effective July 1, 2009.

*2007 Amendment:* Chapter 247 inserted (1)(b) providing that the department may not make deductions from interest or income generated from lands granted to the state pursuant to the Morrill Acts of 1862 and 1890; in (3) near middle before "permanent funds" deleted "nine" and after "permanent funds" inserted "other than the fund containing proceeds derived from lands granted to the state pursuant to the Morrill Act of 1862, 7 U.S.C. 301 through 308, and the Morrill Act of 1890, 7 U.S.C. 321 through 329"; and made minor changes in style. Amendment effective April 26, 2007.

*2003 Amendments — Composite Section:* Chapter 291 in (2) in first sentence near middle after "university system lands" inserted "and other than those purchased pursuant to 17-6-340" and inserted third sentence providing for use of royalty payments purchased pursuant to 17-6-340. Amendment effective April 11, 2003.

Chapter 355 inserted (1)(d) relating to fees collected pursuant to 77-2-328; and made minor changes in style. Amendment effective April 17, 2003.

*Severability:* Section 20, Ch. 355, L. 2003, was a severability clause.

*2001 Amendments — Composite Section:* Chapter 34 in (2) after "deposited in the" substituted "appropriate permanent fund" for "permanent fund for the appropriate trust"; and in (3) after "nine" substituted "permanent funds" for "nonexpendable trust funds". Amendment effective July 1, 2001.

Chapter 420 in (1)(b) substituted "public school and Montana university system lands" for "public school lands"; in (2) in first sentence inserted "other than proceeds from timber from Montana university system lands" and inserted second sentence pertaining to allocation of timber proceeds for Montana university system lands; and made minor changes in style. Amendment effective July 1, 2001.

*Effective Date:* Section 9, Ch. 122, L. 1999, provided: "[This act] is effective July 1, 1999."

### 77-1-110. Written undertaking required in legal action for challenge to use or disposition of state lands.

**Compiler's Comments**

*2001 Amendment:* Chapter 504 inserted (1) referring to Article X, section 11, of Montana constitution; in (2) in two places after "board" inserted reference to department; and made minor changes in style. Amendment effective May 1, 2001.

*Saving Clause:* Section 3, Ch. 273, L. 1995, was a saving clause.

**Case Notes**

*Sanctions Not Applied Absent Finding of Bad Faith in State Timber Sale:* Plaintiff sought sanctions against the Department of Natural Resources and Conservation (DNRC) under former Rule 11, M.R.Civ.P. (now superseded), for requesting an injunction bond pursuant to this section in relation to plaintiff's attempt to halt a timber sale. The District Court found that an injunction bond was not required, but also denied sanctions. On appeal, plaintiff contended that sanctions should apply because the DNRC's actions were intended solely to harass and cause needless increase in the cost of litigation. The Supreme Court agreed that the DNRC could not be said to have acted in bad faith by seeking to have a bond posted, so the District Court did not err in declining to impose sanctions under former Rule 11. Friends of the Wild Swan v. Dept. of Natural Resources and Conservation, 2000 MT 209, 301 M 1, 6 P3d 972, 57 St. Rep. 816 (2000).

*Statute Inapplicable to Injunction Based on Inadequacy of Department EIS:* Plaintiff sought an injunction against the Department of Natural Resources and Conservation (DNRC) to halt a timber sale based on inadequacy of the DNRC environmental impact statement (EIS). The DNRC contended that this section required plaintiff to post a postappeal injunction bond during the pendency of the appeal. The District Court concluded that because the timber sale was expected to lose money, it would be difficult to comprehend how damages might be incurred as a result of enjoining the project and that a bond was thus not required. The Supreme Court affirmed. This section pertains to actions enjoining a decision by the Board of Land Commissioners, but does not apply to cases that deal with an injunction against the DNRC based on the inadequacy of an EIS and that have no effect on any decision by the Board of Land Commissioners. Friends of the Wild Swan v. Dept. of Natural Resources and Conservation, 2000 MT 209, 301 M 1, 6 P3d 972, 57 St. Rep. 816 (2000).

### 77-1-111. Court actions.

**Compiler's Comments**

*2009 Amendments — Composite Section:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Chapter 472 inserted (3) providing that use of a ford or crossing on a navigable river or stream may not be considered a trespass; and made minor changes in style. Amendment effective May 6, 2009.

*Preamble:* The preamble attached to Ch. 472, L. 2009, provided: "WHEREAS, the Department of Natural Resources and Conservation has asserted regulatory jurisdiction over the beds of various rivers and streams based on the premise that the streams are navigable and that the state therefore owns the riverbeds and streambeds; and

WHEREAS, very few Montana rivers or streams have been adjudicated as navigable, either in whole or in part; and

WHEREAS, it is not economically feasible for either the Department of Revenue or the Department of Natural Resources and Conservation to obtain judicial determinations of riverbed or streambed ownership by statewide quiet title actions, yet that ownership determination may not be made legally by unilateral administrative decisions; and

WHEREAS, if the Department of Natural Resources and Conservation wishes to assert regulatory control over the bed of a river or stream that has not been adjudicated to be navigable and was not determined navigable at the time of the original federal government surveys of the public land as evidenced by the recorded and monumented surveys of the meander lines of the river, it is required to provide written notice of the claim of state ownership to the affected property owners; and

WHEREAS, because the present claims of state ownership of riverbeds and streambeds is contrary to longstanding administrative practice and because the test for navigability depends upon evidence concerning the log floating capability of a stream at the time of statehood, there is no presumption of correctness attached to a navigability claim made by any state agency."

*Legislative Findings:* Section 1, Ch. 472, L. 2009, provided: "The legislature finds that:

(1) for 120 years since the admission of Montana as a state in 1889, the department of revenue and its predecessor agencies have taxed some landowners whose property abuts a river or stream on the assumption that those riparian landowners owned the property to the middle of the river or stream;

(2) in Montana v. United States, 450 U.S. 544 (1981), the United States supreme court recognized that if a river or stream is not navigable, the abutting riparian landowners own the land in the bed of the stream to the middle of the stream, but if a river or stream is navigable, the state owns the bed of the river or stream, having acquired ownership from the United States when the state was admitted to the union, and therefore Montana owns the bed of the Bighorn River where it flows through the Crow reservation;

(3) for the purpose of determining the ownership of a riverbed or streambed, the test of navigability is whether logs could be floated in the stream at the time of statehood as stated in Montana Coalition for Stream Access v. Curran, 210 Mont. 38, 682 P.2d 163 (1984), based upon The Montello, 87 U.S. 430 (1874), Sierra Pacific Power Co. v. Federal Energy Regulatory Commission, 681 F.2d 1134 (9th Cir. 1982), and State of Oregon v. Riverfront Protection Association, 672 F.2d 792 (9th Cir. 1982);

(4) beginning with tax assessments that were effective January 1, 2008, the lien date for real property taxes, the department of revenue reassessed the property of riparian landowners whose land abuts various rivers and streams by reducing the amount of land assessed based upon the premise that the landowners did not own to the middle of the river or stream because the river or stream was navigable and these reassessments, if correct, have enormous impact upon the riparian landowners because they affect land titles, acreage owned, qualification for various conservation and price support programs, and ownership of water diversion facilities and other structures that the riparian landowners have constructed for water usage;

(5) the 2008 reassessments were made by simply sending out tax bills without any notice that they were based upon a claim of state ownership of the riverbeds or streambeds and some riparian landowners have paid the first installment of 2008 real property taxes based upon the reassessments without realizing that a claim of state ownership of the riverbeds and streambeds was the basis for the reassessments;

(6) procedural due process requires that if a claim of change in ownership is involved, the state agency involved shall afford the affected property owners both notice of the claim and the opportunity to be heard;

(7) the 2008 real property tax assessments based upon claims of state ownership did not comply with the constitutional requirement for procedural due process and under that circumstance payment by the property owners of taxes based on the reassessment does not constitute acquiesence in the underlying state ownership claim;

(8) The department of revenue is required to provide written notice to the affected property owners of the state's claim of ownership so that the affected property owners have a fair opportunity to be heard and to dispute the government's claim."

## 77-1-112. Violations classified.

### Compiler's Comments

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 77-1-113. Restrictions on who may buy or lease state lands.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 near middle substituted "officer or employee of the department" for "person connected with the department of state lands as an officer or employee"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

**Administrative Rules**

Title 36, chapter 2, subchapter 10, ARM General state land rules.

Title 36, chapter 25, ARM State land leasing.

### 77-1-114. Prosecutions.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 77-1-115. Punishments.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 77-1-117. Disposition of fines and judgment proceeds.

**Compiler's Comments**

*2011 Amendment:* Chapter 413 inserted (2) relating to deposit, use, and appropriation of compensatory damages; and made minor changes in style. Amendment effective May 13, 2011.

*Applicability:* Section 3, Ch. 413, L. 2011, provided: "[This act] applies to court proceedings commenced after [the effective date of this act]." Effective May 13, 2011.

*2001 Amendment:* Chapter 257 near end substituted "paid to the department of revenue for deposit in the general fund" for "paid to the state treasurer and by him deposited to the credit of the general fund"; and made minor changes in style. Amendment effective July 1, 2001.

*Applicability:* Section 49, Ch. 257, L. 2001, provided: "[This act] applies to remittances of state money made to the department of revenue for fiscal years beginning after June 30, 2001."

*1987 Amendment:* Near middle, after "state", inserted "except money received by a justice's court".

### 77-1-118. Use of exploding targets prohibited — definition — penalty.

**Compiler's Comments**

*Effective Date:* Section 5, Ch. 513, L. 2021, provided: "[This act] is effective on passage and approval." Approved May 14, 2021.

### 77-1-121. Environmental review compliance — exemptions.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 1, Ch. 63, L. 2023. Amendment effective March 16, 2023.

*2011 Amendment:* Chapter 359 in (1) in exception clause near beginning inserted "77-1-1112". Amendment effective October 1, 2011.

*Severability:* Section 15, Ch. 359, L. 2011, was a severability clause.

*2009 Amendment:* Chapter 239 in (1) near beginning after "provided in" inserted "77-1-122 and"; and made minor changes in style. Amendment effective April 16, 2009.

*Applicability:* Section 5, Ch. 239, L. 2009, provided: "[This act] applies to environmental reviews pursuant to Title 75, chapter 1, part 2, initiated on or after [the effective date of this act]." Effective April 16, 2009.

*2003 Amendments — Composite Section:* Chapter 147 in (1) at beginning inserted exception clause; inserted (2) providing that the department and board are exempt from certain provisions of law when issuing a lease that is subject to further permitting under Title 75 or 82; and made minor changes in style. Amendment effective March 27, 2003.

Chapter 318 in (1) at beginning inserted exception clause; inserted (2) exempting the department and board from Title 75, chapter 1, parts 1 and 2, when issuing a lease or license expressly stating that it is subject to further permitting under Title 75 or 82; and made minor changes in style. Amendment effective April 14, 2003.

*2001 Amendment:* Chapter 478 in (1) after "permit" deleted "or other authorization for use of state lands"; inserted (3) exempting department or board from environmental review requirements on actions related to growth policy, neighborhood plan, zoning regulations, proposed subdivision review, annexation, extension of services, or local planning; and made minor changes in style. Amendment effective April 30, 2001.

*Retroactive Applicability:* Section 3, Ch. 478, L. 2001, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to all matters pending before the department or the board on [the effective date of this act]." Effective April 30, 2001.

*Effective Date:* Section 4, Ch. 223, L. 1999, provided: "[This act] is effective on passage and approval." Approved April 1, 1999.

*Retroactive Applicability:* Section 5, Ch. 223, L. 1999, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to all matters pending before an agency on [the effective date of this act]." Effective April 1, 1999.

**Case Notes**

*Leasing State Land Mineral Interests Without Environmental Review — No Violation of Right to Clean and Healthful Environment:* Plaintiffs sought declaratory rulings that the State Land Board wrongfully failed to conduct environmental studies required by the Montana Constitution prior to entering leases with the coal company. Section 77-1-121(2) expressly exempts the State Land Board from conducting any environmental review under the Montana Environmental Policy Act (MEPA) prior to issuing a lease as long as the lease is subject to further state permitting regulations. The Supreme Court held that because the leases did not remove any action by the coal company from environmental review or regulation provided by Montana law, such environmental review was only deferred from the leasing stage to the permitting stage. The terms of the leases required the coal company to comply with all applicable state and federal laws and specifically with Montana laws regarding mine siting and reclamation as well as with the provisions of MEPA. Because the leases themselves did not allow for any degradation of the environment, the act of issuing the leases without environmental review under 77-1-121(2) did not violate Article II, section 3, or Article IX, section 1, 2, or 3, of the Montana Constitution. N. Plains Resource Council v. Mont. Bd. of Land Comm'rs, 2012 MT 234, 366 Mont. 399, 288 P.3d 169.

## 77-1-122. Environmental review of energy development projects on state land.

**Compiler's Comments**

*Effective Date:* Section 4, Ch. 239, L. 2009, provided: "[This act] is effective on passage and approval." Approved April 16, 2009.

*Applicability:* Section 5, Ch. 239, L. 2009, provided: "[This act] applies to environmental reviews pursuant to Title 75, chapter 1, part 2, initiated on or after [the effective date of this act]." Effective April 16, 2009.

## 77-1-125. Liability for unauthorized installation or construction of facility or structure on state trust land — penalty.

**Compiler's Comments**

*2017 Amendment:* Chapter 275 in (3) near beginning substituted "subsection (2)" for "subsection (1)". Amendment effective October 1, 2017.

*1997 Statement of Intent:* The statement of intent attached to Ch. 460, L. 1997, provided: "It is the intent of the legislature to protect state trust land from resource damage by nonauthorized use of state trust land. The legislature intends that the department of natural resources and conservation and the board of land commissioners use this legislation to ensure that all use of state trust land is in the best interests of the state and returns full market value to the school trust. The legislature intends that the penalty amounts established in this bill be used as maximums and expects the board to set appropriate specific penalty amounts on a case-by-case basis, taking into account the facts of each situation. It is not the intent of the legislature that the board impose the maximum penalty without sufficient justification. Nothing in this bill should be construed as requiring the department or the board to change or increase current state trust land trespass enforcement efforts."

*Effective Date:* Section 3, Ch. 460, L. 1997, provided: "[This act] is effective July 1, 1997."

## 77-1-126. Notice of noncompliance.

**Compiler's Comments**

*2009 Amendment:* Chapter 472 inserted (3) concerning right of property owner to control weeds on land adjacent to a navigable river or stream. Amendment effective May 6, 2009.

*Preamble:* The preamble attached to Ch. 472, L. 2009, provided: "WHEREAS, the Department of Natural Resources and Conservation has asserted regulatory jurisdiction over the beds of various rivers and streams based on the premise that the streams are navigable and that the state therefore owns the riverbeds and streambeds; and

WHEREAS, very few Montana rivers or streams have been adjudicated as navigable, either in whole or in part; and

WHEREAS, it is not economically feasible for either the Department of Revenue or the Department of Natural Resources and Conservation to obtain judicial determinations of riverbed or streambed ownership by statewide quiet title actions, yet that ownership determination may not be made legally by unilateral administrative decisions; and

WHEREAS, if the Department of Natural Resources and Conservation wishes to assert regulatory control over the bed of a river or stream that has not been adjudicated to be navigable and was not determined navigable at the time of the original federal government surveys of the public land as evidenced by the recorded and monumented surveys of the meander lines of the river, it is required to provide written notice of the claim of state ownership to the affected property owners; and

WHEREAS, because the present claims of state ownership of riverbeds and streambeds is contrary to longstanding administrative practice and because the test for navigability depends upon evidence concerning the log floating capability of a stream at the time of statehood, there is no presumption of correctness attached to a navigability claim made by any state agency."

*Legislative Findings:* Section 1, Ch. 472, L. 2009, provided: "The legislature finds that:

(1) for 120 years since the admission of Montana as a state in 1889, the department of revenue and its predecessor agencies have taxed some landowners whose property abuts a river or stream on the assumption that those riparian landowners owned the property to the middle of the river or stream;

(2) in Montana v. United States, 450 U.S. 544 (1981), the United States supreme court recognized that if a river or stream is not navigable, the abutting riparian landowners own the land in the bed of the stream to the middle of the stream, but if a river or stream is navigable, the state owns the bed of the river or stream, having acquired ownership from the United States when the state was admitted to the union, and therefore Montana owns the bed of the Bighorn River where it flows through the Crow reservation;

(3) for the purpose of determining the ownership of a riverbed or streambed, the test of navigability is whether logs could be floated in the stream at the time of statehood as stated in Montana Coalition for Stream Access v. Curran, 210 Mont. 38, 682 P.2d 163 (1984), based upon The Montello, 87 U.S. 430 (1874), Sierra Pacific Power Co. v. Federal Energy Regulatory Commission, 681 F.2d 1134 (9th Cir. 1982), and State of Oregon v. Riverfront Protection Association, 672 F.2d 792 (9th Cir. 1982);

(4) beginning with tax assessments that were effective January 1, 2008, the lien date for real property taxes, the department of revenue reassessed the property of riparian landowners whose land abuts various rivers and streams by reducing the amount of land assessed based upon the premise that the landowners did not own to the middle of the river or stream because the river or stream was navigable and these reassessments, if correct, have enormous impact upon the riparian landowners because they affect land titles, acreage owned, qualification for various conservation and price support programs, and ownership of water diversion facilities and other structures that the riparian landowners have constructed for water usage;

(5) the 2008 reassessments were made by simply sending out tax bills without any notice that they were based upon a claim of state ownership of the riverbeds or streambeds and some riparian landowners have paid the first installment of 2008 real property taxes based upon the reassessments without realizing that a claim of state ownership of the riverbeds and streambeds was the basis for the reassessments;

(6) procedural due process requires that if a claim of change in ownership is involved, the state agency involved shall afford the affected property owners both notice of the claim and the opportunity to be heard;

(7) the 2008 real property tax assessments based upon claims of state ownership did not comply with the constitutional requirement for procedural due process and under that circumstance payment by the property owners of taxes based on the reassessment does not constitute acquiesence in the underlying state ownership claim;

(8) The department of revenue is required to provide written notice to the affected property owners of the state's claim of ownership so that the affected property owners have a fair opportunity to be heard and to dispute the government's claim."

*Severability:* Section 7, Ch. 164, L. 2007, was a severability clause.

*Effective Date:* This section is effective October 1, 2007.

### 77-1-127. Department authorized to control weeds — billing for weed control.

**Compiler's Comments**

*2009 Amendments — Composite Section:* Chapter 465 in (2) in fourth sentence substituted "placed in the trust land administration account established in 77-1-108" for "placed in the resource development account established in 77-1-604". Amendment effective July 1, 2009.

Chapter 472 inserted (4) concerning right of property owner to control weeds on land adjacent to a navigable river or stream. Amendment effective May 6, 2009.

*Preamble:* The preamble attached to Ch. 472, L. 2009, provided: "WHEREAS, the Department of Natural Resources and Conservation has asserted regulatory jurisdiction over the beds of various rivers and streams based on the premise that the streams are navigable and that the state therefore owns the riverbeds and streambeds; and

WHEREAS, very few Montana rivers or streams have been adjudicated as navigable, either in whole or in part; and

WHEREAS, it is not economically feasible for either the Department of Revenue or the Department of Natural Resources and Conservation to obtain judicial determinations of riverbed or streambed ownership by statewide quiet title actions, yet that ownership determination may not be made legally by unilateral administrative decisions; and

WHEREAS, if the Department of Natural Resources and Conservation wishes to assert regulatory control over the bed of a river or stream that has not been adjudicated to be navigable and was not determined navigable at the time of the original federal government surveys of the public land as evidenced by the recorded and monumented surveys of the meander lines of the river, it is required to provide written notice of the claim of state ownership to the affected property owners; and

WHEREAS, because the present claims of state ownership of riverbeds and streambeds is contrary to longstanding administrative practice and because the test for navigability depends upon evidence concerning the log floating capability of a stream at the time of statehood, there is no presumption of correctness attached to a navigability claim made by any state agency."

*Legislative Findings:* Section 1, Ch. 472, L. 2009, provided: "The legislature finds that:

(1) for 120 years since the admission of Montana as a state in 1889, the department of revenue and its predecessor agencies have taxed some landowners whose property abuts a river or stream on the assumption that those riparian landowners owned the property to the middle of the river or stream;

(2) in Montana v. United States, 450 U.S. 544 (1981), the United States supreme court recognized that if a river or stream is not navigable, the abutting riparian landowners own the land in the bed of the stream to the middle of the stream, but if a river or stream is navigable, the state owns the bed of the river or stream, having acquired ownership from the United States when the state was admitted to the union, and therefore Montana owns the bed of the Bighorn River where it flows through the Crow reservation;

(3) for the purpose of determining the ownership of a riverbed or streambed, the test of navigability is whether logs could be floated in the stream at the time of statehood as stated in Montana Coalition for Stream Access v. Curran, 210 Mont. 38, 682 P.2d 163 (1984), based upon The Montello, 87 U.S. 430 (1874), Sierra Pacific Power Co. v. Federal Energy Regulatory Commission, 681 F.2d 1134 (9th Cir. 1982), and State of Oregon v. Riverfront Protection Association, 672 F.2d 792 (9th Cir. 1982);

(4) beginning with tax assessments that were effective January 1, 2008, the lien date for real property taxes, the department of revenue reassessed the property of riparian landowners whose land abuts various rivers and streams by reducing the amount of land assessed based upon the premise that the landowners did not own to the middle of the river or stream because the river or stream was navigable and these reassessments, if correct, have enormous impact upon the riparian landowners because they affect land titles, acreage owned, qualification for various conservation and price support programs, and ownership of water diversion facilities and other structures that the riparian landowners have constructed for water usage;

(5) the 2008 reassessments were made by simply sending out tax bills without any notice that they were based upon a claim of state ownership of the riverbeds or streambeds and some riparian landowners have paid the first installment of 2008 real property taxes based upon the reassessments without realizing that a claim of state ownership of the riverbeds and streambeds was the basis for the reassessments;

(6) procedural due process requires that if a claim of change in ownership is involved, the state agency involved shall afford the affected property owners both notice of the claim and the opportunity to be heard;

(7) the 2008 real property tax assessments based upon claims of state ownership did not comply with the constitutional requirement for procedural due process and under that circumstance payment by the property owners of taxes based on the reassessment does not constitute acquiesence in the underlying state ownership claim;

(8) The department of revenue is required to provide written notice to the affected property owners of the state's claim of ownership so that the affected property owners have a fair opportunity to be heard and to dispute the government's claim."

*Severability:* Section 7, Ch. 164, L. 2007, was a severability clause.

*Effective Date:* This section is effective October 1, 2007.

## 77-1-128. Administrative hearings.

**Compiler's Comments**

*Severability:* Section 7, Ch. 164, L. 2007, was a severability clause.

*Effective Date:* This section is effective October 1, 2007.

## 77-1-129. Rulemaking authority.

**Compiler's Comments**

*Severability:* Section 7, Ch. 164, L. 2007, was a severability clause.

*Effective Date:* This section is effective October 1, 2007.

## 77-1-130. Recognition of historic right-of-way — criteria for right-of-way deed — conditions — fees.

**Compiler's Comments**

*2017 Amendment:* Chapter 411 in (1)(c)(i) near beginning inserted "or images"; in (2)(a) in middle substituted "full market value" for "fair market value"; and in (4)(a) near end substituted "estate or interest disposed of for" for "acreage of". Amendment effective October 1, 2017.

*2015 Amendment:* Chapter 325 in (1) near end of first sentence substituted "October 1, 2021" for "October 1, 2015". Amendment effective April 27, 2015.

*Extension of Termination Date:* Sections 2 through 7, Ch. 325, L. 2015, amended secs. 2 through 7, Ch. 325, L. 2011, by extending the termination dates imposed by those sections to October 1, 2031. Effective April 27, 2015.

*2011 Amendment:* Chapter 325 in (1) near end substituted "October 1, 2015" for "October 1, 2011". Amendment effective October 1, 2011, and terminates October 1, 2025.

*Extension of Termination Date:* Sections 2 through 6, Ch. 325, L. 2011, amended sec. 5, Ch. 461, L. 1997, sec. 6, Ch. 270, L. 2001, and secs. 2, 3, and 4, Ch. 57, L. 2005, by extending the termination dates imposed by those sections to October 1, 2025. Effective October 1, 2011.

*2005 Amendment:* Chapter 57 in (1) near end of first sentence substituted "2011" for "2006". Amendment effective October 1, 2005, and terminates October 1, 2016.

*Extension of Termination Date:* Sections 2 and 3, Ch. 57, L. 2005, amended sec. 5, Ch. 461, L. 1997, and sec. 6, Ch. 270, L. 2001, by extending the termination dates imposed by those sections to October 1, 2016.

*2001 Amendment:* Chapter 270 in (1) in first sentence near middle after "to provide continuation of a county road" inserted "or to provide for authorization of existing utilities" and after "October 1" substituted "2006" for "2001"; in (1)(b)(i) and (1)(b)(ii) substituted "1997" for "1973"; in (3) in third sentence near beginning after "The department" deleted "may not require a fee for the approval of an assignment and"; in (4)(a) at end after "historic right-of-way" deleted part of introductory clause and former (4)(a)(i) through (4)(a)(iv) that read: "based on the following classification of land:

(i) $37.50 per acre for state land classified as grazing land;

(ii) $275 per acre for state land classified as timber land;

(iii) $100 per acre for state land classified as crop land; and

(iv) $100 per acre for other land"; in (5)(b) near middle after "condition of the road" inserted "or utility facilities"; in (8) deleted former second sentence that read: "However, the department may not require reversion of the right-of-way to the state"; and made minor changes in style. Amendment effective April 20, 2001.

*Extension of Termination Date:* Section 6, Ch. 270, L. 2001, amended sec. 5, Ch. 461, L. 1997, by extending the termination date imposed by Ch. 461 to October 1, 2011. Effective April 10, 2001.

*Preamble:* The preamble attached to Ch. 461, L. 1997, provided: "WHEREAS, the Department of State Lands, as the predecessor of the Department of Natural Resources [and Conservation] with respect to state land, encouraged the development of road rights-of-way across state land before 1972; and

WHEREAS, the Department of State Lands either did not charge for these rights-of-way or charged minimal fees for the rights-of-way before 1972; and

WHEREAS, many of the road rights-of-way granted by the Department of State Lands were granted without a written easement; and

WHEREAS, Article X, section 11(2), of the Montana Constitution requires that the fair market value, ascertained in the manner provided by law, must be charged for the disposition of an interest in state land; and

WHEREAS, the 55th Legislature intends that the Department of Natural Resources and Conservation honor the historical uses of state land for rights-of-way."

*Termination:* Section 5, Ch. 461, L. 1997, provided: "[This act] terminates October 1, 2003."

**Case Notes**

*Market Value of State Land Rights-of-Way Set by Statute at 1972 Levels — Unconstitutionality:* The plain language of this section as it read prior to the 2001 amendments required that full market valuations of right-of-way acreage for historic deeds on state trust lands be based on the median values for the classifications of land at 1972 levels, leaving the Department of Natural Resources and Conservation no choice but to use those levels instead of current market value. The state argued that pursuant to 40 A.G. Op. 24 (1983), the figures in this section were merely a minimum above which the Department may charge full market value. However, the statutory language prior to amendment was mandatory rather than discretionary and violated the provisions of the Montana Constitution and The Enabling Act, which require the state to receive full market value for school trust lands, and thus is unconstitutional. Montanans for Responsible Use of School Trust v. State ex rel. Bd. of Land Comm'rs, 1999 MT 263, 296 M 402, 989 P2d 800, 56 St. Rep. 1065 (1999).

### 77-1-131. State lands historic right-of-way account.

**Compiler's Comments**

*Extension of Termination Date:* Sections 2 through 5, Ch. 325, L. 2015, amended secs. 2 through 5, Ch. 325, L. 2011, by extending the termination dates imposed by those sections to October 1, 2031. Effective April 27, 2015.

*Extension of Termination Date:* Sections 2 through 6, Ch. 325, L. 2011, amended sec. 5, Ch. 461, L. 1997, sec. 6, Ch. 270, L. 2001, and secs. 2, 3, and 4, Ch. 57, L. 2005, by extending the termination dates imposed by those sections to October 1, 2025. Effective October 1, 2011.

*Extension of Termination Date:* Sections 2 and 3, Ch. 57, L. 2005, amended sec. 5, Ch. 461, L. 1997, and sec. 6, Ch. 270, L. 2001, by extending the termination dates imposed by those sections to October 1, 2016.

*Extension of Termination Date:* Section 6, Ch. 270, L. 2001, amended sec. 5, Ch. 461, L. 1997, by extending the termination date imposed by Ch. 461 to October 1, 2011. Effective April 10, 2001.

*1999 Amendment:* Chapter 389 in second sentence after "account" substituted "must be used" for "is statutorily appropriated to the department, as provided in 17-7-502". Amendment effective July 1, 1999.

*Preamble:* The preamble attached to Ch. 461, L. 1997, provided: "WHEREAS, the Department of State Lands, as the predecessor of the Department of Natural Resources [and Conservation] with respect to state land, encouraged the development of road rights-of-way across state land before 1972; and

WHEREAS, the Department of State Lands either did not charge for these rights-of-way or charged minimal fees for the rights-of-way before 1972; and

WHEREAS, many of the road rights-of-way granted by the Department of State Lands were granted without a written easement; and

WHEREAS, Article X, section 11(2), of the Montana Constitution requires that the fair market value, ascertained in the manner provided by law, must be charged for the disposition of an interest in state land; and

WHEREAS, the 55th Legislature intends that the Department of Natural Resources and Conservation honor the historical uses of state land for rights-of-way."

*Termination:* Section 5, Ch. 461, L. 1997, provided: "[This act] terminates October 1, 2003."

### 77-1-132. Earnings reserve account.

**Compiler's Comments**

*Effective Date:* Section 29, Ch. 465, L. 2009, provided that this section is effective July 1, 2009.

### 77-1-134. Irrigation structures, utility structures, and bridges of formerly taxable land — water rights.

**Compiler's Comments**

*2011 Amendment:* Chapter 359 in (1) in second sentence at beginning and in (2) inserted "Subject to 77-1-1112(10)"; and made minor changes in style. Amendment effective October 1, 2011.

*Severability:* Section 15, Ch. 359, L. 2011, was a severability clause.

*Preamble:* The preamble attached to Ch. 472, L. 2009, provided: "WHEREAS, the Department of Natural Resources and Conservation has asserted regulatory jurisdiction over the beds of various rivers and streams based on the premise that the streams are navigable and that the state therefore owns the riverbeds and streambeds; and

WHEREAS, very few Montana rivers or streams have been adjudicated as navigable, either in whole or in part; and

WHEREAS, it is not economically feasible for either the Department of Revenue or the Department of Natural Resources and Conservation to obtain judicial determinations of riverbed or streambed ownership by statewide quiet title actions, yet that ownership determination may not be made legally by unilateral administrative decisions; and

WHEREAS, if the Department of Natural Resources and Conservation wishes to assert regulatory control over the bed of a river or stream that has not been adjudicated to be navigable and was not determined navigable at the time of the original federal government surveys of the public land as evidenced by the recorded and monumented surveys of the meander lines of the river, it is required to provide written notice of the claim of state ownership to the affected property owners; and

WHEREAS, because the present claims of state ownership of riverbeds and streambeds is contrary to longstanding administrative practice and because the test for navigability depends upon evidence concerning the log floating capability of a stream at the time of statehood, there is no presumption of correctness attached to a navigability claim made by any state agency."

*Legislative Findings:* Section 1, Ch. 472, L. 2009, provided: "The legislature finds that:

(1) for 120 years since the admission of Montana as a state in 1889, the department of revenue and its predecessor agencies have taxed some landowners whose property abuts a river or stream on the assumption that those riparian landowners owned the property to the middle of the river or stream;

(2) in Montana v. United States, 450 U.S. 544 (1981), the United States supreme court recognized that if a river or stream is not navigable, the abutting riparian landowners own the land in the bed of the stream to the middle of the stream, but if a river or stream is navigable, the state owns the bed of the river or stream, having acquired ownership from the United States when the state was admitted to the union, and therefore Montana owns the bed of the Bighorn River where it flows through the Crow reservation;

(3) for the purpose of determining the ownership of a riverbed or streambed, the test of navigability is whether logs could be floated in the stream at the time of statehood as stated in Montana Coalition for Stream Access v. Curran, 210 Mont. 38, 682 P.2d 163 (1984), based upon The Montello, 87 U.S. 430 (1874), Sierra Pacific Power Co. v. Federal Energy Regulatory Commission, 681 F.2d 1134 (9th Cir. 1982), and State of Oregon v. Riverfront Protection Association, 672 F.2d 792 (9th Cir. 1982);

(4) beginning with tax assessments that were effective January 1, 2008, the lien date for real property taxes, the department of revenue reassessed the property of riparian landowners whose land abuts various rivers and streams by reducing the amount of land assessed based upon the premise that the landowners did not own to the middle of the river or stream because the river or stream was navigable and these reassessments, if correct, have enormous impact upon the riparian landowners because they affect land titles, acreage owned, qualification for various conservation and price support programs, and ownership of water diversion facilities and other structures that the riparian landowners have constructed for water usage;

(5) the 2008 reassessments were made by simply sending out tax bills without any notice that they were based upon a claim of state ownership of the riverbeds or streambeds and some riparian landowners have paid the first installment of 2008 real property taxes based upon the

reassessments without realizing that a claim of state ownership of the riverbeds and streambeds was the basis for the reassessments;

(6) procedural due process requires that if a claim of change in ownership is involved, the state agency involved shall afford the affected property owners both notice of the claim and the opportunity to be heard;

(7) the 2008 real property tax assessments based upon claims of state ownership did not comply with the constitutional requirement for procedural due process and under that circumstance payment by the property owners of taxes based on the reassessment does not constitute acquiesence in the underlying state ownership claim;

(8) The department of revenue is required to provide written notice to the affected property owners of the state's claim of ownership so that the affected property owners have a fair opportunity to be heard and to dispute the government's claim."

*Effective Date:* Section 18, Ch. 472, L. 2009, provided: "[This act] is effective on passage and approval." Approved May 6, 2009.

### 77-1-141. Determination of date of delivery.

**Compiler's Comments**

*Preamble:* The preamble attached to Ch. 67, L. 2001, provided: "WHEREAS, the state administers over 10,000 leases, licenses, permits, and agreements on state lands; and

WHEREAS, as a result of the decisions of the Montana Supreme Court in Johansen v. Department of Natural Resources and Conservation, 288 Mont. 39, 955 P.2d 653 (1998), and Johansen v. State, 1999 MT 187, 983 P.2d 962 (1999), the determination of the date of delivery for the submission of documents and payments required by the terms of leases, licenses, permits, and agreements issued by the Board of Land Commissioners or the Department has been made less efficient; and

WHEREAS, there is a need to provide a uniform and exclusive method for determining the date of delivery of documents and payments to the state for uses of state lands."

*Effective Date:* Section 3, Ch. 67, L. 2001, provided that this section is effective on passage and approval. Approved March 16, 2001.

### 77-1-145. Enabling Act enforcement — findings.

**Compiler's Comments**

*Effective Date:* Section 3, Ch. 345, L. 2015, provided: "[This act] is effective on passage and approval." Chapter 345, L. 2015, was enacted into law without the governor's signature on April 27, 2015.

## Part 2

## Board of Land Commissioners

**Part Compiler's Comments**

*Severability — Board to Bridge Gap:* Section 122, Ch. 60, L. 1927, provided: "If any subdivision, section or part of section of this act should be found to be unconstitutional by the Supreme Court of this State, such finding of unconstitutionality shall not affect the remainder of the act but such remainder shall remain in full force and effect and shall be carried out, and the State Board of Land Commissioners is hereby specifically charged with the duty of bridging over as far as possible any gap which might result in case any portion or portions of this act should be found unconstitutional by exercising the general grant of powers given to it by the Constitution of the State."

### 77-1-201. Board — meetings and officers.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 77-1-202. Powers and duties of board.

**Compiler's Comments**

*2005 Amendment:* Chapter 335 inserted (1)(b) requiring administration of the trust to provide for the long-term support of education; and made minor changes in style. Amendment effective July 1, 2005.

*1995 Amendment:* Chapter 222 in (1), in second sentence after "guiding", deleted "rule and" and at end inserted "as provided in The Enabling Act"; and made minor changes in style.

*1991 Amendment:* Inserted (2) providing that the people are entitled to general recreational use of state lands to the extent that trusts are compensated for value of the recreation. Amendment effective March 1, 1992.

*1991 Statement of Intent:* The statement of intent attached to Ch. 609, L. 1991, provided: "A statement of intent is required for this bill because [section 13] [77-1-804] requires the board of land commissioners to adopt rules to implement the provisions for recreational use of state lands established by this bill. Consistent with the provisions of this bill, it is intended that public recreational use of state lands be accomplished to the fullest extent possible. It is acknowledged that certain state lands will merit closure from public recreational use due to certain considerations, including but not limited to the presence of growing crops and livestock and the proximity of dwellings and agricultural buildings. Nothing in this bill authorizes or purports to authorize trespass on private lands to reach state lands.

This bill requires the board to adopt rules governing the actions of the recreational user of state lands. These rules must address protection of the resource value, compensation for damage to improvements, criteria for closure, restrictions upon certain recreational activities, and, when state land is posted, provision for the recreational user to contact the lessee or his agent to provide prior notice of the type and extent of the recreational use contemplated.

[Section 18] [77-1-810] authorizes the department to adopt rules for weed control activities. It is the intent of the legislature that the board establish a procedure whereby weed infestations on state lands that are attributable to recreational access are controlled or eradicated. Examples of procedures that fulfill this intent include:

(1) a departmental weed control program;
(2) payments for weed control activities; and
(3) payments to county weed boards.

It is the intent of the legislature that the board evaluate the implementation of this bill, develop recommendations to address problems, if any, that arise through the course of rulemaking and implementation, and report its findings and recommendations to the 53rd legislature."

*Severability:* Section 21, Ch. 609, L. 1991, was a severability clause.

*Applicability:* Section 22, Ch. 609, L. 1991, provided: "On passage and approval of [this act], the board of land commissioners shall commence proceedings to adopt rules to be effective March 1, 1992. The department of state lands [now department of natural resources and conservation] and the department of fish, wildlife, and parks shall commence proceedings and arrangements necessary to establish a recreational use license to be effective March 1, 1992." Approved April 24, 1991.

*1983 Amendment:* Inserted (2) requiring valuation of land after an appraisal by a qualified appraiser.

**Administrative Rules**

Title 36, chapter 2, subchapter 10, ARM General state land rules.
Title 36, chapter 11, subchapter 4, ARM State forest land management.
Title 36, chapter 25, ARM State land leasing.

**Case Notes**

*Proper Application of Profitability Method of Determining Fair Market Value of Hydroelectric Facility's Damages Owed to State for Past Use of State-Owned Riverbeds — Future Lease Terms Left to Board of Land Commissioners:*

After holding that the state was entitled to compensation for use of state-owned riverbeds by plaintiff hydroelectric utility, the District Court applied a profitability methodology to determine the productive value of the land in order to arrive at a fair market value for plaintiff's use of the riverbeds. Plaintiff contested the methodology, but the Supreme Court affirmed. The state uses productive value of the land in determining lease rates, and nothing in Montana law barred an award of damages based on plaintiff's profits, so income-based leasing was an appropriate method to calculate past damages in this case. Use of the Hydroelectric Resources Act (HRA), Title 77, ch. 4, part 2, was a proper mechanism to assess past damages, and the District Court's findings in support of the award were not clearly erroneous. The District Court also correctly left to the discretion of the Board of Land Commissioners the terms of any future lease with plaintiff and properly held that the Board was not bound by the same method used to calculate past damages in developing future lease terms. PPL Mont., LLC v. St., 2010 MT 64, 355 Mont. 402, 229 P.3d 421, following State ex rel. Thompson v. Babcock, 147 Mont. 46, 409 P.2d 808 (1966).

Following the Montana Supreme Court's decision, PPL appealed to the United States Supreme Court. The United States Supreme Court reversed the Montana court's ruling in part, holding that the Montana court had not properly considered the rivers in question on a segment-by-segment basis and had not determined whether they were navigable in fact at the time of statehood. The United States Supreme Court remanded the case for proceedings consistent with its opinion. PPL Montana, LLC v. Montana, 565 US 576, 132 S Ct 1215 (2012). See also St. v. Avista Corp., 2023 MT 6, 411 Mont. 192, 523 P.3d 44, in which the Supreme Court reversed the District Court's order interpreting a retroactivity clause in the parties' consent judgment as being unripe and constituting an advisory opinion.

*Harvest-Level Accounting of Timber Sales Not Required:* Plaintiff challenged the methodology used by the state Board of Land Commissioners in approving the harvest and sale of timber in state forests, asserting that this section required harvest-level accounting. The District Court granted summary judgment to defendants, ruling that the statute did not require the Board to reconcile timber sale costs and benefits at the harvest level. On appeal, the Supreme Court noted that the statute, on its face, does not require accountings at all, but rather requires the Board to secure the largest measure of legitimate and reasonable advantage to the state. The court declined to insert what has been omitted from the statutory language, despite plaintiff's contention that a comprehensive economic evaluation was implicit in the statute. The court held that it could not be concluded that the Board has not secured or could not secure the largest measure of benefit from timber sales without harvest-level accounting, given the multiple purposes that the Board must fulfill with regard to school trust lands, the broad discretion and deference that the law provides to the Board in administering school trust lands, and current statutory accounting requirements. Thus, the Board is not legally required to conduct harvest-level review of timber sales and did not violate this section when it decided to forego harvest-level financial reconciliation in a timber sale. Summary judgment was affirmed. Friends of the Wild Swan v. Dept. of Natural Resources and Conservation, 2005 MT 351, 330 M 186, 127 P3d 394 (2005). See also State ex rel. Thompson v. Babcock, 147 M 46, 409 P2d 808 (1966), and Montanans for Responsible Use of School Trust v. State ex rel. Bd. of Land Comm'rs, 1999 MT 263, 296 M 402, 989 P2d 800 (1999).

*Repealed Statute Regarding Sale or Lease of School Trust Lands to School Districts — No Justiciable Controversy or Action Upon Which Relief Could Be Granted:* Former 20-6-621(4) allowed the Board of Land Commissioners to sell, for appraised value, or to lease, for $1 a year, school trust lands to a school district. The Department of Natural Resources and Conservation stipulated that the provision was unconstitutional because it made state lands available for less than full market value. The District Court agreed, noting that leasing school trust lands to some school districts would favor only some of the beneficiaries and not the school trust as a whole. The Legislature concurred and repealed the subsection in 1999. Plaintiff subsequently sued the Department, the Board, and the state, contending that the Department unlawfully determined that the provision was unconstitutional and failed to defend the constitutionality of the provision. The state moved to dismiss the complaint on grounds that no justiciable controversy existed and that the complaint alleged no cause of action upon which relief could be granted. The District Court granted summary judgment for the state, and on appeal, the Supreme Court affirmed. Any determination that the Department exceeded its authority would have had no bearing on the existing rights or interests at issue, and a judgment granting the relief sought would not have effectively operated to resolve any issue in the case. Thus, there was no justiciable case or controversy, and the claim was properly dismissed. Advocates for Educ., Inc. v. Dept. of Natural Resources and Conservation, 2004 MT 230, 322 M 429, 97 P3d 553 (2004), following Mont.-Dak. Util. Co. v. Billings, 2003 MT 332, 318 M 862, 80 P3d 1247 (2003).

*Standard of Review Applicable to Noncontested Cases — Approval of Plan for Drilling Exploratory Well:* The District Court incorrectly applied the "clearly erroneous" standard set out in 2-4-704 when reviewing whether the Department of State Lands (now Department of Natural Resources and Conservation) properly approved a plan proposing drilling of an exploratory well on a leased tract near Glacier Park. The court found that shortcomings in the approval procedure, coupled with the fact that information gathered by the Department indicating that the well would generate a significant environmental impact, necessitated preparation of an environmental impact statement. However, 2-4-704 was inapplicable because the case was not truly contested. No hearing was requested or held before the Department, there was no action initiated until after the Department had approved the operating plan, and there was no evidentiary record against which to measure the Department's decision and determine whether it was clearly erroneous. Rather, the proper standard of review was whether the record established that the Department acted arbitrarily, capriciously, or unlawfully. The fact that the Department conducted two preliminary environmental reviews, conditioned approval on 42 protective stipulations, and considered the concerns raised in the approval process and took significant steps to address them indicated that the decision to forego preparation of an environmental impact statement was not arbitrary, capricious, or illegal. N. Fork Preservation Ass'n v. Dept. of State Lands, 238 M 451, 778 P2d 862, 46 St. Rep. 1409 (1989), distinguishing Conner v. Burford, 605 F. Supp. 107 (D.C. Mont. 1985), and followed in Ravalli County Fish & Game Ass'n, Inc. v. Dept. of State Lands, 273 M 371, 903 P2d 1362, 52 St. Rep. 996 (1995), Mont. Envtl. Information Center, Inc. v. Dept. of Transportation, 2000 MT 5, 298 M 1, 994 P2d 676, 57 St. Rep. 18 (2000), and Friends of the Wild Swan v. Dept. of Natural Resources and Conservation, 2000 MT 209, 301 M 1, 6 P3d 972, 57 St. Rep. 816 (2000), in which omission of a cumulative impact analysis was directly related to the "unlawful" portion of the MEPA standard of review. See also Madison River R.V. Ltd. v. Ennis, 2000 MT 15, 298 M 91, 994 P2d 1098, 57 St. Rep. 84 (2000).

*Lease Rental Affected by Land Reclassification — Writ of Prohibition Proper:* Lessees developed a water spreading project on a portion of their state grazing lease, and the Department of State Lands (now Department of Natural Resources and Conservation) reclassified 32 acres of the lease as agricultural. Lessees later concluded that the project was inadequate for producing a profitable crop at the higher agricultural rental rates. They negotiated to pay back a loan for the project and reverted the land to grazing. After the loan was repaid, there were no other agreements supplementing the original lease. However, the Department subsequently determined that the 32 acres should retain the agricultural classification, sought rental at the agricultural rate, and canceled the lease upon nonpayment. The District Court properly filed a writ of prohibition restraining the Department from canceling the lease, re-leasing the property to other parties, and taking action against lessees for trespass after finding the Department was in excess of its jurisdiction for canceling the lease for nonpayment of agricultural rental when the property was leased for grazing only. Winchell v. Dept. of State Lands, 235 M 10, 764 P2d 1267, 45 St. Rep. 2121 (1988).

*School Trust Land Water Rights Owned by State:* In a case involving a dispute over ownership of water rights on state school trust lands, the Supreme Court ruled that title to the surface and ground water rights on school trust lands vests in the state and that the lessee, in making appropriations on and for school trust sections, is acting on behalf of the state. It is only through state action that the lessee is on the land, and Montana law expressly provides that the lessee must be reimbursed for all capital expenditures made in putting the water to beneficial use. The state is the beneficial user of the water, and its duty as trustee of the school trust lands prohibits it from alienating any interest in the land without receiving full compensation for it or from giving up control over the water rights. Dept. of State Lands v. Pettibone, 216 M 361, 702 P2d 948, 42 St. Rep. 869 (1985). However, see Advocates for School Trust Lands v. St., 2022 MT 46, 408 Mont. 39, 505 P.3d 825, holding that 85-2-441, which allows a water right owner to put water from a well or developed spring located on private land to beneficial use on state trust land and presumes against a state ownership in that water right, was not facially unconstitutional.

*Board's Fiduciary Duty — Basis of Discretionary Power — No Mandamus to Compel Discretionary Action:* The Board and the Department are under a fiduciary duty to manage the school lands according to the highest standards. Therefore, the Department's power when administering the trust is discretionary, and a Writ of Mandamus may not be issued to compel the Department to approve an assignment of a lease. Jeppeson v. St., 205 M 282, 667 P2d 428, 40 St. Rep. 1272 (1983).

*Leasing State-Owned Land:* State Board of Land Commissioners had discretion to award 10-year lease to bidder at 33⅓% crop share, rather than to another who bid 50%, especially where lessee had farmed the land before and the Board was taking less risk. State ex rel. Thompson v. Babcock, 147 M 46, 409 P2d 808 (1966).

*Lapse of Time Not Confirming a Void Act:* In a proceeding in mandamus, commenced in 1937, to compel the state Board of Land Commissioners to refund the purchase price of a tract of state land sold in 1910, in violation of Art. XVII, sec. 1, 2, 1889 Mont. Const. (similar to Art. X, sec. 11, 1972 Mont. Const.), the defenses of laches and Statute of Limitations may not be relied upon, lapse of time not confirming a void act. Under 77-1-303, the Board may refund money. State ex rel. Boorman v. St. Bd. of Land Comm'rs, 109 M 127, 94 P2d 201 (1939).

*Protection of Interest of State:* An arrangement whereby the state will share in all the natural gas brought to the surface on a certain unified area in proportion to the acreage owned by the state in that area fully protects the rights of the state in securing to it its full share of the gas underlying its lands. Toomey v. St. Bd. of Land Comm'rs, 106 M 547, 81 P2d 407 (1938).

**Attorney General's Opinions**

*Diversion of School Lands:* The state must actually compensate its school trust in money for the full appraised value of school trust lands designated as or exchanged for natural areas to prevent a breach of trust under The Enabling Act and the Montana Constitution. 36 A.G. Op. 92 (1976).

### 77-1-203. Multiple-use management.

#### Compiler's Comments

*1991 Amendment:* Inserted (3) providing that state lands are open for general recreational use subject to certain conditions; and inserted (4) requiring a provision in land leases that the land may not be closed to general recreational use without advance written permission. Amendment effective March 1, 1992.

*1991 Statement of Intent:* The statement of intent attached to Ch. 609, L. 1991, provided: "A statement of intent is required for this bill because [section 13] [77-1-804] requires the board of land commissioners to adopt rules to implement the provisions for recreational use of state lands established by this bill. Consistent with the provisions of this bill, it is intended that public recreational use of state lands be accomplished to the fullest extent possible. It is acknowledged that certain state lands will merit closure from public recreational use due to certain considerations, including but not limited to the presence of growing crops and livestock and the proximity of dwellings and agricultural buildings. Nothing in this bill authorizes or purports to authorize trespass on private lands to reach state lands.

This bill requires the board to adopt rules governing the actions of the recreational user of state lands. These rules must address protection of the resource value, compensation for damage to improvements, criteria for closure, restrictions upon certain recreational activities, and, when state land is posted, provision for the recreational user to contact the lessee or his agent to provide prior notice of the type and extent of the recreational use contemplated.

[Section 18] [77-1-810] authorizes the department to adopt rules for weed control activities. It is the intent of the legislature that the board establish a procedure whereby weed infestations on state lands that are attributable to recreational access are controlled or eradicated. Examples of procedures that fulfill this intent include:

(1) a departmental weed control program;
(2) payments for weed control activities; and
(3) payments to county weed boards.

It is the intent of the legislature that the board evaluate the implementation of this bill, develop recommendations to address problems, if any, that arise through the course of rulemaking and implementation, and report its findings and recommendations to the 53rd legislature."

*Severability:* Section 21, Ch. 609, L. 1991, was a severability clause.

*Applicability:* Section 22, Ch. 609, L. 1991, provided: "On passage and approval of [this act], the board of land commissioners shall commence proceedings to adopt rules to be effective March 1, 1992. The department of state lands [now department of natural resources and conservation] and the department of fish, wildlife, and parks shall commence proceedings and arrangements necessary to establish a recreational use license to be effective March 1, 1992." Approved April 24, 1991.

#### Administrative Rules

Title 36, chapter 11, subchapter 4, ARM State forest land management.
Title 36, chapter 25, ARM State land leasing.

#### Case Notes

*Harvest-Level Accounting of Timber Sales Not Required:* Plaintiff challenged the methodology used by the state Board of Land Commissioners in approving the harvest and sale of timber in state forests, asserting that 77-1-202 required harvest-level accounting. The District Court granted summary judgment to defendants, ruling that the statute did not require the Board to reconcile timber sale costs and benefits at the harvest level. On appeal, the Supreme Court noted that the statute, on its face, does not require accountings at all, but rather requires the Board to secure the largest measure of legitimate and reasonable advantage to the state. The court declined to insert what has been omitted from the statutory language, despite plaintiff's contention that a comprehensive economic evaluation was implicit in the statute. The court held that it could not be concluded that the Board has not secured or could not secure the largest measure of benefit from timber sales without harvest-level accounting, given the multiple purposes that the Board must fulfill with regard to school trust lands, the broad discretion and deference that the law provides to the Board in administering school trust lands, and current statutory accounting requirements. Thus, the Board is not legally required to conduct harvest-level review of timber sales and did not violate 77-1-202 when it decided to forego harvest-level financial reconciliation in a timber sale. Summary judgment was affirmed. Friends of the Wild Swan v. Dept. of Natural Resources and Conservation, 2005 MT 351, 330 M 186, 127 P3d 394 (2005). See also State ex rel. Thompson v. Babcock, 147 M 46, 409 P2d 808 (1966), and Montanans for Responsible Use of School Trust v. State ex rel. Bd. of Land Comm'rs, 1999 MT 263, 296 M 402, 989 P2d 800 (1999).

*Allowance of Change in Grazing Permit Not Ministerial Act — EIS Required:* Shoberg transferred his grazing permit to Madden, and Madden changed from grazing cattle to grazing sheep. The Department of State Lands (now Department of Natural Resources and Conservation) allowed the grazing of sheep to continue, notwithstanding that the Department had information indicating that the grazing of sheep would adversely impact upon bighorn sheep reintroduced into the area. The plaintiffs brought an action to require the completion of an environmental impact statement (EIS). The Supreme Court held that an EIS was required because the Department was allowing an action, grazing of sheep, to go forward that could have a significant effect upon the quality of the human environment, notwithstanding statutes requiring the Department to protect the best interests of the state, including consideration of consequences to environment and wildlife. Ravalli County Fish & Game Ass'n, Inc. v. Dept. of State Lands, 273 M 371, 903 P2d 1362, 52 St. Rep. 996 (1995).

### 77-1-204. Power to sell, lease, or exchange certain state trust lands.

**Compiler's Comments**

*2003 Amendment:* Chapter 404 in (1) in first sentence after "state" inserted "trust" and at end of second sentence extended lease period from 40 years to 99 years; in (2) at end of first sentence substituted "state trust land" for "state forests and state parks"; and made minor changes in style. Amendment effective July 1, 2003.

*Saving Clause:* Section 18, Ch. 404, L. 2003, was a saving clause.

*Severability:* Section 19, Ch. 404, L. 2003, was a severability clause.

*Applicability:* Section 21, Ch. 404, L. 2003, provided: "[This act] applies to all leases for commercial purposes made or renewed on or after July 1, 2003."

*1991 Amendment:* In (1), at end of first sentence, deleted subsection reference to 77-1-203. Amendment effective March 1, 1992.

*Applicability:* Section 22, Ch. 609, L. 1991, provided: "On passage and approval of [this act], the board of land commissioners shall commence proceedings to adopt rules to be effective March 1, 1992. The department of state lands [now department of natural resources and conservation] and the department of fish, wildlife, and parks shall commence proceedings and arrangements necessary to establish a recreational use license to be effective March 1, 1992." Approved April 24, 1991.

*1985 Amendment:* In (1) at end, increased lease period limitation from 25 to 40 years.

**Administrative Rules**

Title 36, chapter 2, subchapter 10, ARM General state land rules.

Title 36, chapter 25, ARM State land leasing.

**Case Notes**

*Statutes Presumed Constitutional — Burden of Proof — Standard of Review:* In deciding whether certain statutes violated the mandates of the Montana Constitution and The Enabling Act regarding use of school trust lands, the Supreme Court eschewed standards of review suggested by both parties, holding that the proper standard was whether the District Court's conclusions of law were correct. Statutes are presumed to be constitutional, and the Supreme Court will avoid an unconstitutional interpretation if possible. A party challenging the constitutionality of a statute has the burden of proving it unconstitutional beyond a reasonable doubt, and any doubt will be resolved in favor of the statute. Montanans for Responsible Use of School Trust v. State ex rel. Bd. of Land Comm'rs, 1999 MT 263, 296 M 402, 989 P2d 800, 56 St. Rep. 1065 (1999), following Steer, Inc. v. Dept. of Revenue, 245 M 470, 803 P2d 601, 47 St. Rep. 2199 (1990), St. v. Martel, 273 M 143, 902 P2d 14, 52 St. Rep. 873 (1995), Davis v. Union Pac. RR Co., 282 M 233, 937 P2d 27, 54 St. Rep. 328 (1997), and St. v. Nye, 283 M 505, 943 P2d 96, 54 St. Rep. 766 (1997), and followed in Montanans for Responsible Use of School Trust v. Darkenwald, 2005 MT 190, 328 M 105, 119 P3d 27 (2005), and Eklund v. Wheatland County, 2009 MT 231, 351 M 370, 212 P3d 297 (2009).

### 77-1-208. Cabin site licenses and leases — method of establishing value.

**Compiler's Comments**

*2015 Amendment:* Chapter 361 in (1)(a) in third sentence near middle substituted "statewide reappraisal" for "statewide periodic revaluation" and at end deleted "without any adjustments as a result of phasing in values". Amendment effective April 29, 2015.

*Retroactive Applicability:* Section 34, Ch. 361, L. 2015, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 2014, and to the reappraisal cycle beginning January 1, 2015."

*2011 Amendment:* Chapter 401 in (1) at end inserted "one of the following methods"; inserted (1)(b) regarding open competitive bidding process; inserted (2) allowing optional valuation methods; in (4)(a) at beginning inserted "Subject to subsection (4)(b)"; inserted (4)(b) regarding valuation and sale of improvements; and made minor changes in style. Amendment effective May 12, 2011.

*2001 Amendments — Composite Section:* Chapter 11 at end of (1) substituted "chapter 15" for "chapter 2". Amendment effective February 14, 2001.

Chapter 270 in (3) near beginning after "set forth in" substituted "77-6-302, 77-6-303, and 77-6-306" for "77-6-302 through 77-6-306". Amendment effective April 20, 2001.

*1997 Amendment:* Chapter 463 in (1), at end of fourth sentence, inserted "without any adjustments as a result of phasing in values". Amendment effective April 30, 1997.

*Effective Date — Retroactive Applicability:* Section 15, Ch. 463, L. 1997, provided: "[This act] is effective on passage and approval, and [sections 1 through 9] [7-6-2514 (now repealed), 15-6-134, 15-7-102, 15-7-111, 15-10-401, 15-10-402, 15-10-412 (now repealed), 15-36-323 (now repealed), and 77-1-208] apply retroactively, within the meaning of 1-2-109, to property tax years beginning after December 31, 1996."

*1993 Amendment:* Chapter 586 in (1), in first sentence near beginning after "shall", inserted bracketed reference to Advisory Council, after "fee" inserted "based on the full market value", and after "site" deleted "subject to a license or lease in effect on January 1, 1988" and in second sentence, near beginning after "must", substituted "attain full market value based on" for "be 3.5% of the" and at end, after "revenue", deleted "or $150, whichever is greater"; deleted (4) that read: "(4) Nothing in this section may be construed as a delegation of rulemaking authority to the board"; and made minor changes in style. Amendment effective July 1, 1993.

*Applicability:* Section 16(1), Ch. 586, L. 1993, provided: "[Section 1] [77-1-208] applies to leases entered into or renewed on or after [the effective date of this act] [effective July 1, 1993] and, for leases in effect on [the effective date of this act] [effective July 1, 1993], to rentals due after rental adjustments made pursuant to adjustment provisions in the lease."

*1989 Amendment:* Rewrote (1), (2), and (3) relating to percentage of market value appraisal (see 1987 MCA for former text) to require Board to value cabin site licenses and leases at greater of 3.5% of value determined by Department of Revenue or $150 and directing Board to follow procedures in 77-6-302 through 77-6-306 for disposal or valuation of cabin site improvements (see 1989 Session Law for text); and made minor changes in form. Amendment effective May 22, 1989.

*Effective Date — Retroactive Applicability:* Section 3, Ch. 705, L. 1989, provided: "[This act] is effective on passage and approval [approved May 22, 1989] and applies retroactively, within the meaning of 1-2-109, to licenses or leases on cabin sites entered into or extended on or after January 1, 1988."

*Preamble:* The preamble to Ch. 459, L. 1983, provided: "WHEREAS, on February 13, 1981, the Board of Land Commissioners proposed to adopt rules concerning surface licenses and leases for the use of state forest lands for recreational cabin sites by private individuals, which rules would have established the market value of recreational cabin site licenses and leases by a system of competitive bidding; and

WHEREAS, the rules would have allowed out-of-state interests and other parties to increase by competitive bidding the cost of current cabin site licenses and leases and would thereby have worked a hardship on or dispossessed current licensees and lessees and were therefore subsequently withdrawn by the Board; and

WHEREAS, the policy of this state for the leasing of state lands as provided in 77-1-202 is that the guiding principle in the leasing of state lands is "that these lands and funds are held in trust for the support of education and for the attainment of other worthy objects helpful to the well-being of the people of this state"; and

WHEREAS, allowing current cabin site licensees and lessees to continue to enjoy the benefits of existing licenses and leases and the benefits of their labor is a worthy object helpful to the well-being of the people of this state in that it promotes continuity in the care of state lands, promotes use of state lands by the public by granting a minimal expectation of continuing enjoyment, and promotes satisfaction with governmental processes.

THEREFORE, it is the intent of this bill to direct that if the Board of Land Commissioners adopts any rules under whatever existing rulemaking authority it may have to establish the market value of current cabin site licenses or leases, that the Board, in furtherance of the state policy expressed in 77-1-202, adopt a method of establishing the market values of cabin site licenses and leases which would not cause undue disruption to the lives and property of and useful enjoyment by current licensees and lessees."

**Administrative Rules**

Title 36, chapter 25, subchapter 1, ARM Surface management rules.

Title 36, chapter 25, subchapter 10, ARM Cabinsite leasing.

**Case Notes**

*State Land Cabin Site Renewal Policy Not Violative of Obligation to Obtain Full Market Value:* Plaintiff contended that this section is facially invalid because the use of a cabin site renewal policy that did not employ competitive bidding was calculated to keep cabin site rental rates below full market value. However, nothing in the plain language of this section abrogates the mandate that full market value be obtained for school trust lands. Plaintiff failed to show that the statute violates the duty of undivided loyalty or that the preference accorded lessees on cabin site leases on state lands resulted in renewal rates below market value. The statute legislatively establishes a method by which full market value is obtained, which is allowed pursuant to Jerke v. Dept. of State Lands, 182 M 294, 597 P2d 49 (1979), but the language of this section nevertheless requires that full market value be obtained, by whatever method is used, and therefore on its face does not violate the trust. Thus, the District Court correctly held that the renewal preference in this section does not violate the school trust requirements of the Montana Constitution or The Enabling Act of 1889. Montanans for Responsible Use of School Trust v. State ex rel. Bd. of Land Comm'rs, 1999 MT 263, 296 M 402, 989 P2d 800, 56 St. Rep. 1065 (1999).

*State Land Cabin Site Rental Policy Violative of School Trust Obligation to Obtain Fair Market Value:* The policy employed by the Department of Natural Resources and Conservation in renting cabin sites on state lands, in a manner that resulted in below-market rentals, violated the state's school trust obligations under the Montana Constitution and The Enabling Act of 1889, even though this section is facially valid because it requires that full market value be obtained. Montanans for Responsible Use of School Trust v. State ex rel. Bd. of Land Comm'rs, 1999 MT 263, 296 M 402, 989 P2d 800, 56 St. Rep. 1065 (1999), following State ex rel. Thompson v. Babcock, 147 M 46, 409 P2d 808 (1966), and Jerke v. Dept. of State Lands, 182 M 294, 597 P2d 49 (1979).

## 77-1-209. Leasing rules.

**Compiler's Comments**

*1993 Amendment:* Chapter 586 inserted second sentence concerning procedure for setting fees and rental rates and inserted third sentence concerning content of procedure. Amendment effective July 1, 1993.

**Administrative Rules**

Title 36, chapter 2, subchapter 10, ARM General state land rules.

Title 36, chapter 25, ARM State land leasing.

## 77-1-211. Acceptance of federal land grants.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 in (3) substituted "department of environmental quality" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1989 Amendment:* Inserted (3) relating to land granted under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980.

## 77-1-218. Public school land acquisition account.

**Compiler's Comments**

*2015 Amendment:* Chapter 55 in (3) substituted "school facility and technology account" for "school facility improvement account". Amendment effective October 1, 2015.

*Bond Authorization:* Section 9, Ch. 485, L. 2009, authorized the board of examiners to issue and sell up to $21 million in general obligation bonds for public school land purchases.

Section 10, Ch. 485, L. 2009, appropriated up to $21 million from the general obligation bond proceeds to the board of land commissioners.

*Severability:* Section 12, Ch. 485, L. 2009, was a severability clause.

*Effective Date:* Section 15, Ch. 485, L. 2009, provided: "[This act] is effective on passage and approval." Chapter 485, L. 2009, was enacted into law without the governor's signature on May 10, 2009.

### 77-1-219. Public school land purchases — considerations — distributions.

**Compiler's Comments**

*2013 Amendment:* Chapter 264 in (4)(d) substituted "72-38-801" for "72-34-114". Amendment effective October 1, 2013.

*Severability:* Section 161, Ch. 264, L. 2013, was a severability clause.

*Bond Authorization:* Section 9, Ch. 485, L. 2009, authorized the board of examiners to issue and sell up to $21 million in general obligation bonds for public school land purchases.

Section 10, Ch. 485, L. 2009, appropriated up to $21 million from the general obligation bond proceeds to the board of land commissioners.

*Severability:* Section 12, Ch. 485, L. 2009, was a severability clause.

*Effective Date:* Section 15, Ch. 485, L. 2009, provided: "[This act] is effective on passage and approval." Chapter 485, L. 2009, was enacted into law without the governor's signature on May 10, 2009.

### 77-1-220. Offsetting purchases — proceeds — records.

**Compiler's Comments**

*2011 Amendment:* Chapter 362 in (1) near end after "77-1-219" inserted "and 77-1-229"; inserted (2) regarding inability to use certain proceeds for additional lands or land banking; inserted (3) regarding separate record of proceeds received; and made minor changes in style. Amendment effective May 9, 2011.

*Preamble:* The preamble attached to Ch. 362, L. 2011, provided: "WHEREAS, on March 30, 2010, the Montana Supreme Court in PPL Montana, LLC v. State, 2010 MT 64, 355 Mont. 402, 229 P.3d 421 (2010), affirmed the decision by the Montana First Judicial District Court, Lewis and Clark County, that the use of navigable riverbed lands for power generation subjected PPL Montana to the payment of damages under Montana's hydroelectric resources laws and held that the navigable riverbeds are part of the state's public land trust under Article X, section 11, of the Montana Constitution; and

WHEREAS, the Montana Supreme Court affirmed the judgment entered for the State of Montana in the amount of $40,956,180, plus postjudgment interest, as compensatory damages for PPL Montana's use of state-owned riverbeds from 2000 through 2007; and

WHEREAS, the Montana Supreme Court determined the riverbeds are held "in trust for the people", but it did not determine which specific beneficiaries are entitled to recovery from the award of compensatory damages and postjudgment interest; and

WHEREAS, the Montana Supreme Court did not determine whether past, present, or future beneficiaries are entitled to compensation; and

WHEREAS, in 1937 the Montana Legislature enacted legislation providing that when a navigable stream changes course, the abandoned bed belongs to the State of Montana to be held in trust for the benefit of public schools by enacting section 1, Chapter 36, Laws of 1937, now codified as section 77-1-102, MCA; and

WHEREAS, PPL Montana petitioned the United States Supreme Court to review the Montana Supreme Court's decision and overturn the award of damages; and

WHEREAS, compensatory damages and postjudgment interest have not been paid to the state based on PPL Montana's pending appeal to the United States Supreme Court; and

WHEREAS, it is the Legislature's intent to balance the interest of past, present, and future beneficiaries by clarifying that any money received by the State of Montana from PPL Montana as a result of the litigation cited in this preamble must be used to purchase higher-producing state lands while selling lower-producing state lands; and

WHEREAS, it is the Legislature's intent to distribute to the public schools the net interest and income earned on real property and appurtenances purchased."

*Retroactive Applicability:* Section 6, Ch. 362, L. 2011, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to the use of funds identified in [section 1] [77-1-228] prior to [the effective date of this act] [May 9, 2011]."

*Bond Authorization:* Section 9, Ch. 485, L. 2009, authorized the board of examiners to issue and sell up to $21 million in general obligation bonds for public school land purchases.

Section 10, Ch. 485, L. 2009, appropriated up to $21 million from the general obligation bond proceeds to the board of land commissioners.

*Severability:* Section 12, Ch. 485, L. 2009, was a severability clause.

*Effective Date:* Section 15, Ch. 485, L. 2009, provided: "[This act] is effective on passage and approval." Chapter 485, L. 2009, was enacted into law without the governor's signature on May 10, 2009.

### 77-1-223. State trust land report to trust beneficiaries and legislature — contents.

**Compiler's Comments**

*2021 Amendment:* See 2021 Session Law for amendment made by sec. 107, Ch. 261, L. 2021. Amendment effective April 20, 2021.

*2015 Amendment:* Chapter 195 substituted current text concerning reporting for former text that read: "The board shall annually prepare and provide to each beneficiary of a trust a separate financial report on the forested lands classified by 77-1-401 as Class 2 lands that are held in trust for the beneficiary. The report must include for each beneficiary:

(1) the total acreage of forested land held in trust;

(2) a summary of the asset value of the forested tracts held in trust;

(3) a calculation of the average return of revenue on asset value for the forested tracts held in trust; and

(4) a listing by each department land office of the total acreage of forested land administered for the trust beneficiary and a calculation of the average return of revenue on asset value for lands designated to the trust beneficiary." Amendment effective October 1, 2015.

*Effective Date:* Section 5, Ch. 462, L. 1999, provided that this section is effective July 1, 1999.

**Case Notes**

*Harvest-Level Accounting of Timber Sales Not Required:* Plaintiff challenged the methodology used by the state Board of Land Commissioners in approving the harvest and sale of timber in state forests, asserting that 77-1-202 required harvest-level accounting. The District Court granted summary judgment to defendants, ruling that the statute did not require the Board to reconcile timber sale costs and benefits at the harvest level. On appeal, the Supreme Court noted that the statute, on its face, does not require accountings at all, but rather requires the Board to secure the largest measure of legitimate and reasonable advantage to the state. The court declined to insert what has been omitted from the statutory language, despite plaintiff's contention that a comprehensive economic evaluation was implicit in the statute. The court held that it could not be concluded that the Board has not secured or could not secure the largest measure of benefit from timber sales without harvest-level accounting, given the multiple purposes that the Board must fulfill with regard to school trust lands, the broad discretion and deference that the law provides to the Board in administering school trust lands, and current statutory accounting requirements. Thus, the Board is not legally required to conduct harvest-level review of timber sales and did not violate 77-1-202 when it decided to forego harvest-level financial reconciliation in a timber sale. Summary judgment was affirmed. Friends of the Wild Swan v. Dept. of Natural Resources and Conservation, 2005 MT 351, 330 M 186, 127 P3d 394 (2005). See also State ex rel. Thompson v. Babcock, 147 M 46, 409 P2d 808 (1966), and Montanans for Responsible Use of School Trust v. State ex rel. Bd. of Land Comm'rs, 1999 MT 263, 296 M 402, 989 P2d 800 (1999).

### 77-1-228. Public land trust acquisition account.

**Compiler's Comments**

*Preamble:* The preamble attached to Ch. 362, L. 2011, provided: "WHEREAS, on March 30, 2010, the Montana Supreme Court in PPL Montana, LLC v. State, 2010 MT 64, 355 Mont. 402, 229 P.3d 421 (2010), affirmed the decision by the Montana First Judicial District Court, Lewis and Clark County, that the use of navigable riverbed lands for power generation subjected PPL Montana to the payment of damages under Montana's hydroelectric resources laws and held that the navigable riverbeds are part of the state's public land trust under Article X, section 11, of the Montana Constitution; and

WHEREAS, the Montana Supreme Court affirmed the judgment entered for the State of Montana in the amount of $40,956,180, plus postjudgment interest, as compensatory damages for PPL Montana's use of state-owned riverbeds from 2000 through 2007; and

WHEREAS, the Montana Supreme Court determined the riverbeds are held "in trust for the people", but it did not determine which specific beneficiaries are entitled to recovery from the award of compensatory damages and postjudgment interest; and

WHEREAS, the Montana Supreme Court did not determine whether past, present, or future beneficiaries are entitled to compensation; and

WHEREAS, in 1937 the Montana Legislature enacted legislation providing that when a navigable stream changes course, the abandoned bed belongs to the State of Montana to be held in trust for the benefit of public schools by enacting section 1, Chapter 36, Laws of 1937, now codified as section 77-1-102, MCA; and

WHEREAS, PPL Montana petitioned the United States Supreme Court to review the Montana Supreme Court's decision and overturn the award of damages; and

WHEREAS, compensatory damages and postjudgment interest have not been paid to the state based on PPL Montana's pending appeal to the United States Supreme Court; and

WHEREAS, it is the Legislature's intent to balance the interest of past, present, and future beneficiaries by clarifying that any money received by the State of Montana from PPL Montana as a result of the litigation cited in this preamble must be used to purchase higher-producing state lands while selling lower-producing state lands; and

WHEREAS, it is the Legislature's intent to distribute to the public schools the net interest and income earned on real property and appurtenances purchased."

*Effective Date:* Section 5, Ch. 362, L. 2011, provided that this section is effective on passage and approval. Approved May 9, 2011.

*Retroactive Applicability:* Section 6, Ch. 362, L. 2011, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to the use of funds identified in [section 1] [77-1-228] prior to [the effective date of this act] [May 9, 2011]."

### **77-1-229. Public land trust purchases.**

**Compiler's Comments**

*2013 Amendment:* Chapter 264 in (2)(d) substituted "72-38-801" for "72-34-114". Amendment effective October 1, 2013.

*Severability:* Section 161, Ch. 264, L. 2013, was a severability clause.

*Preamble:* The preamble attached to Ch. 362, L. 2011, provided: "WHEREAS, on March 30, 2010, the Montana Supreme Court in PPL Montana, LLC v. State, 2010 MT 64, 355 Mont. 402, 229 P.3d 421 (2010), affirmed the decision by the Montana First Judicial District Court, Lewis and Clark County, that the use of navigable riverbed lands for power generation subjected PPL Montana to the payment of damages under Montana's hydroelectric resources laws and held that the navigable riverbeds are part of the state's public land trust under Article X, section 11, of the Montana Constitution; and

WHEREAS, the Montana Supreme Court affirmed the judgment entered for the State of Montana in the amount of $40,956,180, plus postjudgment interest, as compensatory damages for PPL Montana's use of state-owned riverbeds from 2000 through 2007; and

WHEREAS, the Montana Supreme Court determined the riverbeds are held "in trust for the people", but it did not determine which specific beneficiaries are entitled to recovery from the award of compensatory damages and postjudgment interest; and

WHEREAS, the Montana Supreme Court did not determine whether past, present, or future beneficiaries are entitled to compensation; and

WHEREAS, in 1937 the Montana Legislature enacted legislation providing that when a navigable stream changes course, the abandoned bed belongs to the State of Montana to be held in trust for the benefit of public schools by enacting section 1, Chapter 36, Laws of 1937, now codified as section 77-1-102, MCA; and

WHEREAS, PPL Montana petitioned the United States Supreme Court to review the Montana Supreme Court's decision and overturn the award of damages; and

WHEREAS, compensatory damages and postjudgment interest have not been paid to the state based on PPL Montana's pending appeal to the United States Supreme Court; and

WHEREAS, it is the Legislature's intent to balance the interest of past, present, and future beneficiaries by clarifying that any money received by the State of Montana from PPL Montana as a result of the litigation cited in this preamble must be used to purchase higher-producing state lands while selling lower-producing state lands; and

WHEREAS, it is the Legislature's intent to distribute to the public schools the net interest and income earned on real property and appurtenances purchased."

*Effective Date:* Section 5, Ch. 362, L. 2011, provided that this section is effective on passage and approval. Approved May 9, 2011.

*Retroactive Applicability:* Section 6, Ch. 362, L. 2011, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to the use of funds identified in [section 1] [77-1-228] prior to [the effective date of this act] [May 9, 2011]."

### 77-1-235. Alternative rental market valuation — open competitive bidding process — rules.

**Compiler's Comments**

*Effective Date:* Section 7, Ch. 401, L. 2011, provided: "[This act] is effective on passage and approval." Chapter 401, L. 2011, was enacted into law without the Governor's signature on May 12, 2011.

**Administrative Rules**

Title 36, chapter 25, subchapter 10, ARM Cabinsite leasing.

### 77-1-236. Rental market valuation lease program — transition — rules.

**Compiler's Comments**

*Effective Date:* Section 7, Ch. 401, L. 2011, provided: "[This act] is effective on passage and approval." Chapter 401, L. 2011, was enacted into law without the Governor's signature on May 12, 2011.

**Administrative Rules**

Title 36, chapter 25, subchapter 10, ARM Cabinsite leasing.

## Part 3

## Department of Natural Resources and Conservation

### 77-1-301. Powers and duties of the department.

**Administrative Rules**

Title 36, chapter 2, subchapter 10, ARM General state land rules.

Title 36, chapter 25, ARM State land leasing.

**Case Notes**

*Repealed Statute Regarding Sale or Lease of School Trust Lands to School Districts — No Justiciable Controversy or Action Upon Which Relief Could Be Granted:* Former 20-6-621(4) allowed the Board of Land Commissioners to sell, for appraised value, or to lease, for $1 a year, school trust lands to a school district. The Department of Natural Resources and Conservation stipulated that the provision was unconstitutional because it made state lands available for less than full market value. The District Court agreed, noting that leasing school trust lands to some school districts would favor only some of the beneficiaries and not the school trust as a whole. The Legislature concurred and repealed the subsection in 1999. Plaintiff subsequently sued the Department, the Board, and the state, contending that the Department unlawfully determined that the provision was unconstitutional and failed to defend the constitutionality of the provision. The state moved to dismiss the complaint on grounds that no justiciable controversy existed and that the complaint alleged no cause of action upon which relief could be granted. The District Court granted summary judgment for the state, and on appeal, the Supreme Court affirmed. Any determination that the Department exceeded its authority would have had no bearing on the existing rights or interests at issue, and a judgment granting the relief sought would not have effectively operated to resolve any issue in the case. Thus, there was no justiciable case or controversy, and the claim was properly dismissed. Advocates for Educ., Inc. v. Dept. of Natural Resources and Conservation, 2004 MT 230, 322 M 429, 97 P3d 553 (2004), following Mont.-Dak. Util. Co. v. Billings, 2003 MT 332, 318 M 862, 80 P3d 1247 (2003).

*Lease Rental Affected by Land Reclassification — Writ of Prohibition Proper:* Lessees developed a water spreading project on a portion of their state grazing lease, and the Department of State Lands (now Department of Natural Resources and Conservation) reclassified 32 acres of the lease as agricultural. Lessees later concluded that the project was inadequate for producing a profitable crop at the higher agricultural rental rates. They negotiated to pay back a loan for the project and reverted the land to grazing. After the loan was repaid, there were no other agreements supplementing the original lease. However, the Department subsequently determined that the 32 acres should retain the agricultural classification, sought rental at the agricultural rate, and canceled the lease upon nonpayment. The District Court properly filed a writ of prohibition restraining the Department from canceling the lease, re-leasing the property to other parties, and taking action against lessees for trespass after finding the Department was in excess of its jurisdiction for canceling the lease for nonpayment of agricultural rental when the property was leased for grazing only. Winchell v. Dept. of State Lands, 235 M 10, 764 P2d 1267, 45 St. Rep. 2121 (1988).

*Lack of Oil and Gas Production — Lease Properly Canceled:* The Department of State Lands (now Department of Natural Resources and Conservation) was entitled to a surrender of an oil and gas lease when the clear terms of the lease agreement provided the lease would end after 10 years if no commercial quantities were being produced and it was shown that commercial quantities were never produced. Gypsy-Highview Gathering System, Inc. v. Dept. of State Lands, 231 M 330, 753 P2d 317, 45 St. Rep. 657 (1988).

*Department's Fiduciary Duty — Basis of Discretionary Power — No Mandamus to Compel Discretionary Action:* The Department is under a fiduciary duty to manage the school lands according to the highest standards. Therefore, the Department's power when administering the trust is discretionary, and a Writ of Mandamus may not be issued to compel the Department to approve an assignment of a lease. Jeppeson v. St., 205 M 282, 667 P2d 428, 40 St. Rep. 1272 (1983).

### 77-1-302. Setting fees.

**Administrative Rules**

ARM 36.2.1003 Schedule of fees.
ARM 36.25.205 Procedures for issue of lease.
ARM 36.25.418 Fees.

### 77-1-303. Refunding of money paid by mistake.

**Case Notes**

*Interest Paid State Refunded:* Interest on installment payments plus principal paid the state on a sale of land for which the state could not produce title must be refunded. State ex rel. Wash. Phosphate & Silver Co. v. St. Bd. of Land Comm'rs, 113 M 298, 124 P2d 1001 (1942).

*Mandamus to Compel Refund:* Mandamus lies to compel state boards and officers to perform a clear legal duty, such as is imposed upon the state Board of Land Commissioners by this section to refund money erroneously paid to it on a contract of sale of state lands where the contract is invalid. State ex rel. Boorman v. St. Bd. of Land Comm'rs, 109 M 127, 94 P2d 201 (1939).

*Money Never Becoming Part of State School Fund:* Where the state Board of Land Commissioners received money erroneously paid to it on a void contract of sale of state lands, such money never becomes a part of the common School Fund; however, the Board, under 77-1-202, has control over the disposition thereof and, under this section, has authority to refund it to the purchaser. A legislative appropriation is not required for that purpose, "appropriation" applying to state funds with reference exclusively to the General Fund. State ex rel. Boorman v. St. Bd. of Land Comm'rs, 109 M 127, 94 P2d 201 (1939), distinguished in State ex rel. Wash. Phosphate & Silver Co. v. St. Bd. of Land Comm'rs, 113 M 298, 124 P2d 1001 (1942).

### 77-1-304. Selection and location of lands granted by United States.

**Compiler's Comments**

*1985 Amendment:* In first sentence, after "lands", deleted "except timberlands".

## Part 4
## Classification of State Lands

**Part Case Notes**

*School Trust Land Water Rights Owned by State:* In a case involving a dispute over ownership of water rights on state school trust lands, the Supreme Court ruled that title to the surface and ground water rights on school trust lands vests in the state and that the lessee, in making appropriations on and for school trust sections, is acting on behalf of the state. It is only through state action that the lessee is on the land, and Montana law expressly provides that the lessee must be reimbursed for all capital expenditures made in putting the water to beneficial use. The state is the beneficial user of the water, and its duty as trustee of the school trust lands prohibits it from alienating any interest in the land without receiving full compensation for it or from giving up control over the water rights. Dept. of State Lands v. Pettibone, 216 M 361, 702 P2d 948, 42 St. Rep. 869 (1985). However, see Advocates for School Trust Lands v. St., 2022 MT 46, 408 Mont. 39, 505 P.3d 825, holding that 85-2-441, which allows a water right owner to put water from a well or developed spring located on private land to beneficial use on state trust land and presumes against a state ownership in that water right, was not facially unconstitutional.

### 77-1-401. Classes of land.

**Administrative Rules**

Title 36, chapter 25, subchapter 1, ARM Surface management rules.

### 77-1-402. Basis for classification or reclassification.

**Compiler's Comments**

*1991 Amendment:* In (1), at end of first sentence, deleted subsection reference to 77-1-203. Amendment effective March 1, 1992.

*Applicability:* Section 22, Ch. 609, L. 1991, provided: "On passage and approval of [this act], the board of land commissioners shall commence proceedings to adopt rules to be effective March 1, 1992. The department of state lands [now department of natural resources and conservation] and the department of fish, wildlife, and parks shall commence proceedings and arrangements necessary to establish a recreational use license to be effective March 1, 1992." Approved April 24, 1991.

**Administrative Rules**

Title 36, chapter 25, subchapter 1, ARM Surface management rules.

**Case Notes**

*Lease Rental Affected by Land Reclassification — Writ of Prohibition Proper:* Lessees developed a water spreading project on a portion of their state grazing lease, and the Department of State Lands (now Department of Natural Resources and Conservation) reclassified 32 acres of the lease as agricultural. Lessees later concluded that the project was inadequate for producing a profitable crop at the higher agricultural rental rates. They negotiated to pay back a loan for the project and reverted the land to grazing. After the loan was repaid, there were no other agreements supplementing the original lease. However, the Department subsequently determined that the 32 acres should retain the agricultural classification, sought rental at the agricultural rate, and canceled the lease upon nonpayment. The District Court properly filed a writ of prohibition restraining the Department from canceling the lease, re-leasing the property to other parties, and taking action against lessees for trespass after finding the Department was in excess of its jurisdiction for canceling the lease for nonpayment of agricultural rental when the property was leased for grazing only. Winchell v. Dept. of State Lands, 235 M 10, 764 P2d 1267, 45 St. Rep. 2121 (1988).

### 77-1-405. Island parks established — development limited.

**Compiler's Comments**

*2015 Amendment:* Chapter 5 inserted (1)(e) concerning development of a boat dock; and made minor changes in style. Amendment effective October 1, 2015.

*2013 Amendment:* Chapter 235 in (1)(b) substituted "state parks and recreation board established in 2-15-3406" for "fish, wildlife, and parks commission". Amendment effective July 1, 2013.

*Saving Clause:* Section 40, Ch. 235, L. 2013, was a saving clause.

*Preamble:* The preamble attached to Ch. 449, L. 1997, provided: "WHEREAS, publicly owned or leased islands in Montana's navigable rivers, streams, and lakes provide the public an opportunity for a unique recreational experience; and

WHEREAS, in order to preserve the integrity of the island experience, those public properties should remain in as natural and undeveloped state as possible."

*Effective Date:* Section 3, Ch. 449, L. 1997, provided: "[This act] [77-1-405] is effective on passage and approval." Approved April 30, 1997.

## Part 6
## Development of State Lands

**Part Compiler's Comments**

*Severability Clause:* Section 9, Ch. 295, L. 1967, was a severability clause.

**Part Administrative Rules**

ARM 36.25.140 Resource development project requests.
Title 36, chapter 27, ARM Land administration.

### 77-1-601. Statement of policy.

**Administrative Rules**

Title 36, chapter 2, subchapter 7, ARM Citizen participation in agency decisions.
ARM 36.25.140 Resource development project requests.
Title 36, chapter 27, subchapter 1, ARM Resource Development Division.

### 77-1-603. Rules.

**Administrative Rules**

ARM 36.25.140 Resource development project requests.

Title 36, chapter 27, ARM Land administration.

### 77-1-605. Types of resource developments.

**Compiler's Comments**

*2009 Amendment:* Chapter 465 in (1) in first sentence inserted "by this part" and near end inserted "and other land"; inserted (2) authorizing department to use funds appropriated from trust land administration account; and made minor changes in style. Amendment effective July 1, 2009.

**Administrative Rules**

Title 36, chapter 27, subchapter 1, ARM Resource Development Division.

### 77-1-613. Administrative costs associated with sale of timber from state trust lands.

**Compiler's Comments**

*2009 Amendment:* Chapter 465 in (1) substituted provision authorizing department to use appropriated funds for timber sale costs for former language that read: "There is an account in the state special revenue fund called the state timber sale account. Money in the account may be appropriated by the legislature for use by the department in the manner set out in this section to enhance the revenue creditable to the trusts. There must be placed in the account an amount from timber sales on state lands, other than land granted to the state pursuant to the Morrill Act of 1862, 7 U.S.C. 301 through 308, and the Morrill Act of 1890, 7 U.S.C. 321 through 329, each fiscal year equal to the amount appropriated from the account for the corresponding fiscal year"; deleted former (2) that read: "(2) Timber sale program funds deducted under subsection (1) must be directly applied to timber sale preparation, timber sale documentation, and contract harvesting costs as provided in 77-5-219"; in (3) at end inserted "conducted pursuant to 77-5-201"; and made minor changes in style. Amendment effective July 1, 2009.

*2007 Amendments — Composite Section:* Chapter 247 in (1) in second sentence near middle after "state lands" inserted "other than land granted to the state pursuant to the Morrill Act of 1862, 7 U.S.C. 301 through 308, and the Morrill Act of 1890, 7 U.S.C. 321 through 329"; and made minor changes in style. Amendment effective April 26, 2007.

Chapter 494 in (2) after "preparation" inserted "timber sale" and at end inserted "and contract harvesting costs as provided in 77-5-219"; and made minor changes in style. Amendment effective May 16, 2007.

*Severability:* Section 12, Ch. 494, L. 2007, was a severability clause.

*1995 Amendment:* Chapter 157 in (1), at end of first sentence, inserted "called the state timber sale account", deleted former second sentence that read: "The amount of $312,000 per year of the income received from the sale of timber from state trust lands must be deducted and placed in the account to the credit of the state timber sale program", at beginning of second sentence inserted "Money in the account may be appropriated by the legislature", and inserted third sentence concerning placing funds in the account corresponding to appropriation; and deleted (5) that read: "(5) A timber purchaser who successfully bids on a contract to purchase timber from state trust lands shall deposit with the department 20% of the bid price as a downpayment when the contract is awarded." Amendment effective June 30, 1995.

*Repeal of Termination Date:* Section 3, Ch. 157, L. 1995, repealed sec. 12, Ch. 533, L. 1993, that terminated this section. Repealer effective June 30, 1995.

*Preamble:* The preamble attached to Ch. 533, L. 1993, provided: "WHEREAS, the amount of timber harvested from state lands continues to decline; and

WHEREAS, the gap between the level of harvest and the biological sustained yield continues to grow; and

WHEREAS, the price of timber continues to escalate because of market conditions and reduced harvesting of federal timber; and

WHEREAS, Montana schools and other institutions face a continuing funding crisis; and

WHEREAS, the rate of return on timber sales is approximately 3 to 1; and

WHEREAS, the use of state trust lands is intended to provide the maximum dollar return to the trusts; and

WHEREAS, investment of a portion of the money from timber sales on state lands directly into activities that will result in additional sales being offered will result in more revenue flowing to the trusts."

*Effective Date:* Section 11, Ch. 533, L. 1993, provided that this section is effective June 30, 1993.

*Termination Date:* Section 12, Ch. 533, L. 1993, provided that this section terminates June 30, 1995.

### 77-1-617. Management of isolated trust lands — reciprocal access.

**Compiler's Comments**

*Effective Date:* Section 4, Ch. 182, L. 1999, provided that this section is effective on passage and approval. Approved March 26, 1999.

## Part 7

## Ownership Records of State-Owned Land

**Part Administrative Rules**

Title 36, chapter 2, subchapter 9, ARM Ownership records for nonschool trust land.

### 77-1-701. Definitions.

**Compiler's Comments**

*1997 Amendment:* Chapter 32 in definition of state land, in (a) after "through", deleted "foreclosure of any", after "investments" deleted "purchased", and at end substituted "17-6-201" for "17-6-211".

### 77-1-702. Transfer of records.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

*1991 Amendment:* Substituted references to Department of Transportation for references to Department of Highways. Amendment effective July 1, 1991.

### 77-1-703. Filing of ownership records.

**Administrative Rules**

Title 36, chapter 2, subchapter 9, ARM Ownership records for nonschool trust land.

### 77-1-704. Department to maintain repository.

**Compiler's Comments**

*1987 Statement of Intent:* The statement of intent attached to Ch. 467, L. 1987, provided: "A statement of intent is required for this bill because it grants rulemaking authority to the department of state lands [now department of natural resources and conservation] to implement and administer the transfer and filing of ownership records of state lands.

Currently, certain records regarding state ownership of land are held by the secretary of state. This bill requires the secretary of state to transfer these records to the department of state lands [now department of natural resources and conservation] by November 1, 1987. It further requires the department of state lands [now department of natural resources and conservation] to transfer records of land held or administered by the department of highways [now department of transportation] for highway rights-of-way and maintenance to that department. Finally, the bill requires the department of state lands [now department of natural resources and conservation] to transfer any remaining ownership records, other than those of state lands, to the state agency administering the interest or property described in such records.

The legislature intends that the department of state lands [now department of natural resources and conservation] be the sole repository for records of all state lands owned by virtue of fee simple title, grant, or deed except for land specifically excluded under the bill. State land with buildings attached to it and used by the department of highways [now department of transportation] for maintenance must be recorded on records maintained by the department of state lands [now department of natural resources and conservation].

It is intended that the department of state lands [now department of natural resources and conservation] may adopt rules to specify which records will be kept by the department and which records will be transferred to other agencies, including records of lesser interests such as leases. In addition, it is intended that the rules clarify which records must be filed in the future with the department of state lands [now department of natural resources and conservation] and specify the format that the records must follow to ensure a reliable and uniform body of records and index as required under section 5 [77-1-705]."

**Administrative Rules**

Title 36, chapter 2, subchapter 9, ARM Ownership records for nonschool trust land.

### 77-1-705. Index and verification of ownership records.

**Administrative Rules**

Title 36, chapter 2, subchapter 9, ARM Ownership records for nonschool trust land.

### 77-1-706. Treatment of highway lands.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 in two places, after "department", deleted "of state lands". Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clauses:* Section 503, Ch. 418, L. 1995, was a saving clause.

Section 571, Ch. 546, L. 1995, was a saving clause.

*1991 Amendment:* Substituted references to Department of Transportation for references to Department of Highways. Amendment effective July 1, 1991.

**Administrative Rules**

Title 36, chapter 2, subchapter 9, ARM Ownership records for nonschool trust land.

### 77-1-707. Rules.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 after "department" deleted "of state lands". Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1987 Statement of Intent:* The statement of intent attached to Ch. 467, L. 1987, provided: "A statement of intent is required for this bill because it grants rulemaking authority to the department of state lands [now department of natural resources and conservation] to implement and administer the transfer and filing of ownership records of state lands.

Currently, certain records regarding state ownership of land are held by the secretary of state. This bill requires the secretary of state to transfer these records to the department of state lands [now department of natural resources and conservation] by November 1, 1987. It further requires the department of state lands [now department of natural resources and conservation] to transfer records of land held or administered by the department of highways [now department of transportation] for highway rights-of-way and maintenance to that department. Finally, the bill requires the department of state lands [now department of natural resources and conservation] to transfer any remaining ownership records, other than those of state lands, to the state agency administering the interest or property described in such records.

The legislature intends that the department of state lands [now department of natural resources and conservation] be the sole repository for records of all state lands owned by virtue of fee simple title, grant, or deed except for land specifically excluded under the bill. State land with buildings attached to it and used by the department of highways [now department of transportation] for maintenance must be recorded on records maintained by the department of state lands [now department of natural resources and conservation].

It is intended that the department of state lands [now department of natural resources and conservation] may adopt rules to specify which records will be kept by the department and which records will be transferred to other agencies, including records of lesser interests such as leases. In addition, it is intended that the rules clarify which records must be filed in the future with the department of state lands [now department of natural resources and conservation] and specify the format that the records must follow to ensure a reliable and uniform body of records and index as required under section 5 [77-1-705]."

**Administrative Rules**

Title 36, chapter 2, subchapter 9, ARM Ownership records for nonschool trust land.

## Part 8
## Recreational Use of State Lands

**Part Compiler's Comments**

*1991 Statement of Intent:* The statement of intent attached to Ch. 609, L. 1991, provided: "A statement of intent is required for this bill because [section 13] [77-1-804] requires the board of land commissioners to adopt rules to implement the provisions for recreational use of state lands established by this bill. Consistent with the provisions of this bill, it is intended that public recreational use of state lands be accomplished to the fullest extent possible. It is acknowledged that certain state lands will merit closure from public recreational use due to certain considerations, including but not limited to the presence of growing crops and livestock and the proximity of dwellings and agricultural buildings. Nothing in this bill authorizes or purports to authorize trespass on private lands to reach state lands.

This bill requires the board to adopt rules governing the actions of the recreational user of state lands. These rules must address protection of the resource value, compensation for damage to improvements, criteria for closure, restrictions upon certain recreational activities, and, when state land is posted, provision for the recreational user to contact the lessee or his agent to provide prior notice of the type and extent of the recreational use contemplated.

[Section 18] [77-1-810] authorizes the department to adopt rules for weed control activities. It is the intent of the legislature that the board establish a procedure whereby weed infestations on state lands that are attributable to recreational access are controlled or eradicated. Examples of procedures that fulfill this intent include:

(1) a departmental weed control program;
(2) payments for weed control activities; and
(3) payments to county weed boards.

It is the intent of the legislature that the board evaluate the implementation of this bill, develop recommendations to address problems, if any, that arise through the course of rulemaking and implementation, and report its findings and recommendations to the 53rd legislature."

*Severability:* Section 21, Ch. 609, L. 1991, was a severability clause.

*Applicability:* Section 22, Ch. 609, L. 1991, provided: "On passage and approval of [this act], the board of land commissioners shall commence proceedings to adopt rules to be effective March 1, 1992. The department of state lands [now department of natural resources and conservation] and the department of fish, wildlife, and parks shall commence proceedings and arrangements necessary to establish a recreational use license to be effective March 1, 1992." Approved April 24, 1991.

*Effective Date:* Section 23, Ch. 609, L. 1991, provided: "[This act] is effective March 1, 1992."

### Part Administrative Rules

Title 36, chapter 25, ARM State land leasing.

## 77-1-801. Recreational use license required to use state lands for general recreational purposes — penalty — exemption.

### Compiler's Comments

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 5, Ch. 507, L. 2023. Amendment effective July 1, 2023.

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

*2003 Amendment:* Chapter 596 in (1) and (2) at beginning inserted exception clause; inserted (3) concerning agreement for hunting, fishing, and trapping purposes; and made minor changes in style. Amendment effective March 1, 2004.

*Preamble:* The preamble attached to Ch. 596, L. 2003, provided: "WHEREAS, the Department of Natural Resources and Conservation presently authorizes the public to use state school trust land through individual recreational use licenses; and

WHEREAS, the primary recreational uses of state school trust land are hunting and fishing; and

WHEREAS, the Department of Natural Resources and Conservation and the Department of Fish, Wildlife, and Parks wish to provide a more efficient system for authorizing public recreational use for hunting, fishing, and trapping on state trust land and concurrently provide greater benefit to the institutional beneficiaries of the trust; and

WHEREAS, the Department of Fish, Wildlife, and Parks has the discretionary authority in section 87-1-209, MCA, to enter into an agreement to compensate state trust land beneficiaries for the use and impacts associated with hunting, fishing, and trapping on legally accessible state trust land as defined by department of natural resources and conservation rule; and

WHEREAS, the Department of Fish, Wildlife, and Parks needs additional revenue to offset the cost of an agreement with the Department of Natural Resources and Conservation to compensate state trust land beneficiaries for the use and impacts associated with hunting, fishing, and trapping on legally accessible state trust land; and

WHEREAS, the Department of Natural Resources and Conservation and the Department of Fish, Wildlife, and Parks have reached an agreement that, given the legislative authority, they intend to enter into an agreement for the recreational use of school trust land parcels for hunting, fishing, and trapping purposes."

*Severability:* Section 11, Ch. 596, L. 2003, was a severability clause.

## 77-1-802. Recreational use — fee.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 6, Ch. 507, L. 2023. Amendment effective July 1, 2023.

*2009 Amendment:* Chapter 465 in (2)(b) at beginning substituted "Revenue from recreational use license fees, less 50 cents from the fee for each license that must be returned" for "Two dollars from the fee for each license, less 50 cents to be returned", after "commission" inserted "is distributable revenue and", and at end substituted "deposited pursuant to 77-1-109 and used to pay for administrative costs as provided in 77-1-708" for "deposited in the state lands recreational use account established by 77-1-808". Amendment effective July 1, 2009.

*2003 Amendment:* Chapter 596 in (1) near beginning after "use" substituted "on state trust land" for "license" and at end inserted "whether the license is sold on an individual basis or on a group basis through an agreement with the department of fish, wildlife, and parks as provided in 77-1-815"; in (2)(a) substituted "of acreage in" for "contribution to"; and made minor changes in style. Amendment effective March 1, 2004.

*Preamble:* The preamble attached to Ch. 596, L. 2003, provided: "WHEREAS, the Department of Natural Resources and Conservation presently authorizes the public to use state school trust land through individual recreational use licenses; and

WHEREAS, the primary recreational uses of state school trust land are hunting and fishing; and

WHEREAS, the Department of Natural Resources and Conservation and the Department of Fish, Wildlife, and Parks wish to provide a more efficient system for authorizing public recreational use for hunting, fishing, and trapping on state trust land and concurrently provide greater benefit to the institutional beneficiaries of the trust; and

WHEREAS, the Department of Fish, Wildlife, and Parks has the discretionary authority in section 87-1-209, MCA, to enter into an agreement to compensate state trust land beneficiaries for the use and impacts associated with hunting, fishing, and trapping on legally accessible state trust land as defined by department of natural resources and conservation rule; and

WHEREAS, the Department of Fish, Wildlife, and Parks needs additional revenue to offset the cost of an agreement with the Department of Natural Resources and Conservation to compensate state trust land beneficiaries for the use and impacts associated with hunting, fishing, and trapping on legally accessible state trust land; and

WHEREAS, the Department of Natural Resources and Conservation and the Department of Fish, Wildlife, and Parks have reached an agreement that, given the legislative authority, they intend to enter into an agreement for the recreational use of school trust land parcels for hunting, fishing, and trapping purposes."

*Severability:* Section 11, Ch. 596, L. 2003, was a severability clause.

*1993 Amendment:* Chapter 586 in (1), after "license", substituted "must[, taking into account recommendations of the state land board advisory council [now terminated],] attain full market value" for "is $5. The fee is based upon:

(a) a $3 charge as the value of 1 year of recreational use of state lands; and

(b) a $2 surcharge for the administrative costs of providing recreational access to state lands and the maintenance of a state lands recreational use account pursuant to 77-1-808"; in (2)(a), at beginning, inserted exception clause and substituted "license fees" for "proceeds collected under subsection (1)(a)"; and substituted (2)(b) concerning disposition of license fee for former (2)(b) that read: "(b) proceeds collected under the surcharge of subsection (1)(b), less 50 cents for each license to be returned as a commission to license dealers, must be deposited in the state lands recreational use account established by 77-1-808 for use by the department in the management of state lands open to general recreational use". Amendment effective July 1, 1993.

*Applicability:* Section 16(2), Ch. 586, L. 1993, provided: "[Section 2] [77-1-802] applies to licenses sold after February 28, 1994."

## 77-1-804. Rules for recreational use of state lands — penalty.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 7, Ch. 507, L. 2023. Amendment effective July 1, 2023.

*2015 Amendment:* Chapter 394 in (2) near end after "by the lessee" inserted "or by the department at the request of the lessee"; in (6)(c) after "dedicated county roads" inserted "trails developed by the department for motorized use"; inserted (6)(d) through (6)(h) regarding recreational overnight use, pets, and horses on state lands and restrictions on general recreational activities; inserted (9) regarding unauthorized dumping of refuse and destruction of property; and made minor changes in style. Amendment effective May 4, 2015.

*2011 Amendment:* Chapter 62 in (8) at end substituted "87-1-601(8)" for "87-1-601(7)". Amendment effective March 25, 2011.

*1997 Amendment:* Chapter 42 in (8), at end, substituted "87-1-601(7)" for "87-1-601(6)"; and made minor changes in style. Amendment effective March 12, 1997.

**Administrative Rules**

Title 36, chapter 25, subchapter 1, ARM Surface management rules.

## 77-1-805. Liability of state and lessee.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

## 77-1-806. Prior notification to lessee of recreational use — trespass — penalty.

**Compiler's Comments**

*2009 Amendments — Composite Section:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Chapter 472 inserted (4) regarding use of a ford or crossing on a navigable river or stream; and made minor changes in style. Amendment effective May 6, 2009.

Style changes were slightly different in the chapters. In each case, the codifier chose appropriate text.

*Preamble:* The preamble attached to Ch. 472, L. 2009, provided: "WHEREAS, the Department of Natural Resources and Conservation has asserted regulatory jurisdiction over the beds of various rivers and streams based on the premise that the streams are navigable and that the state therefore owns the riverbeds and streambeds; and

WHEREAS, very few Montana rivers or streams have been adjudicated as navigable, either in whole or in part; and

WHEREAS, it is not economically feasible for either the Department of Revenue or the Department of Natural Resources and Conservation to obtain judicial determinations of riverbed or streambed ownership by statewide quiet title actions, yet that ownership determination may not be made legally by unilateral administrative decisions; and

WHEREAS, if the Department of Natural Resources and Conservation wishes to assert regulatory control over the bed of a river or stream that has not been adjudicated to be navigable and was not determined navigable at the time of the original federal government surveys of the public land as evidenced by the recorded and monumented surveys of the meander lines of the river, it is required to provide written notice of the claim of state ownership to the affected property owners; and

WHEREAS, because the present claims of state ownership of riverbeds and streambeds is contrary to longstanding administrative practice and because the test for navigability depends upon evidence concerning the log floating capability of a stream at the time of statehood, there is no presumption of correctness attached to a navigability claim made by any state agency."

*Legislative Findings:* Section 1, Ch. 472, L. 2009, provided: "The legislature finds that:

(1) for 120 years since the admission of Montana as a state in 1889, the department of revenue and its predecessor agencies have taxed some landowners whose property abuts a river or stream on the assumption that those riparian landowners owned the property to the middle of the river or stream;

(2) in Montana v. United States, 450 U.S. 544 (1981), the United States supreme court recognized that if a river or stream is not navigable, the abutting riparian landowners own the land in the bed of the stream to the middle of the stream, but if a river or stream is navigable, the state owns the bed of the river or stream, having acquired ownership from the United States when the state was admitted to the union, and therefore Montana owns the bed of the Bighorn River where it flows through the Crow reservation;

(3) for the purpose of determining the ownership of a riverbed or streambed, the test of navigability is whether logs could be floated in the stream at the time of statehood as stated in Montana Coalition for Stream Access v. Curran, 210 Mont. 38, 682 P.2d 163 (1984), based

upon The Montello, 87 U.S. 430 (1874), Sierra Pacific Power Co. v. Federal Energy Regulatory Commission, 681 F.2d 1134 (9th Cir. 1982), and State of Oregon v. Riverfront Protection Association, 672 F.2d 792 (9th Cir. 1982);

(4) beginning with tax assessments that were effective January 1, 2008, the lien date for real property taxes, the department of revenue reassessed the property of riparian landowners whose land abuts various rivers and streams by reducing the amount of land assessed based upon the premise that the landowners did not own to the middle of the river or stream because the river or stream was navigable and these reassessments, if correct, have enormous impact upon the riparian landowners because they affect land titles, acreage owned, qualification for various conservation and price support programs, and ownership of water diversion facilities and other structures that the riparian landowners have constructed for water usage;

(5) the 2008 reassessments were made by simply sending out tax bills without any notice that they were based upon a claim of state ownership of the riverbeds or streambeds and some riparian landowners have paid the first installment of 2008 real property taxes based upon the reassessments without realizing that a claim of state ownership of the riverbeds and streambeds was the basis for the reassessments;

(6) procedural due process requires that if a claim of change in ownership is involved, the state agency involved shall afford the affected property owners both notice of the claim and the opportunity to be heard;

(7) the 2008 real property tax assessments based upon claims of state ownership did not comply with the constitutional requirement for procedural due process and under that circumstance payment by the property owners of taxes based on the reassessment does not constitute acquiesence in the underlying state ownership claim;

(8) The department of revenue is required to provide written notice to the affected property owners of the state's claim of ownership so that the affected property owners have a fair opportunity to be heard and to dispute the government's claim."

## 77-1-808. State lands recreational use.

**Compiler's Comments**

*2009 Amendment:* Chapter 465 deleted former (1) and (2) that read: "(1) There is a state lands recreational use account in the state special revenue fund provided for in 17-2-102.

(2) There must be deposited in the account:

(a) all revenue received from the recreational use license established by 77-1-802; and

(b) money received by the department in the form of legislative appropriations, reimbursements, gifts, federal funds, or appropriations from any source intended to be used for the purposes of this account"; in introductory clause substituted "Money appropriated for the purpose of managing recreational use of state lands" for "Money deposited in the state lands recreational use account"; in temporary version deleted former (2)(b) that read: "(b) 10% of the revenue received as a result of an agreement with the department of fish, wildlife, and parks for the use and impacts of hunting, fishing, and trapping as provided in 77-1-815"; and made minor changes in style. Amendment effective July 1, 2009.

*2003 Amendment:* Chapter 596 inserted (2)(b) concerning revenue from agreement for hunting, fishing, and trapping use; inserted (3)(e) concerning road maintenance; and made minor changes in style. Amendment effective March 1, 2004.

*Preamble:* The preamble attached to Ch. 596, L. 2003, provided: "WHEREAS, the Department of Natural Resources and Conservation presently authorizes the public to use state school trust land through individual recreational use licenses; and

WHEREAS, the primary recreational uses of state school trust land are hunting and fishing; and

WHEREAS, the Department of Natural Resources and Conservation and the Department of Fish, Wildlife, and Parks wish to provide a more efficient system for authorizing public recreational use for hunting, fishing, and trapping on state trust land and concurrently provide greater benefit to the institutional beneficiaries of the trust; and

WHEREAS, the Department of Fish, Wildlife, and Parks has the discretionary authority in section 87-1-209, MCA, to enter into an agreement to compensate state trust land beneficiaries for the use and impacts associated with hunting, fishing, and trapping on legally accessible state trust land as defined by department of natural resources and conservation rule; and

WHEREAS, the Department of Fish, Wildlife, and Parks needs additional revenue to offset the cost of an agreement with the Department of Natural Resources and Conservation to compensate state trust land beneficiaries for the use and impacts associated with hunting, fishing, and trapping on legally accessible state trust land; and

WHEREAS, the Department of Natural Resources and Conservation and the Department of Fish, Wildlife, and Parks have reached an agreement that, given the legislative authority, they intend to enter into an agreement for the recreational use of school trust land parcels for hunting, fishing, and trapping purposes."

*Severability:* Section 11, Ch. 596, L. 2003, was a severability clause.

*2001 Amendment:* Chapter 117 deleted former (2)(b) that read: "(b) all revenue received from the imposition of fines under 77-1-801 and 77-1-806 and from civil penalties imposed pursuant to 77-1-804"; and made minor changes in style. Amendment effective March 23, 2001.

*1995 Amendment:* Chapter 509 in (3), after "account", deleted "is statutorily appropriated, as provided in 17-7-502, and". Amendment effective July 1, 1995.

### 77-1-809. Compensation for damage to improvements, growing crops, or livestock.

**Compiler's Comments**

*2009 Amendments — Composite Section:* Chapter 465 in sixth sentence near middle substituted "trust land administration account established by 77-1-108" for "state lands recreational use account established by 77-1-808" and at end substituted "limited to 10% of revenue received from the recreational use fee and deposited in the account" for "limited to the available appropriation". Amendment effective July 1, 2009.

Chapter 472 inserted second sentence providing that improvements include the structures described in 77-1-134. Amendment effective May 6, 2009.

*Preamble:* The preamble attached to Ch. 472, L. 2009, provided: "WHEREAS, the Department of Natural Resources and Conservation has asserted regulatory jurisdiction over the beds of various rivers and streams based on the premise that the streams are navigable and that the state therefore owns the riverbeds and streambeds; and

WHEREAS, very few Montana rivers or streams have been adjudicated as navigable, either in whole or in part; and

WHEREAS, it is not economically feasible for either the Department of Revenue or the Department of Natural Resources and Conservation to obtain judicial determinations of riverbed or streambed ownership by statewide quiet title actions, yet that ownership determination may not be made legally by unilateral administrative decisions; and

WHEREAS, if the Department of Natural Resources and Conservation wishes to assert regulatory control over the bed of a river or stream that has not been adjudicated to be navigable and was not determined navigable at the time of the original federal government surveys of the public land as evidenced by the recorded and monumented surveys of the meander lines of the river, it is required to provide written notice of the claim of state ownership to the affected property owners; and

WHEREAS, because the present claims of state ownership of riverbeds and streambeds is contrary to longstanding administrative practice and because the test for navigability depends upon evidence concerning the log floating capability of a stream at the time of statehood, there is no presumption of correctness attached to a navigability claim made by any state agency."

*Legislative Findings:* Section 1, Ch. 472, L. 2009, provided: "The legislature finds that:

(1) for 120 years since the admission of Montana as a state in 1889, the department of revenue and its predecessor agencies have taxed some landowners whose property abuts a river or stream on the assumption that those riparian landowners owned the property to the middle of the river or stream;

(2) in Montana v. United States, 450 U.S. 544 (1981), the United States supreme court recognized that if a river or stream is not navigable, the abutting riparian landowners own the land in the bed of the stream to the middle of the stream, but if a river or stream is navigable, the state owns the bed of the river or stream, having acquired ownership from the United States when the state was admitted to the union, and therefore Montana owns the bed of the Bighorn River where it flows through the Crow reservation;

(3) for the purpose of determining the ownership of a riverbed or streambed, the test of navigability is whether logs could be floated in the stream at the time of statehood as stated in Montana Coalition for Stream Access v. Curran, 210 Mont. 38, 682 P.2d 163 (1984), based upon The Montello, 87 U.S. 430 (1874), Sierra Pacific Power Co. v. Federal Energy Regulatory Commission, 681 F.2d 1134 (9th Cir. 1982), and State of Oregon v. Riverfront Protection Association, 672 F.2d 792 (9th Cir. 1982);

(4) beginning with tax assessments that were effective January 1, 2008, the lien date for real property taxes, the department of revenue reassessed the property of riparian landowners whose land abuts various rivers and streams by reducing the amount of land assessed based upon the premise that the landowners did not own to the middle of the river or stream because the river or stream was navigable and these reassessments, if correct, have enormous impact upon the riparian landowners because they affect land titles, acreage owned, qualification for various conservation and price support programs, and ownership of water diversion facilities and other structures that the riparian landowners have constructed for water usage;

(5) the 2008 reassessments were made by simply sending out tax bills without any notice that they were based upon a claim of state ownership of the riverbeds or streambeds and some riparian landowners have paid the first installment of 2008 real property taxes based upon the reassessments without realizing that a claim of state ownership of the riverbeds and streambeds was the basis for the reassessments;

(6) procedural due process requires that if a claim of change in ownership is involved, the state agency involved shall afford the affected property owners both notice of the claim and the opportunity to be heard;

(7) the 2008 real property tax assessments based upon claims of state ownership did not comply with the constitutional requirement for procedural due process and under that circumstance payment by the property owners of taxes based on the reassessment does not constitute acquiesence in the underlying state ownership claim;

(8) The department of revenue is required to provide written notice to the affected property owners of the state's claim of ownership so that the affected property owners have a fair opportunity to be heard and to dispute the government's claim."

*1995 Amendment:* Chapter 509 in fifth sentence inserted "appropriations from" and at end substituted "available appropriation" for "existing balance of the account"; and made minor changes in style. Amendment effective July 1, 1995.

## 77-1-810. Weed control management.

### Compiler's Comments

*2009 Amendment:* Chapter 465 in (2) substituted "from the trust land administration account provided for in 77-1-108" for "from the state lands recreational use account pursuant to 77-1-808". Amendment effective July 1, 2009.

*1995 Amendment:* Chapter 509 in (2) inserted "appropriations from". Amendment effective July 1, 1995.

## 77-1-815. Agreement for general recreational use on legally accessible state trust land.

### Compiler's Comments

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 8, Ch. 507, L. 2023. Amendment effective July 1, 2023.

*2009 Amendment:* Chapter 465 in (2) deleted former third sentence that read: "Ten percent of the gross receipts from the agreement must be deposited in the state lands recreational use account established in 77-1-808", inserted third sentence authorizing department to use funds to implement and manage agreement, and at beginning of fourth sentence substituted "Except as provided for in 17-7-304, any unexpended amount in the account that resulted from recreational use fees must" for "The remaining 90% must"; and made minor changes in style. Amendment effective July 1, 2009.

*Preamble:* The preamble attached to Ch. 596, L. 2003, provided: "WHEREAS, the Department of Natural Resources and Conservation presently authorizes the public to use state school trust land through individual recreational use licenses; and

WHEREAS, the primary recreational uses of state school trust land are hunting and fishing; and

WHEREAS, the Department of Natural Resources and Conservation and the Department of Fish, Wildlife, and Parks wish to provide a more efficient system for authorizing public recreational use for hunting, fishing, and trapping on state trust land and concurrently provide greater benefit to the institutional beneficiaries of the trust; and

WHEREAS, the Department of Fish, Wildlife, and Parks has the discretionary authority in section 87-1-209, MCA, to enter into an agreement to compensate state trust land beneficiaries for the use and impacts associated with hunting, fishing, and trapping on legally accessible state trust land as defined by department of natural resources and conservation rule; and

WHEREAS, the Department of Fish, Wildlife, and Parks needs additional revenue to offset the cost of an agreement with the Department of Natural Resources and Conservation to compensate state trust land beneficiaries for the use and impacts associated with hunting, fishing, and trapping on legally accessible state trust land; and

WHEREAS, the Department of Natural Resources and Conservation and the Department of Fish, Wildlife, and Parks have reached an agreement that, given the legislative authority, they intend to enter into an agreement for the recreational use of school trust land parcels for hunting, fishing, and trapping purposes."

*Severability:* Section 11, Ch. 596, L. 2003, was a severability clause.

*Effective Date:* Section 12, Ch. 596, L. 2003, provided: "[This act] is effective March 1, 2004."

### 77-1-820. Reporting requirements.

**Compiler's Comments**

*Effective Date:* Section 4, Ch. 394, L. 2015, provided: "[This act] is effective on passage and approval." Approved May 4, 2015.

## Part 9
## Commercial Leasing of State Trust Land

**Part Compiler's Comments**

*Saving Clause:* Section 18, Ch. 404, L. 2003, was a saving clause.

*Severability:* Section 19, Ch. 404, L. 2003, was a severability clause.

*Effective Date:* Section 20, Ch. 404, L. 2003, provided: "[This act] is effective July 1, 2003."

*Applicability:* Section 21, Ch. 404, L. 2003, provided: "[This act] applies to all leases for commercial purposes made or renewed on or after July 1, 2003."

### 77-1-902. Definitions.

**Compiler's Comments**

*2021 Amendment:* Chapter 313 in definition of commercial purpose in (b)(iii) at end substituted "resources from geothermal, wind, or solar" for "geothermal resources"; and made minor changes in style. Amendment effective October 1, 2021.

*2017 Amendment:* Chapter 412 inserted definitions of land value and limited valuation; and made minor changes in style. Amendment effective October 1, 2017.

### 77-1-904. Commercial leasing authorized.

**Compiler's Comments**

*2005 Amendment:* Chapter 335 inserted (4) setting out review criteria to be implemented by the board and the department when preparing plans or proposals. Amendment effective July 1, 2005.

### 77-1-905. Rental provisions for commercial leasing — payments and credits — administration — lease options.

**Compiler's Comments**

*2017 Amendment:* Chapter 412 in (2) deleted former first sentence that read: "The board shall specify in any commercial lease an annual rental payment equal to the full market rental value of the land" and in second sentence substituted "payment is full market value and may not be less than the product of the land value" for "payment may not be less than the product of the appraised value of the land"; in (4) deleted former second sentence that read: "An option to lease may not exceed a term of 2 years"; and made minor changes in style. Amendment effective October 1, 2017.

*2015 Amendment:* Chapter 193 in (1) near beginning inserted reference to electronic funds transfer and near middle after "first year's rental" inserted "payment"; in (2) in four places standardized references to annual rental payment and near end substituted "full market rental value calculated for" for "full market value of the rent calculated to be owed on"; and made minor changes in style. Amendment effective October 1, 2015.

*2009 Amendment:* Chapter 465 in (3) at beginning substituted "The department may use funds appropriated from the trust land administration account provided for in 77-1-108" for "Except for rent received from lands granted to the state pursuant to the Morrill Act of 1862, 7 U.S.C. 301 through 308, and the Morrill Act of 1890, 7 U.S.C. 321 through 329, the department may use up to 10% of the annual rent received from a commercial lease". Amendment effective July 1, 2009.

*2007 Amendment:* Chapter 247 in (3) at beginning inserted exception clause; and made minor changes in style. Amendment effective April 26, 2007.

## Part 10
## Management of Crown Butte Land Exchange Property Interests

**Part Compiler's Comments**

*Preamble:* The preamble attached to Ch. 318, L. 2003, provided: "WHEREAS, in August 1996, President Clinton announced an agreement between the federal government and Crown Butte Mines, Incorporated, that resulted in Crown Butte abandoning further development efforts of a gold mine near Yellowstone National Park in exchange for unspecified federal assets; and

WHEREAS, in October 1997, Congress passed legislation providing $65 million to purchase the Crown Butte holdings and authorizing the transfer of $10 million of federal mineral properties or the federal mineral rights to the State of Montana as compensation for the economic opportunity lost to the people of Montana as a result of the Crown Butte agreement; and

WHEREAS, the State of Montana notified Secretary of the Interior Babbitt on February 24, 1999, of the State of Montana's selection of certain mineral tracts; and

WHEREAS, the federal government on April 10, 2002, transferred to the State of Montana the mineral title to certain mineral tracts containing 7,623 acres of federal minerals and 533 million tons of federal coal; and

WHEREAS, the property interests acquired from the federal government in the Crown Butte land exchange are a unique asset of the State of Montana, in that those assets represent a concentrated ownership of state mineral interests, rather than isolated properties; and

WHEREAS, the concentrated state mineral ownership dictates that the state take a proactive approach to the leasing and development of the property interests acquired from the federal government in the Crown Butte land exchange; and

WHEREAS, development of the property interests acquired from the federal government in the Crown Butte land exchange presents a tremendous opportunity to create hundreds of new high quality jobs, generate significant long-term sources of revenue for Montana schools, create additional electrical generation capacity to help meet the growing demand for electricity, and promote associated economic benefits and opportunities; and

WHEREAS, given the proximity of the property interests acquired from the federal government in the Crown Butte land exchange to the Northern Cheyenne Indian Reservation, the State of Montana should continue to work with the Northern Cheyenne in facilitating the development of the state coal interests acquired from the federal government in the Crown Butte land exchange; and

WHEREAS, the State of Montana recognizes the opportunities to export coal to coal-fueled generating plants in order to address Montana's current flat coal export market and the projected decline in coal severance tax revenue; and

WHEREAS, the State of Montana recognizes the need to develop new sources of electric power for Montana's consumers, industry, state institutions, rural cooperatives, and export to sustain economic stability and growth; and

WHEREAS, the State of Montana and the Northern Cheyenne have worked together and negotiated the Otter Creek Settlement Agreement, and the state recognizes the importance of involving the Northern Cheyenne in cultural resource inventories and assessments; and

WHEREAS, the State of Montana recognizes that developing coal-based electrical generation using the property interests in coal resources acquired from the federal government in the Crown Butte land exchange to serve the long-term power needs of both Montana and the western United States and recognizes that the development of coal-based electrical generation and necessary transmission infrastructure provide the opportunity for other development consistent with Montana's economic development policy."

### 77-1-1001. Inventories and assessments.

**Compiler's Comments**

*Effective Date:* Section 7, Ch. 318, L. 2003, provided that this section is effective on passage and approval. Approved April 14, 2003.

### 77-1-1002. Planning of lease actions.

**Compiler's Comments**

*Effective Date:* Section 7, Ch. 318, L. 2003, provided that this section is effective on passage and approval. Approved April 14, 2003.

## Part 11
## Use of Beds of Navigable Rivers

**Part Compiler's Comments**

*Contingent Voidness — Supreme Court Holding:* Section 12, Ch. 475, L. 2009, provided: "If the supreme court determines that the beds of navigable rivers are not owned by the state or are not school trust lands, [this act] is void." The Montana Supreme Court made the following determination in the second issue of PPL Montana, LLC v. Montana, 2010 MT 64, 355 M 402, 229 P3d 421, (2010) at ¶ 117: "We reverse the District Court's determination that the riverbeds are school trust lands, and hold instead that they are public trust lands under Article X, Section 11(1) of the Montana Constitution. Although we conclude the riverbeds at issue are not school trust lands, the Land Board is still required to administer these lands in accordance with the trust obligations imposed by Article X, Section 11 of the Montana Constitution. As such, the riverbeds are held "in trust for the people" and shall not "ever be disposed of except in pursuance of general laws providing for such disposition, or until the full market value of the estate or interest disposed of, to be ascertained in such manner as may be provided by law, has been paid or safely secured to the state." Mont. Const. Art. X, § 11(2); See Norman v. State, 182 Mont. 439, 444, 597 P.2d 715, 718 (1979)." In PPL Montana, LLC v. State of Montana, 2010 MT 64, the Montana Supreme Court held that the beds of navigable rivers are owned by the state of Montana, but are not school trust lands. Therefore, the contingency occurred.

*Effective Date:* This part is effective October 1, 2009.

*Severability:* Section 11, Ch. 475, L. 2009, was a severability clause.

**Part Administrative Rules**

Title 36, chapter 25, subchapter 11, ARM Navigable waterways.

**77-1-1109. Legislative findings — purpose.**

**Compiler's Comments**

*Effective Date:* This section is effective October 1, 2011.

*Severability:* Section 15, Ch. 359, L. 2011, was a severability clause.

**Case Notes**

*Navigability for Title Test for Missouri, Clark Fork, and Madison Rivers — Equal Footing Doctrine — State Ownership of Riverbeds — Montana Supreme Court Reversed:* The District Court granted the state's motion for summary judgment on the issue of whether the Missouri, Clark Fork, and Madison Rivers were navigable for determining whether title to the riverbeds resided with the state. The concept of navigability for title means that a river does not have to experience actual use at or before the time of statehood, as long as the river was susceptible of providing a channel for commerce. Commerce is very broadly construed, and emerging and newly discovered forms of commerce can be applied retroactively to considerations of navigability. Thus, present day use of a river may be probative of its status as a navigable river at the time of statehood. Under the navigability for title test, the state has held title to the riverbeds beginning at statehood in 1889, and according to the equal footing doctrine, the disposition, use, and ownership interests in the beds of the rivers in question have been governed by state law since that time. The evidence presented by the state was clearly sufficient to demonstrate navigability in fact, and the state was therefore entitled to judgment as a matter of law. The District Court was affirmed. PPL Mont., LLC v. St., 2010 MT 64, 355 Mont. 402, 229 P.3d 421. See also Dept. of Natural Resources and Conservation v. Abbco Investments, LLC, 2012 MT 187, 366 Mont. 120, 285 P.3d 532.

Following the Montana Supreme Court's decision, PPL appealed to the United States Supreme Court. The United States Supreme Court reversed the Montana court's ruling, holding that the Montana court had not properly considered the rivers in question on a segment-by-segment basis and had not determined whether they were navigable in fact at the time of statehood. The United States Supreme Court remanded the case for proceedings consistent with its opinion. PPL Montana, LLC v. Montana, 565 US 576, 132 S Ct 1215 (2012).

**77-1-1110. Definitions.**

**Compiler's Comments**

*Effective Date:* This section is effective October 1, 2011.

*Severability:* Section 15, Ch. 359, L. 2011, was a severability clause.

### 77-1-1111. Use of beds of navigable rivers — authorization requirement restricted.

**Compiler's Comments**

*Effective Date:* This section is effective October 1, 2011.

*Severability:* Section 15, Ch. 359, L. 2011, was a severability clause.

### 77-1-1112. Historic use of navigable riverbeds — authorization required — exemptions.

**Compiler's Comments**

*2021 Amendment:* Chapter 334 in (1) at end extended the filing date to July 15, 2025, from July 15, 2021. Amendment effective April 30, 2021.

*2015 Amendment:* Chapter 108 in (1) at end substituted "July 15, 2021" for "July 15, 2017". Amendment effective March 23, 2015.

*Effective Date:* This section is effective October 1, 2011.

*Severability:* Section 15, Ch. 359, L. 2011, was a severability clause.

### 77-1-1113. Historic riverbed use account.

**Compiler's Comments**

*Effective Date:* This section is effective October 1, 2011.

*Severability:* Section 15, Ch. 359, L. 2011, was a severability clause.

### 77-1-1114. Notice required.

**Compiler's Comments**

*2015 Amendment:* Chapter 108 in (1) at beginning inserted "Before July 1, 2016"; in (2) at end of first sentence after "river" inserted reference to 6-month requirement; and made minor changes in style. Amendment effective March 23, 2015.

*Effective Date:* This section is effective October 1, 2011.

*Severability:* Section 15, Ch. 359, L. 2011, was a severability clause.

### 77-1-1115. Navigable riverbed uses — lease, license, or easement required — challenges.

**Compiler's Comments**

*Effective Date:* This section is effective October 1, 2011.

*Severability:* Section 15, Ch. 359, L. 2011, was a severability clause.

### 77-1-1116. Easement transferable — relocation of structure — increased footprint.

**Compiler's Comments**

*Effective Date:* This section is effective October 1, 2011.

*Severability:* Section 15, Ch. 359, L. 2011, was a severability clause.

### 77-1-1117. Board to adopt rules.

**Compiler's Comments**

*Effective Date:* This section is effective October 1, 2011.

*Severability:* Section 15, Ch. 359, L. 2011, was a severability clause.

## CHAPTER 2
## TRANSFERS AND RESERVATIONS OF PROPERTY INTERESTS

**Chapter Compiler's Comments**

*Preamble:* The preamble attached to Ch. 480, L. 1993, provided: "WHEREAS, the State of Montana still owns the Montana Territorial Prison, more commonly known as the old Montana State Prison, in the city of Deer Lodge in Powell County, Montana; and

WHEREAS, since at least 1980, the Department of Corrections and Human Services [now Department of Corrections] has leased the old Montana State Prison to the city of Deer Lodge, which has, since 1980, assigned that lease to the Powell County Museum and Arts Foundation; and

WHEREAS, the Powell County Museum and Arts Foundation has maintained the old Montana State Prison as a museum and regional tourist attraction and has expended substantial sums of money for the operation and maintenance of the prison complex, all of which have benefited the prison structure and the economy of the Powell County area and have been made for the education and enjoyment of the public; and

WHEREAS, continued operation of the old Montana State Prison as a museum by the Powell County Museum and Arts Foundation will fulfill a substantial governmental purpose by contributing to the local economies of the city of Deer Lodge and of Powell County and by providing for the care and upkeep of the prison complex without public expense; and

WHEREAS, the city of Deer Lodge, Powell County, the Powell County Museum and Arts Foundation, and the Department of Corrections and Human Services [now Department of Corrections] desire to make the land available to the Foundation for museum purposes; and

WHEREAS, transfer of the prison complex to the Powell County Museum and Arts Foundation will recognize the consideration paid over the years by the Foundation in the form of the expenditure of funds for the maintenance and upkeep of the prison complex."

*Disposition of Old Prison:* Section 1, Ch. 480, L. 1993, provided: "(1) The department of corrections and human services [now department of corrections] is directed to transfer the interest of the state of Montana in the Montana territorial prison, commonly known as the old Montana state prison, which property is further described in subsection (2), by 99-year lease to the Powell County museum and arts foundation or its successor for operation as a museum. The lease must guarantee the rights of the Montana law enforcement museum that were established in the December 14, 1989, lease between the Powell County museum and arts foundation and the Montana law enforcement museum.

(2) The property is described as all the buildings comprising the Montana state prison complex, which constitutes blocks 52, 53, 61 (lots 5 through 10), 62, 63, 66, 67, and 68 (lots 1 through 10) of the original townsite of the city of Deer Lodge, all situated in the northwest quarter of section 4, township 6 north of the official plat thereof on file at the Powell County courthouse.

(3) The department of corrections and human services [now department of corrections] shall establish appropriate conditions to protect the interests of the state on the transfer of the property, including a provision for reversion should the property cease to be used for museum purposes. The commitment to expend sums of money, the past expenditure of money in the development of the property for use for museum purposes, and the dedication of the property as so developed for public use for the benefit of all Montanans may be considered as a part or all of the consideration necessary to constitute full market value if it is determined that the state cannot transfer the property without obtaining full market value for it.

(4) The provisions of Title 77, chapter 2, part 3, do not apply to the transfer of land directed by this section."

## Part 1
## Easements

**Part Administrative Rules**

Title 36, chapter 2, subchapter 10, ARM General state land rules.

**77-2-101. Easements for specific uses.**

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 1, Ch. 309, L. 2023. Amendment effective May 1, 2023.

*2011 Amendment:* Chapter 359 inserted (2)(c) regarding use of navigable river bed; and made minor changes in style. Amendment effective October 1, 2011.

*Severability:* Section 15, Ch. 359, L. 2011, was a severability clause.

*2009 Amendment:* Chapter 475 inserted (2)(c) allowing the grant of an easement for the use of the bed of a navigable river; and made minor changes in style. Amendment effective October 1, 2009.

*Contingent Voidness — Supreme Court Holding:* Section 12, Ch. 475, L. 2009, provided: "If the supreme court determines that the beds of navigable rivers are not owned by the state or are not school trust lands, [this act] is void." The Montana Supreme Court made the following determination in the second issue of PPL Montana, LLC v. Montana, 2010 MT 64, 355 M 402, 229 P3d 421, (2010) at ¶ 117: "We reverse the District Court's determination that the riverbeds are school trust lands, and hold instead that they are public trust lands under Article X, Section 11(1) of the Montana Constitution. Although we conclude the riverbeds at issue are not school trust lands, the Land Board is still required to administer these lands in accordance with the trust obligations imposed by Article X, Section 11 of the Montana Constitution. As such, the riverbeds are held "in trust for the people" and shall not "ever be disposed of except in pursuance of general laws providing for such disposition, or until the full market value of the estate or interest disposed of, to be ascertained in such manner as may be provided by law, has been paid or safely secured to the state." Mont. Const. Art. X, § 11(2); See Norman v. State, 182 Mont. 439, 444, 597 P.2d 715, 718 (1979)." In PPL Montana, LLC v. State of Montana, 2010 MT 64, the Montana Supreme Court held that the beds of navigable rivers are owned by the state of Montana, but are not school trust lands. Therefore, the contingency occurred.

*Severability:* Section 11, Ch. 475, L. 2009, was a severability clause.

*2001 Amendment:* Chapter 230 in (1) substituted language outlining purposes for which the board may grant easements on state lands for former language that read: "The board may grant easements in state lands for schoolhouse sites and grounds, public parks, community buildings, cemeteries, and other public uses upon proper applications accompanied by accurate and duly verified plats from the lawfully constituted authorities having charge of those properties"; in (2)(a) deleted former second sentence that read: "This subsection shall not be construed to grant authority to convey any such land, except for the purposes above set forth"; inserted (2)(b) allowing the grant of an easement for any private building or private sewage system that encroaches on state lands; and made minor changes in style. Amendment effective April 12, 2001.

**Administrative Rules**

Title 36, chapter 25, subchapter 1, ARM Surface management rules.

### 77-2-102. Application for easement — survey exemptions.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 2, Ch. 309, L. 2023. Amendment effective May 1, 2023.

*2007 Amendment:* Chapter 160 in (1) in second sentence at end of exception clause substituted "through (5)" for "and (4)"; and inserted (5) concerning right-of-way for regional water authority and electronic global positioning system data. Amendment effective October 1, 2007.

*2001 Amendment:* Chapter 7 in (4) in first sentence substituted "electrical energy" for "electric energy". Amendment effective October 1, 2001.

*1999 Amendment:* Chapter 277 at beginning of second sentence in (1) inserted reference to subsection (4); inserted (3) requiring application to include affidavit stating methodology accurate within 5 meters, requiring survey tied to established section corner or monument, and authorizing department to request greater accuracy if needed to describe easement; inserted third sentence in (4) requiring that accuracy requirements be met; and made minor changes in style. Amendment effective October 1, 1999.

*1995 Amendment:* Chapter 300 in (1), at beginning of second sentence, inserted exception clause; in (2), at end of first sentence, substituted "engineer or surveyor who prepared the application" for "county surveyor or county or city engineer or other engineer having prepared the same endorsed thereon"; in (3), at beginning of second sentence, inserted "An exact geographical survey is not required, but the application must include" and at end inserted "that refers to an established monument within a filed corner recordation form, certificate of survey, or subdivision plat" and inserted fourth sentence requiring no archaeological survey absent impact to heritage properties; and made minor changes in style. Amendment effective March 30, 1995.

### 77-2-103. Processing of application.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 3, Ch. 309, L. 2023. Amendment effective May 1, 2023.

*2011 Amendment:* Chapter 141 inserted (3) relating to regional water authorities. Amendment effective October 1, 2011.

*1995 Amendment:* Chapter 300 in (1) deleted fifth sentence that read: "The board shall issue right-of-way deeds for all such easements that it grants upon full payment being made"; and made minor changes in style. Amendment effective March 30, 1995.

### 77-2-105. Termination of easements.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

**77-2-106. Charge for granting of easement — in-kind payments for easements.**

**Compiler's Comments**

*2003 Amendment:* Chapter 404 inserted (2) authorizing board to accept in-kind payments of service and material equal to full market value of state trust land easement as lawful consideration; and made minor changes in style. Amendment effective July 1, 2003.

*Saving Clause:* Section 18, Ch. 404, L. 2003, was a saving clause.

*Severability:* Section 19, Ch. 404, L. 2003, was a severability clause.

*Applicability:* Section 21, Ch. 404, L. 2003, provided: "[This act] applies to all leases for commercial purposes made or renewed on or after July 1, 2003."

*1999 Amendment:* Chapter 18 deleted second sentence that provided: "Where a road follows the section lines of state lands, the increased value accruing to said lands on account of construction of a road on said right-of-way easement shall be taken into consideration by the board in determining compensation, if any, for the easement"; and made minor changes in style. Amendment effective October 1, 1999.

**Administrative Rules**

Title 36, chapter 2, subchapter 10, ARM General state land rules.

**77-2-107. Involvement of lessee when land subject to prior lease.**

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 4, Ch. 309, L. 2023. Amendment effective May 1, 2023.

*2021 Amendment:* Chapter 535 in (3)(e) near end after "state land is located" deleted "or the district court in Lewis and Clark County". Amendment effective October 1, 2021.

*1995 Amendment:* Chapter 418 in (3)(b), in three places, substituted "director" for "commissioner"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1983 Amendment:* Inserted (3) requiring arbitration of disputed valuation of easement damages, providing a process for arbitration, and providing for judicial review of a departmental valuation.

## Part 2
## Exchanges of Land

**77-2-201. Exchange of land with United States or tribal governments.**

**Compiler's Comments**

*1985 Amendment:* Inserted (2) allowing the Board to contract for rights to lands located within tribal government reservations.

*Bill From Select Committee on Indian Affairs (now Law and Justice Interim Committee):* Chapter 628, L. 1985, was introduced by request of the Select Committee on Indian Affairs (now Law and Justice Interim Committee). See committee report to the 49th Legislature, November 1984, by the Montana Legislative Council.

**77-2-203. Exchange for nongovernment, state government, and other state and local public entity land.**

**Compiler's Comments**

*2001 Amendment:* Chapter 139 in (1) in introductory clause at beginning inserted "Subject to subsection (2)" and substituted "exchange state land for land owned by" for "exchange state land for private land"; inserted (1)(a) through (1)(d) regarding certain owners of land; in (2) at beginning of first sentence substituted "The board may exchange the land described in subsection (1) if the land" for "provided that the private land"; in (3) near beginning inserted reference to subsection (2) and in two places substituted "nongovernment-owned land" for "private land"; and made minor changes in style. Amendment effective March 28, 2001.

*1985 Amendment:* In (1) inserted second sentence concerning making appraisal available upon request.

*1983 Amendment:* In first sentence of (1), inserted ", as determined by the board after appraisal by a qualified land appraiser,".

**Case Notes**

*Summary Judgment Holding Board of Land Commissioners' Decision Approving Land Exchange Not Arbitrary, Capricious, or Unlawful Found Improper:* The plaintiffs, various environmental groups, sought a preliminary injunction to prevent the exchange of certain properties during the pendency of their lawsuit challenging the action of the Board of Land Commissioners. The District Court denied the injunction and entered a summary judgment in favor of the Board, holding that the Board's decision to make the exchange was based on an adequate consideration of the requirements set forth in subsection (2) of this section and therefore was not arbitrary, capricious, or unlawful. The Supreme Court vacated and remanded the lower court's decision, finding that the plaintiffs had raised genuine issues of material fact, including whether the streams on the land to be given to the state have a significant public use value; whether a "potential to" provide significant public use value is equivalent to providing significant public use value; and the weight, if any, to be accorded an increase in stream mileage. The Supreme Court held that as a result of the material issues of fact raised by the plaintiffs, a material issue of fact also existed as to whether the Board's decision approving the proposed land exchange was arbitrary, capricious, or unlawful. Skyline Sportsmen's Ass'n v. Bd. of Land Comm'rs, 286 M 108, 951 P2d 29, 54 St. Rep. 1326 (1997).

## 77-2-204. Notification of proposed exchange — hearing.

**Compiler's Comments**

*1985 Amendment:* Inserted (1) requiring notice of a proposal for exchange of land and allowing the right to comment by affected leaseholders; in (2) at beginning, deleted "Prior to completing any such exchange under 77-2-203", near beginning, after "hearing", inserted "on any exchange under this part", in second sentence, after "raised", inserted "before or" and after "hearing" inserted "pursuant to subsection (1)".

## 77-2-205. Restriction on exchange for nongovernment-owned land.

**Compiler's Comments**

*2001 Amendment:* Chapter 139 near beginning inserted "for nongovernment-owned land"; and made minor changes in style. Amendment effective March 28, 2001.

## 77-2-206. Settlement for improvements.

**Compiler's Comments**

*2001 Amendment:* Chapter 270 in second sentence near beginning after "The provisions of 77-6-301 through" inserted "77-6-303 and"; and made minor changes in style. Amendment effective April 20, 2001.

## 77-2-211. Exchange of timbered, cut-over, or burned-over lands.

**Compiler's Comments**

*1999 Amendment:* Chapter 18 in third sentence substituted "77-2-303(2)" for "77-2-303(3)"; and made minor changes in style. Amendment effective October 1, 1999.

*1983 Amendment:* In first sentence, inserted ", as determined by the board after appraisal by a qualified land appraiser,".

## 77-2-213. Department to investigate.

**Compiler's Comments**

*2007 Amendment:* Chapter 456 inserted (2) requiring that the estimated fair market value be determined by a Montana-licensed and Montana-certified appraiser; and made minor changes in style. Amendment effective May 8, 2007.

*1985 Amendment:* Changed the Department of Natural Resources and Conservation to the Department of State Lands (now abolished). "Department" means Department of State Lands (now Department of Natural Resources and Conservation). See 77-1-101.

## 77-2-214. Investigation and findings concerning exchange of land.

**Compiler's Comments**

*1985 Amendment:* In (1) changed the Department of Natural Resources and Conservation to the Department of State Lands (now abolished). "Department" means Department of State Lands (now Department of Natural Resources and Conservation). See 77-1-101.

### 77-2-215. Notice and hearing concerning exchange of timbered lands.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 in first sentence, after "department", deleted "of state lands"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

### 77-2-216. Final order of board.

**Compiler's Comments**

*1985 Amendment:* At beginning deleted "Within 10 days after the conclusion of the hearing".

## Part 3
## Sales

### 77-2-301. Sales of state land under board control.

**Compiler's Comments**

*2003 Amendment:* Chapter 355 deleted former last sentence that read: "As a general rule and except as provided in 77-2-318, no sale of state lands shall be held unless applications have been made for the purchase of lands within one county by prospective purchasers representing at least 12 families"; and made minor changes in style. Amendment effective April 17, 2003.

*Preamble:* The preamble attached to Ch. 596, L. 2003, provided: "WHEREAS, the Department of Natural Resources and Conservation presently authorizes the public to use state school trust land through individual recreational use licenses; and

WHEREAS, the primary recreational uses of state school trust land are hunting and fishing; and

WHEREAS, the Department of Natural Resources and Conservation and the Department of Fish, Wildlife, and Parks wish to provide a more efficient system for authorizing public recreational use for hunting, fishing, and trapping on state trust land and concurrently provide greater benefit to the institutional beneficiaries of the trust; and

WHEREAS, the Department of Fish, Wildlife, and Parks has the discretionary authority in section 87-1-209, MCA, to enter into an agreement to compensate state trust land beneficiaries for the use and impacts associated with hunting, fishing, and trapping on legally accessible state trust land as defined by department of natural resources and conservation rule; and

WHEREAS, the Department of Fish, Wildlife, and Parks needs additional revenue to offset the cost of an agreement with the Department of Natural Resources and Conservation to compensate state trust land beneficiaries for the use and impacts associated with hunting, fishing, and trapping on legally accessible state trust land; and

WHEREAS, the Department of Natural Resources and Conservation and the Department of Fish, Wildlife, and Parks have reached an agreement that, given the legislative authority, they intend to enter into an agreement for the recreational use of school trust land parcels for hunting, fishing, and trapping purposes."

*Severability:* Section 11, Ch. 596, L. 2003, was a severability clause.

*1989 Amendment:* In second sentence inserted "and except as provided in 77-2-318".

### 77-2-302. Disposition of former institutions and certain federal land grants.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 in (2), near end, substituted "department of environmental quality" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1989 Amendment:* Inserted (2) relating to land granted under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980.

**Attorney General's Opinions**

*Waiver of Federal Restrictions — Effect of State Requirements for Land Transfer:* Notwithstanding the waiver of federal restrictions on land, in order for the state to transfer title to state land to a city, all state constitutional and statutory requirements must be fulfilled (opinion issued prior to passage of this section). 36 A.G. Op. 113 (1976).

## 77-2-303. Restrictions on land available for sale.

**Compiler's Comments**

*2013 Amendments — Composite Section:* Chapter 17 in (1) at beginning deleted "Subject to purchase by the department pursuant to 17-6-340"; and made minor changes in style. Amendment effective July 1, 2013.

Chapter 422 in (2)(a) in first sentence inserted exception clause; and made minor changes in style. Amendment effective May 6, 2013.

*Preamble:* The preamble attached to Ch. 422, L. 2013, provided: "WHEREAS, implementation of the state cabin site leasing laws has become dysfunctional and those laws have become subject to continuous and unproductive litigation; and

WHEREAS, a significant number of state land cabin site properties are vacant and are producing no revenue for the state trust land beneficiaries; and

WHEREAS, the implementation of the state cabin site leasing laws has caused a loss in value of lessee private property improvements; and

WHEREAS, the sale of all state land cabin site properties is the only long-term and viable solution to resolve the state cabin site leasing law issues and maximize revenue to the state trust land beneficiaries; and

WHEREAS, it is recognized that in order to maximize the revenue from the sale of these state cabin site properties to the state trust land beneficiaries, the properties must be sold over a reasonable period of time."

*2001 Amendment:* Chapter 418 in (1) at beginning of first sentence inserted "Subject to purchase by the department pursuant to 17-6-340" and after "judgment of the" substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 2001.

*1999 Amendment:* Chapter 18 deleted former (1) that provided: "(1) Except as provided in 77-2-318, lands classified as timberlands are not subject to sale, but timber thereon may be sold and disposed of in the manner provided by law"; in (2)(a) near beginning before "nonnavigable meandered lakes" deleted "bordering on" and before "navigable streams" deleted "from all state lands bordering on"; and made minor changes in style. Amendment effective October 1, 1999.

*1989 Amendment:* In (1) inserted "Except as provided in 77-2-318".

## 77-2-304. Mineral reservations in state land.

**Compiler's Comments**

*2013 Amendment:* Chapter 17 in second sentence at beginning deleted "Subject to 17-6-340"; and made minor changes in style. Amendment effective July 1, 2013.

*2001 Amendment:* Chapter 418 at beginning of second sentence inserted "Subject to 17-6-340"; and made minor changes in style. Amendment effective July 1, 2001.

*1981 Amendment:* Deleted subsection (2) which made reference to mineral reservations applying to sale of lands to the United States under 77-2-316 (repealed by sec. 4, Ch. 157, L. 1981).

## 77-2-306. Who may purchase.

**Compiler's Comments**

*2003 Amendments — Composite Section:* Chapter 326 in (2) substituted "160 acres" for "the acreage limitations in 77-2-307"; inserted (4) relating to a local government's right of first refusal; and made minor changes in style. Amendment effective April 15, 2003.

Chapter 355 deleted former subsections (1) through (3) that read: "(1) State lands shall be sold only to citizens of the United States, persons who have declared their intentions to become citizens, corporations organized under the laws of this state, or towns, cities, counties, or consolidated local governments of this state. No person shall be qualified to purchase state land who has not reached the age of 18 years. As far as possible to determine, the lands shall be sold only to actual settlers or to persons who will improve the same and not to persons who are likely to hold such lands for speculative purposes intending to resell the same at a higher price without having added anything to their value.

(2) State lands may be sold to any sovereign state of the United States or to any board of trustees or public corporation or agency of such state created by such state as an agency or political subdivision thereof. Said lands may be purchased in the quantities set forth in 77-2-307 for use by such state, board of trustees, public corporation, agency, or political subdivision for educational or scientific purposes.

(3) State lands located wholly within the exterior boundaries of the tribal government's reservation as recognized by the federal government may be sold to a tribal government as

defined in 18-11-102"; inserted (1) describing who can purchase state land; in (2) substituted "160 acres" for "the acreage limitations in 77-2-307"; inserted (3) relating to sale to the federal government; and made minor changes in style. Amendment effective April 17, 2003.

*Severability:* Section 20, Ch. 355, L. 2003, was a severability clause.

*1991 Amendment:* Near end of first sentence, after "laws of this state", inserted "or towns, cities, counties, or consolidated local governments of this state"; and made minor changes in style.

*1985 Amendment:* Inserted (3) allowing sale of state lands to any sovereign state of the United States or certain agencies or political subdivisions thereof for educational or scientific purposes.

*Bill From Select Committee on Indian Affairs (now Law and Justice Interim Committee):* Chapter 628, L. 1985, was introduced by request of the Select Committee on Indian Affairs (now Law and Justice Interim Committee). See committee report to the 49th Legislature, November 1984, by the Montana Legislative Council.

**Case Notes**

*Sale to Public Agencies:* This section makes it possible for property to be sold to a public corporation or political subdivision, but nothing in the section permits the Board of Land Commissioners to restrict the sale to any such corporation or subdivision. (See 2003 amendment allowing a local government first right of refusal in certain cases.) State ex rel. Werner v. District Court, 142 M 145, 382 P2d 824 (1963).

## 77-2-308. Approval or disapproval of sales.

**Case Notes**

*Reason for Disapproval:* Where the state Board of Land Commissioners rejected all bids and ordered another sale in order that lessee of state-owned armory building might meet the highest bid and be given preference of purchase, it was not required by this section that the Board set forth in their minutes why the original sale was disadvantageous to the state. State ex rel. Werner v. District Court, 142 M 145, 382 P2d 824 (1963).

*Rejection of Sale:* The Board of Land Commissioners was warranted in rejecting the sale of state land and in causing the property sold to petitioner to again be advertised for public auction where it was shown that competitive bidding was stifled and that the person who asked for the sale was erroneously notified as to the time for the holding of the sale. Because of this, the full market value of the land had not been obtained. State ex rel. Robbins v. Bonner, 128 M 45, 270 P2d 400 (1954).

## 77-2-309. Discretion of board with respect to surveying and platting.

**Compiler's Comments**

*2003 Amendment:* Chapter 355 at beginning deleted "Except as provided in 77-2-312"; and made minor changes in style. Amendment effective April 17, 2003.

*Severability:* Section 20, Ch. 355, L. 2003, was a severability clause.

## 77-2-310. Certain lands to be platted before sale.

**Compiler's Comments**

*2005 Amendment:* Chapter 335 in (1) near beginning of first sentence after "lands" substituted "that in the opinion of the board may be sold for residential or commercial purposes must" for "adjacent to cities or towns and other state lands which in the opinion of the board may be wanted for residence or business lots shall" and near middle after "surveyed" deleted "and laid off in blocks, lots, streets, alleys, avenues, highways, public squares, market places, and parks" and at beginning of second sentence inserted exception clause, after "town" inserted "or the resolutions of the appropriate county", and after "regarding" deleted "the platting of additions thereto"; inserted (1)(a) through (1)(f) requiring consideration of appropriate city, town, and county ordinances and resolutions; in (3) near beginning after "lands" deleted "so surveyed and laid off"; and made minor changes in style. Amendment effective July 1, 2005.

## 77-2-311. Survey and plat of shore lands.

**Compiler's Comments**

*2013 Amendment:* Chapter 422 in second sentence after "water front" inserted exception clause and inserted last sentence concerning cabin sites or home sites bordering on meandered lakes or navigable streams. Amendment effective May 6, 2013.

*Preamble:* The preamble attached to Ch. 422, L. 2013, provided: "WHEREAS, implementation of the state cabin site leasing laws has become dysfunctional and those laws have become subject to continuous and unproductive litigation; and

WHEREAS, a significant number of state land cabin site properties are vacant and are producing no revenue for the state trust land beneficiaries; and

WHEREAS, the implementation of the state cabin site leasing laws has caused a loss in value of lessee private property improvements; and

WHEREAS, the sale of all state land cabin site properties is the only long-term and viable solution to resolve the state cabin site leasing law issues and maximize revenue to the state trust land beneficiaries; and

WHEREAS, it is recognized that in order to maximize the revenue from the sale of these state cabin site properties to the state trust land beneficiaries, the properties must be sold over a reasonable period of time."

*1999 Amendment:* Chapter 18 in first sentence substituted "77-2-303(2)" for "77-2-303(3)" and in third sentence substituted "77-2-303(2)(a)" for "77-2-303(3)(a)"; and made minor changes in style. Amendment effective October 1, 1999.

## 77-2-313. Land subject to taxation.

**Compiler's Comments**

*1993 Special Session Amendment:* Chapter 27 in first sentence, at end, deleted "to the full value thereof"; in first sentence of (3), after "revenue", deleted "or its agent in each county"; and made minor changes in style. Amendment effective January 1, 1994.

*Applicability:* Section 171(2), Ch. 27, Sp. L. November 1993, provided that the amendments to this section apply to tax years after December 31, 1993.

## 77-2-315. Participation in irrigation districts — lien status of land.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

## 77-2-317. Valuation of cabin or home site and improvements — rulemaking.

**Compiler's Comments**

*Preamble:* The preamble attached to Ch. 422, L. 2013, provided: "WHEREAS, implementation of the state cabin site leasing laws has become dysfunctional and those laws have become subject to continuous and unproductive litigation; and

WHEREAS, a significant number of state land cabin site properties are vacant and are producing no revenue for the state trust land beneficiaries; and

WHEREAS, the implementation of the state cabin site leasing laws has caused a loss in value of lessee private property improvements; and

WHEREAS, the sale of all state land cabin site properties is the only long-term and viable solution to resolve the state cabin site leasing law issues and maximize revenue to the state trust land beneficiaries; and

WHEREAS, it is recognized that in order to maximize the revenue from the sale of these state cabin site properties to the state trust land beneficiaries, the properties must be sold over a reasonable period of time."

*Effective Date:* Section 9, Ch. 422, L. 2013, provided: "[This act] is effective on passage and approval." Chapter 422, L. 2013, was enacted into law without the governor's signature on May 6, 2013.

**Administrative Rules**

Title 36, chapter 25, subchapter 7, ARM Cabin and home site land banking.

## 77-2-318. Sale of leased cabin or home sites.

**Compiler's Comments**

*2017 Amendment:* Chapter 184 in (2) after "any new" deleted ", replacement"; and made minor changes in style. Amendment effective April 11, 2017.

*Applicability:* Section 3, Ch. 184, L. 2017, provided: "[This act] applies to the sale of cabin or home sites initiated on or after [the effective date of this act]." Effective April 11, 2017.

*2015 Amendment:* Chapter 268 deleted former (2) that read: "(2) The department shall have prepared a current certificate of survey for the property. The cost of preparation of the certificate of survey must be included in the settlement for improvements, as provided for in 77-2-325, if a person other than the lessee is the purchaser"; in (2) substituted "cabin or home site" for "lease"; in (3) substituted "The board may adopt rules" for "By January 1, 2014, the board shall adopt rules"; in (4) substituted current text for former text that read: "Upon a sale of leased land, the department shall, upon compliance with 77-2-101 through 77-2-106, grant a permanent easement across state lands to secure access using current routes"; inserted (5) concerning appraised value and minimum bid for a cabin or home site; and made minor changes in style. Amendment effective April 23, 2015.

*2013 Amendment:* Chapter 422 deleted former (1) that read: "(1) At the request of the lessee and if consistent with the orderly development and management of state lands, the board may make available for sale, in the manner provided in this part, any leased cabin or home site or city or town lot that is under lease during the 15th year of any 15-year lease that was established through the open competitive bidding process or through the transition process provided for in 77-1-236 or subsection (4) of this section"; inserted (1) regarding sale of state land cabin or home sites and disposition of proceeds; in (2) near beginning after "The" substituted "department" for "lessee requesting the sale"; in (4) near beginning substituted "January 1, 2014" for "January 1, 2012" and near middle after "home sites" deleted "or city or town lots"; inserted (6) defining cabin site improvements; and made minor changes in style. Amendment effective May 6, 2013.

*Preamble:* The preamble attached to Ch. 422, L. 2013, provided: "WHEREAS, implementation of the state cabin site leasing laws has become dysfunctional and those laws have become subject to continuous and unproductive litigation; and

WHEREAS, a significant number of state land cabin site properties are vacant and are producing no revenue for the state trust land beneficiaries; and

WHEREAS, the implementation of the state cabin site leasing laws has caused a loss in value of lessee private property improvements; and

WHEREAS, the sale of all state land cabin site properties is the only long-term and viable solution to resolve the state cabin site leasing law issues and maximize revenue to the state trust land beneficiaries; and

WHEREAS, it is recognized that in order to maximize the revenue from the sale of these state cabin site properties to the state trust land beneficiaries, the properties must be sold over a reasonable period of time."

*2011 Amendment:* Chapter 401 in (1) after "town lot" substituted current language regarding lot under lease during 15th year of 15-year lease for "that was under lease on October 1, 1989"; deleted former (4) that read: "(4) The sale of a leased cabin or home site or city or town lot under 77-2-318 through 77-2-320 must be completed no later than 10 years after October 1, 1989 . A lessee may request a lease sale at any time during the 10-year period. Upon request, the board may grant a lessee with a disability or a lessee 65 years of age or older an additional 10-year period to request a sale of leased land"; and inserted (4) requiring adoption of rules. Amendment effective May 12, 2011.

*1997 Amendment:* Chapter 472 in (4), in third sentence, substituted "lessee with a disability" for "handicapped lessee".

**Administrative Rules**

Title 36, chapter 25, subchapter 1, ARM Surface management rules.

Title 36, chapter 25, subchapter 7, ARM Cabin and home site land banking.

### 77-2-323. Sale procedure and limitation.

**Compiler's Comments**

*2003 Amendment:* Chapter 355 deleted former (1)(b) and (1)(c) that read: "(b) Tillable lands capable of producing agricultural crops may not be sold for less than $10 an acre.

(c) Lands principally valuable for grazing purposes may not be sold for less than $5 an acre"; deleted former (4) that read: "(4) If any successful bidder at a sale refuses or neglects to make the initial payment required to be made on the land purchased, the successful bidder shall forfeit to the state not less than $50 or more than $1,000, to be determined by the board according to the circumstances of the case. If the forfeiture is not paid when notice of the amount of the forfeiture has been served by the department, the attorney general shall sue for the recovery of the amount in the name of the state. The forfeiture amount must be deposited in the state general fund"; and made minor changes in style. Amendment effective April 17, 2003.

*Severability:* Section 20, Ch. 355, L. 2003, was a severability clause.

*1997 Amendment:* Chapter 422 in (4) inserted last sentence relating to forfeitures deposited in the state general fund; and made minor changes in style. Amendment effective July 1, 1997.

*1983 Amendment:* At end of (1)(a), substituted "value determined by the board after appraisal by a qualified land appraiser" for "appraised value".

### 77-2-324. Preference to lessee of land.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

*1989 Amendment:* After "shall" substituted "have the option to match the high bid and must" for "if bidding an equal amount"; and inserted second sentence requiring bidding to be reopened if lessee matches high bid and retaining lessee preference right to match highest bid.

**Case Notes**

*Sale to Lessee Meeting High Bid:* Lessee of state-owned armory building may meet the high bid and be given preference of purchase only at the time of the sale and while bidding is in progress. State ex rel. Werner v. District Court, 142 M 145, 382 P2d 824 (1963).

### 77-2-325. Settlement for improvements.

**Compiler's Comments**

*2015 Amendment:* Chapter 268 at beginning inserted exception clause; and made minor changes in style. Amendment effective April 23, 2015.

*2001 Amendment:* Chapter 270 in second sentence after "The provisions of 77-6-301 through" inserted "77-6-303 and"; and made minor changes in style. Amendment effective April 20, 2001.

**Administrative Rules**

Title 36, chapter 25, subchapter 1, ARM Surface management rules.

### 77-2-326. Time of possession.

**Administrative Rules**

Title 36, chapter 25, subchapter 1, ARM Surface management rules.

### 77-2-327. Certificate of purchase.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 in (1), near end of first sentence, substituted "director of the department" for "commissioner of state lands"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1981 Amendment:* Deleted reference to subsection (1) of 77-2-304 in the last sentence of (1).

**Administrative Rules**

Title 36, chapter 2, subchapter 10, ARM General state land rules.

### 77-2-328. Additional rules — deposit of fees.

**Compiler's Comments**

*2009 Amendment:* Chapter 465 in third sentence at end substituted "77-1-109" for "77-1-108". Amendment effective July 1, 2009.

*2007 Amendment:* Chapter 247 inserted second sentence providing that the rules may not include a deduction for fees from land granted to the state pursuant to the Morrill Acts of 1862 and 1890. Amendment effective April 26, 2007.

*2003 Amendment:* Chapter 355 at end substituted "trust land administration account as provided in 77-1-108" for "state general fund"; and made minor changes in style. Amendment effective April 17, 2003.

*Severability:* Section 20, Ch. 355, L. 2003, was a severability clause.

*1997 Amendment:* Chapter 422 inserted second sentence relating to fees deposited in state general fund; and made minor changes in style. Amendment effective July 1, 1997.

**Administrative Rules**

Title 36, chapter 2, subchapter 10, ARM General state land rules.
Title 36, chapter 25, subchapter 1, ARM Surface management rules.
Title 36, chapter 25, subchapter 7, ARM Cabin and home site land banking.

**Case Notes**

*Rules for Particular Sale Not Authorized:* Although this section authorizes the adoption of general rules for the conduct of sales, it does not permit the state Board of Land Commissioners to adopt rules for each particular sale, and a notice of sale which restricted the sale of a state-owned building to public corporations, agencies, or political subdivisions of the state was void. State ex rel. Werner v. District Court, 142 M 145, 382 P2d 824 (1963).

### 77-2-329. Terms of payment.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

*1991 Amendment:* Substituted (2) regarding when balance of purchase price is due for former (2) that read: "(2) The balance of the purchase price shall draw interest at the rate set by the board, but in no instance shall the rate be less than 5% per year, payable annually, and the balance of the purchase price itself shall be payable through a period of 33 years on the amortization plan. This plan is defined as being that plan under which part of the principal is required to be paid each time interest becomes due and payable and under which this part payment on the principal increases at each succeeding installment in the same amount that the interest payment decreases so that the combined amount due on principal and interest on each due date remains the same until the loan or bond is paid in full. However, the amount of the last installment may vary from the other installments to the extent resulting from disregarding fractional cents in the previous installments. The balance of the purchase price on town and city lots shall be payable on the amortization plan through a period of 20 years, but the board may at any time fix a shorter period than 20 years for the payment of the balance on town and city lots. Different periods of time may be established for different towns and cities as the best interests of the state demand. The board shall annually review the interest rate prior to December 31 of each year and may review the interest rate at any time the board determines such review is necessary. The interest rate fixed by the board applies to all contracts entered into until the board fixes a different interest rate".

*1987 Amendment:* Near end of (2) substituted clause allowing Board to review rate when necessary and last sentence allowing application of fixed rate to contracts entered into until Board fixes different rate for "fix the interest rate for all contracts to be entered into during the succeeding year".

### 77-2-332. Procedure in case of default.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 77-2-333. Reinstatement of canceled certificates of purchase.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

**Administrative Rules**

Title 36, chapter 25, subchapter 1, ARM Surface management rules.

**Case Notes**

*Right to Reinstatement Not Absolute — Discretion of Board:* The right to reinstatement is not absolute; it can only be made upon application by the original purchaser or his heirs, assigns, or devisees. The right of reinstatement is not one which the Board is bound to grant, but it may do so in its discretion, and the Board is powerless to allow reinstatement in any event if the land has been sold in the meantime to another purchaser. Christofferson v. Chouteau County, 105 M 577, 74 P2d 427 (1937).

### 77-2-334. Assignment of certificate.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 77-2-335. Lost certificate.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 77-2-336. Lien on improvements and crops for amount due state.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

## 77-2-337. Disposition of sale proceeds.

**Compiler's Comments**

*2003 Amendment:* Chapter 355 in (1) at beginning inserted exception clause; inserted (3) relating to the proceeds for the sale of state trust land; and made minor changes in style. Amendment effective April 17, 2003.

*Severability:* Section 20, Ch. 355, L. 2003, was a severability clause.

## 77-2-342. Execution of patents.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 in (2), near middle, substituted "director of the department" for "commissioner of state lands"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

**Attorney General's Opinions**

*Conveyance of Real Property Acquired by Foreclosure:* The Governor and, in his absence or inability, the Lieutenant Governor are the only proper state officials to execute deeds of conveyance on real property acquired by foreclosure. 36 A.G. Op. 104 (1976).

## 77-2-343. Patent provisions.

**Compiler's Comments**

*1981 Amendment:* Deleted reference to subsection (1) of 77-2-304 in (1).

## 77-2-351. Sale to or exchange of property with public entity.

**Compiler's Comments**

*2011 Amendment:* Chapter 141 in last sentence inserted reference to regional water authority. Amendment effective October 1, 2011.

*1995 Amendment:* Chapter 272 inserted second sentence allowing the sale and transfer of certain state land to be used to provide a community service or fulfill a public purpose; inserted fourth sentence defining public entity; and made minor changes in style.

## 77-2-361. Definitions.

**Compiler's Comments**

*Severability:* Section 20, Ch. 355, L. 2003, was a severability clause.

*Effective Date:* Section 21, Ch. 355, L. 2003, provided: "[This act] is effective on passage and approval." Approved April 17, 2003.

## 77-2-362. State land bank fund — statutory appropriation — rules.

**Compiler's Comments**

*2009 Amendments — Composite Section:* Chapter 2 in (2)(c) near middle after "through" substituted "329" for "328". Amendment effective October 1, 2009.

Chapter 465 in (2)(b) at beginning substituted "Funds appropriated from the trust land administration account provided for in 77-1-108" for "Except as provided in subsection (2)(c), up to 10% of the proceeds in the state land bank fund". Amendment effective July 1, 2009.

*Severability:* Section 20, Ch. 355, L. 2003, was a severability clause.

*Effective Date:* Section 21, Ch. 355, L. 2003, provided: "[This act] is effective on passage and approval." Approved April 17, 2003.

**Administrative Rules**

Title 36, chapter 25, subchapter 7, ARM Cabin and home site land banking.

Title 36, chapter 25, subchapter 8, ARM Land banking.

## 77-2-363. Land banking land sales and limitations — sale preparation costs.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 1, Ch. 226, L. 2023. Amendment effective April 24, 2023.

*2015 Amendments — Composite Section:* Chapter 193 in (2)(a) near middle inserted reference to electronic funds transfer; and made minor changes in style. Amendment effective October 1, 2015.

Chapter 268 substituted current (6) and (7) for former (6) that read: "(6) For the sale of a parcel formerly leased as a cabin or home site:

(a) the department shall assume the cost of the land survey; and

(b) the sale is exempt from the provisions of Title 75, chapter 1, parts 1 through 3." Amendment effective April 23, 2015.

*2013 Amendment:* Chapter 422 in (2)(a) inserted second sentence concerning bid bonds submitted to secure a bid; in (4) near middle after "department" inserted "or the cabin or home site lessee"; in (5)(a) in first sentence at beginning inserted exception clause and at end after "land surveys" inserted "if necessary"; inserted (6) regarding sale of parcel formerly leased as cabin or home site; and made minor changes in style. Amendment effective May 6, 2013.

*Preamble:* The preamble attached to Ch. 422, L. 2013, provided: "WHEREAS, implementation of the state cabin site leasing laws has become dysfunctional and those laws have become subject to continuous and unproductive litigation; and

WHEREAS, a significant number of state land cabin site properties are vacant and are producing no revenue for the state trust land beneficiaries; and

WHEREAS, the implementation of the state cabin site leasing laws has caused a loss in value of lessee private property improvements; and

WHEREAS, the sale of all state land cabin site properties is the only long-term and viable solution to resolve the state cabin site leasing law issues and maximize revenue to the state trust land beneficiaries; and

WHEREAS, it is recognized that in order to maximize the revenue from the sale of these state cabin site properties to the state trust land beneficiaries, the properties must be sold over a reasonable period of time."

*2009 Amendment:* Chapter 209 in (1)(a) in first sentence increased number of acres of state land that the board may cumulatively sell or dispose of from 100,000 to 250,000. Amendment effective April 15, 2009.

*2007 Amendments — Composite Section:* Chapter 396 in (2)(a) near beginning substituted "20 days" for "45 days" and near middle substituted "20%" for "50%"; in (2)(b) in first sentence near end substituted "10 days" for "30 days"; and inserted (5) concerning costs of sale preparation. Amendment effective July 1, 2007.

Chapter 456 inserted (1)(b) requiring that the estimated fair market value be determined by a Montana-licensed and Montana-certified appraiser; and made minor changes in style. Amendment effective May 8, 2007.

*Severability:* Section 20, Ch. 355, L. 2003, was a severability clause.

*Effective Date:* Section 21, Ch. 355, L. 2003, provided: "[This act] is effective on passage and approval." Approved April 17, 2003.

## 77-2-364. Land banking purchases.

**Compiler's Comments**

*2013 Amendment:* Chapter 264 in (5)(d) substituted "72-38-801" for "72-34-114". Amendment effective October 1, 2013.

*Severability:* Section 161, Ch. 264, L. 2013, was a severability clause.

*2007 Amendments — Composite Section:* Chapter 396 in (4) in second sentence after "accounting period" inserted "for Class 1, 3, and 4 lands and over a 60-year accounting period for Class 2 lands, as described in 77-1-401"; and made minor changes in style. Amendment effective July 1, 2007.

Chapter 456 in (2) inserted third sentence requiring that the estimated fair market value be determined by a Montana-licensed and Montana-certified appraiser. Amendment effective May 8, 2007.

*Severability:* Section 20, Ch. 355, L. 2003, was a severability clause.

*Effective Date:* Section 21, Ch. 355, L. 2003, provided: "[This act] is effective on passage and approval." Approved April 17, 2003.

## 77-2-365. Right of access not created.

**Compiler's Comments**

*Severability:* Section 20, Ch. 355, L. 2003, was a severability clause.

*Effective Date:* Section 21, Ch. 355, L. 2003, provided: "[This act] is effective on passage and approval." Approved April 17, 2003.

### 77-2-366. Land banking and state land cabin and home sites — reports to environmental quality council.

**Compiler's Comments**

*2021 Amendment:* See 2021 Session Law for amendment made by sec. 108, Ch. 261, L. 2021. Amendment effective April 20, 2021.

*2013 Amendment:* Chapter 422 inserted (2) requiring the department to report concerning sales of state land cabin or home sites to the environmental quality council; and made minor changes in style. Amendment effective May 6, 2013.

*Preamble:* The preamble attached to Ch. 422, L. 2013, provided: "WHEREAS, implementation of the state cabin site leasing laws has become dysfunctional and those laws have become subject to continuous and unproductive litigation; and

WHEREAS, a significant number of state land cabin site properties are vacant and are producing no revenue for the state trust land beneficiaries; and

WHEREAS, the implementation of the state cabin site leasing laws has caused a loss in value of lessee private property improvements; and

WHEREAS, the sale of all state land cabin site properties is the only long-term and viable solution to resolve the state cabin site leasing law issues and maximize revenue to the state trust land beneficiaries; and

WHEREAS, it is recognized that in order to maximize the revenue from the sale of these state cabin site properties to the state trust land beneficiaries, the properties must be sold over a reasonable period of time."

*2009 Amendment:* Chapter 209 deleted former (1) that read: "(1) State land may not be sold through the land banking process pursuant to 77-2-361 through 77-2-367 after October 1, 2011. Land banking purchases under 77-2-364 may continue after October 1, 2011, until all the proceeds in the state land bank fund are expended or revert to the public school fund or the permanent fund of the respective trust pursuant to 77-2-362(2)(d)"; in first sentence after "July 1" substituted "prior to each regular legislative session" for "2008"; and made minor changes in style. Amendment effective April 15, 2009.

*2007 Amendment:* Chapter 396 in (1) in two places substituted "2011" for "2008". Amendment effective July 1, 2007.

*Severability:* Section 20, Ch. 355, L. 2003, was a severability clause.

*Effective Date:* Section 21, Ch. 355, L. 2003, provided: "[This act] is effective on passage and approval." Approved April 17, 2003.

### 77-2-367. Road easements on state lands.

**Compiler's Comments**

*Severability:* Section 20, Ch. 355, L. 2003, was a severability clause.

*Effective Date:* Section 21, Ch. 355, L. 2003, provided: "[This act] is effective on passage and approval." Approved April 17, 2003.

## Part 4

## Transfer of Federal Land or Easements

**Part Compiler's Comments**

*Code Commissioner Codification:* Section 4, Ch. 670, L. 1983, instructed that sections 1 through 3 (now 77-2-401 through 77-2-403) be codified in chapter 1, part 2, of this title. They have instead been codified in chapter 2 as a new part 4 for a more appropriate codification.

### 77-2-401. Sale or transfer of federal land — when hearing required.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 in (1), near middle, substituted "director of the department" for "commissioner of state lands"; in (2), in two places, and in (3) substituted "director" for "commissioner"; in (3), after "department", deleted "of state lands"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*Code Commissioner Codification:* See compiler's comments to chapter 2, part 4, of this title for an explanation of the codification of this section.

**77-2-402. Hearing requirements.**

**Compiler's Comments**

*1997 Amendment:* Chapter 42 near end substituted "director of the department" for "commissioner"; and made minor changes in style. Amendment effective March 12, 1997.

*Code Commissioner Codification:* See compiler's comments to chapter 2, part 4, of this title for an explanation of the codification of this section.

*Statement of Intent:* The statement of intent attached to SB 118 (Ch. 670, L. 1983) provided: "A statement of intent is required for this bill because section 2 [77-2-402] delegates authority to the Commissioner of State Lands [now Director of Department of Natural Resources and Conservation] to adopt rules governing the procedure for holding public hearings concerning the sale, exchange, or transfer of certain federal land. It is the intent of the Legislature that the content of notice to interested parties be similar to that required under 2-4-601 for contested cases and be published in at least one regional newspaper distributed in the area of the proposed disposition of federal land. Other procedural requirements should be kept as simple as possible in order to provide the maximum opportunity for public response to the proposed federal action."

**77-2-403. Action by director.**

**Compiler's Comments**

*1997 Amendment:* Chapter 42 in introduction substituted "director of the department" for "commissioner"; and made minor changes in style. Amendment effective March 12, 1997.

*Code Commissioner Codification:* See compiler's comments to chapter 2, part 4, of this title for an explanation of the codification of this section.

## CHAPTER 3

## ROCK, MINERAL, COAL, OIL, AND GAS RESOURCES

**Chapter Administrative Rules**

Title 17, chapter 24, ARM Reclamation.

### Part 1

### Prospecting Permits and Mining Leases

**77-3-101. Definitions.**

**Administrative Rules**

Title 36, chapter 25, subchapter 6, ARM Metalliferous leasing rules.

**77-3-102. Mining leases authorized.**

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

**Administrative Rules**

Title 36, chapter 2, subchapter 10, ARM General state land rules.

Title 36, chapter 25, subchapter 6, ARM Metalliferous leasing rules.

**77-3-103. Prospecting permits authorized.**

**Administrative Rules**

Title 36, chapter 2, subchapter 10, ARM General state land rules.

**77-3-104. Notice of permit or lease approval.**

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

**77-3-105. Assignment of leases or permits.**

**Administrative Rules**

Title 36, chapter 2, subchapter 10, ARM General state land rules.

Title 36, chapter 25, subchapter 6, ARM Metalliferous leasing rules.

### 77-3-111. Applications for mining lease.

**Administrative Rules**

Title 36, chapter 25, subchapter 6, ARM Metalliferous leasing rules.

### 77-3-113. Quantity of lands covered by lease.

**Administrative Rules**

Title 36, chapter 25, subchapter 6, ARM Metalliferous leasing rules.

### 77-3-114. Restrictions on mining leases on lands already subject to coal, oil, or gas lease.

**Administrative Rules**

Title 36, chapter 25, subchapter 6, ARM Metalliferous leasing rules.

### 77-3-115. Lease provisions.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

**Administrative Rules**

Title 36, chapter 25, subchapter 6, ARM Metalliferous leasing rules.

### 77-3-116. Royalty provisions.

**Administrative Rules**

Title 36, chapter 25, subchapter 6, ARM Metalliferous leasing rules.

### 77-3-118. Restrictions on removal of minerals and gems during preliminary prospecting period.

**Administrative Rules**

Title 36, chapter 25, subchapter 6, ARM Metalliferous leasing rules.

### 77-3-119. Bonds to state.

**Administrative Rules**

Title 36, chapter 25, subchapter 6, ARM Metalliferous leasing rules.

### 77-3-120. Bonds to protect prior purchasers, lessees, or contractees.

**Administrative Rules**

Title 36, chapter 25, subchapter 6, ARM Metalliferous leasing rules.

### 77-3-130. Limitation on public inspection rights.

**Compiler's Comments**

*1989 Statement of Intent:* The statement of intent attached to Ch. 105, L. 1989, provided: "The legislature is extending the rulemaking authority of the board of land commissioners to allow the board to amend its existing mineral leasing rules to provide for protection of confidential information. The legislature intends that the rules be written broadly to cover all information that would legitimately be considered confidential by lessees, including, as appropriate, mineral quality and quantity, mineral location, mineral depth, cost of production, and the extent of the reserves. This information may include economic or engineering data. The legislature also intends that the rules establish a procedure whereby the lessee may notify the department of state lands [now department of natural resources and conservation] of information it considers to be confidential and to be notified whether the department agrees before the lessee submits the information. Furthermore, the legislature intends that the rules include a process to protect the lessee's interests if the department considers declassification of the information at a future date."

### 77-3-132. Leasing privileges of permittee.

**Compiler's Comments**

*1999 Amendment:* Chapter 18 in (1) deleted second sentence that provided: "The permittee has the preference right to a lease, upon such terms as the board considers just, subject to this part, and in any event the permittee has preference without competitive bidding and upon the most favorable terms permitted under this part to 40 contiguous acres"; and made minor changes in style. Amendment effective October 1, 1999.

**Administrative Rules**

Title 36, chapter 25, subchapter 6, ARM Metalliferous leasing rules.

## Part 2
## Nonmetallic Minerals, Excluding Coal, Oil, and Gas

**77-3-201. Nonmetallic mineral leases authorized.**

**Administrative Rules**

Title 36, chapter 2, subchapter 10, ARM General state land rules.

**77-3-202. Fee.**

**Administrative Rules**

Title 36, chapter 2, subchapter 10, ARM General state land rules.

**77-3-205. Report of lessee and payment of royalty.**

**Compiler's Comments**

*2013 Amendment:* Chapter 96 in (2) after "verified by" deleted "affidavit of"; and made minor changes in style. Amendment effective October 1, 2013.

**77-3-208. Stone, gravel, and sand permits for public use.**

**Compiler's Comments**

*1991 Amendment:* Substituted references to Department of Transportation for references to Department of Highways. Amendment effective July 1, 1991.

**Administrative Rules**

Title 36, chapter 2, subchapter 10, ARM General state land rules.

**77-3-211. Limitation on public inspection rights.**

**Compiler's Comments**

*1989 Statement of Intent:* The statement of intent attached to Ch. 105, L. 1989, provided: "The legislature is extending the rulemaking authority of the board of land commissioners to allow the board to amend its existing mineral leasing rules to provide for protection of confidential information. The legislature intends that the rules be written broadly to cover all information that would legitimately be considered confidential by lessees, including, as appropriate, mineral quality and quantity, mineral location, mineral depth, cost of production, and the extent of the reserves. This information may include economic or engineering data. The legislature also intends that the rules establish a procedure whereby the lessee may notify the department of state lands [now department of natural resources and conservation] of information it considers to be confidential and to be notified whether the department agrees before the lessee submits the information. Furthermore, the legislature intends that the rules include a process to protect the lessee's interests if the department considers declassification of the information at a future date."

## Part 3
## Coal

**Part Compiler's Comments**

*Grandfather Clause:* Section 7, Ch. 358, L. 1975, relating to coal mining leases on state lands including bidding, terms, lessees, and royalties, read: "Nothing in this act may be construed to impair the obligation of any contract entered into by the board before the effective date of this act." Effective date, July 1, 1975.

**Part Administrative Rules**

Title 17, chapter 24, subchapter 2, ARM Rules governing The Opencut Mining Act.

Title 17, chapter 24, subchapters 3 through 13, ARM Rules on The Strip and Underground Mine Reclamation Act.

Title 17, chapter 24, subchapter 18, ARM Rules governing The Strip and Underground Mine Siting Act.

Title 36, chapter 25, subchapter 3, ARM Coal leasing rules.

**Part Collateral References**

SJ 5: Coal in Montana, Final Report to the 66th Legislature, Environmental Quality Council (2018).

Report From the Coal Tax Oversight Subcommittee, Interim Reports, Mont. Leg. Council (1976 to present).

### 77-3-301. Coal leases authorized.

**Compiler's Comments**

*2003 Amendment:* Chapter 318 at beginning inserted "In response to an application or on its own initiative"; and made minor changes in style. Amendment effective April 14, 2003.

**Administrative Rules**

Title 36, chapter 2, subchapter 10, ARM General state land rules.
Title 36, chapter 25, subchapter 3, ARM Coal leasing rules.

### 77-3-302. Lands subject to coal leasing.

**Administrative Rules**

Title 36, chapter 25, subchapter 1, ARM Surface management rules.
Title 36, chapter 25, subchapter 3, ARM Coal leasing rules.

### 77-3-303. Rules relating to coal leasing.

**Compiler's Comments**

*2001 Amendment:* Chapter 485 inserted (2) regarding leasing of property interests acquired in Crown Butte land exchange; and made minor changes in style. Amendment effective on occurrence of contingency.

*Contingent Effective Date:* Section 2, Ch. 485, L. 2001, provided: "[This act] is effective on the date that the governor certifies by executive order that the federal government has transferred the title to federal property interests to the state as part of the Crown Butte land exchange and certifies that the property is not restricted from being used as provided in [this act]. The governor shall provide a copy of the executive order to the secretary of state and the code commissioner." The contingency occurred on May 28, 2002, when the Governor signed Executive Order No. 12-02 certifying that the United States government has transferred the title to federal property interests, without restrictions, as part of the Crown Butte land exchange.

**Administrative Rules**

Title 36, chapter 2, subchapter 10, ARM General state land rules.
Title 36, chapter 25, subchapter 3, ARM Coal leasing rules.

### 77-3-305. Limitations on leasing.

**Compiler's Comments**

*2011 Amendment:* Chapter 332 in (2) at beginning substituted "The board shall consider whether" for "if, after a determination of the amount, location, and quality of the coal on the lands for lease"; and made minor changes in style. Amendment effective May 6, 2011.

*Preamble:* The preamble attached to Ch. 332, L. 2011, provided: "WHEREAS, the Legislature of the State of Montana recognizes the importance of the systematic and orderly development of coal mining operations and the need to ensure that fair market value is realized in the leasing of state coal reserves; and

WHEREAS, the Legislature desires to streamline the leasing process and to ensure that existing terms are construed in a manner consistent with original legislative intent."

*Applicability:* Section 8, Ch. 332, L. 2011, provided: "[This act] applies to coal mining leases in effect on [the effective date of this act] and to all coal mining leases entered into on or after [the effective date of this act]." Effective May 6, 2011.

*1983 Amendment:* Substituted existing (1) limiting leases to foreign interests unless reciprocal privileges are provided to U.S. citizens for former (1), which read: "to any corporation the majority stock of which is controlled by interests foreign to the United States, except for those interests within countries whose borders are contiguous to the United States; or".

*Purported 1981 Amendment:* Section 1, Ch. 538, L. 1981 (SB 367), as introduced, amended 77-3-305. In fact, section 1, as it was finally passed and approved did not amend 77-3-305 but left it exactly as it existed prior to the 1981 legislative session.

### 77-3-306. Conditions on manner of mining.

**Administrative Rules**

Title 36, chapter 25, subchapter 3, ARM Coal leasing rules.

### 77-3-307. Improvements of former lessee.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

**Administrative Rules**

Title 36, chapter 25, subchapter 3, ARM Coal leasing rules.

## 77-3-308. Limitation on public inspection rights.

**Compiler's Comments**

*1989 Statement of Intent:* The statement of intent attached to Ch. 105, L. 1989, provided: "The legislature is extending the rulemaking authority of the board of land commissioners to allow the board to amend its existing mineral leasing rules to provide for protection of confidential information. The legislature intends that the rules be written broadly to cover all information that would legitimately be considered confidential by lessees, including, as appropriate, mineral quality and quantity, mineral location, mineral depth, cost of production, and the extent of the reserves. This information may include economic or engineering data. The legislature also intends that the rules establish a procedure whereby the lessee may notify the department of state lands [now department of natural resources and conservation] of information it considers to be confidential and to be notified whether the department agrees before the lessee submits the information. Furthermore, the legislature intends that the rules include a process to protect the lessee's interests if the department considers declassification of the information at a future date."

## 77-3-312. Leasing procedures.

**Compiler's Comments**

*2011 Amendment:* Chapter 332 inserted (1)(b) concerning determination of market value and leasing at full market value; in (2) at beginning inserted exception clause and near middle inserted reference to amortization at discretion of board; and made minor changes in style. Amendment effective May 6, 2011.

*Preamble:* The preamble attached to Ch. 332, L. 2011, provided: "WHEREAS, the Legislature of the State of Montana recognizes the importance of the systematic and orderly development of coal mining operations and the need to ensure that fair market value is realized in the leasing of state coal reserves; and

WHEREAS, the Legislature desires to streamline the leasing process and to ensure that existing terms are construed in a manner consistent with original legislative intent."

*Applicability:* Section 8, Ch. 332, L. 2011, provided: "[This act] applies to coal mining leases in effect on [the effective date of this act] and to all coal mining leases entered into on or after [the effective date of this act]." Effective May 6, 2011.

**Administrative Rules**

Title 36, chapter 25, subchapter 3, ARM Coal leasing rules.

## 77-3-313. Bond requirements.

**Compiler's Comments**

*2011 Amendment:* Chapter 332 near beginning after "The board" substituted "may" for "shall"; and made minor changes in style. Amendment effective May 6, 2011.

*Preamble:* The preamble attached to Ch. 332, L. 2011, provided: "WHEREAS, the Legislature of the State of Montana recognizes the importance of the systematic and orderly development of coal mining operations and the need to ensure that fair market value is realized in the leasing of state coal reserves; and

WHEREAS, the Legislature desires to streamline the leasing process and to ensure that existing terms are construed in a manner consistent with original legislative intent."

*Applicability:* Section 8, Ch. 332, L. 2011, provided: "[This act] applies to coal mining leases in effect on [the effective date of this act] and to all coal mining leases entered into on or after [the effective date of this act]." Effective May 6, 2011.

## 77-3-314. Duration of lease.

**Compiler's Comments**

*2011 Amendment:* Chapter 332 in (1)(a) at beginning inserted exception clause; inserted (1)(b) regarding extension of term of lease; inserted (3)(b) defining covered and described; and made minor changes in style. Amendment effective May 6, 2011.

*Preamble:* The preamble attached to Ch. 332, L. 2011, provided: "WHEREAS, the Legislature of the State of Montana recognizes the importance of the systematic and orderly development of coal mining operations and the need to ensure that fair market value is realized in the leasing of state coal reserves; and

WHEREAS, the Legislature desires to streamline the leasing process and to ensure that existing terms are construed in a manner consistent with original legislative intent."

*Applicability:* Section 8, Ch. 332, L. 2011, provided: "[This act] applies to coal mining leases in effect on [the effective date of this act] and to all coal mining leases entered into on or after [the effective date of this act]." Effective May 6, 2011.

### 77-3-316. Rental and royalty terms.

**Compiler's Comments**

*2011 Amendment:* Chapter 332 in (3) substituted "may be on a per-acre basis or per-ton basis" for "shall be on a per acre basis"; and made minor changes in style. Amendment effective May 6, 2011.

*Preamble:* The preamble attached to Ch. 332, L. 2011, provided: "WHEREAS, the Legislature of the State of Montana recognizes the importance of the systematic and orderly development of coal mining operations and the need to ensure that fair market value is realized in the leasing of state coal reserves; and

WHEREAS, the Legislature desires to streamline the leasing process and to ensure that existing terms are construed in a manner consistent with original legislative intent."

*Applicability:* Section 8, Ch. 332, L. 2011, provided: "[This act] applies to coal mining leases in effect on [the effective date of this act] and to all coal mining leases entered into on or after [the effective date of this act]." Effective May 6, 2011.

**Administrative Rules**

Title 36, chapter 25, subchapter 3, ARM Coal leasing rules.

### 77-3-317. Report and payment of royalty.

**Compiler's Comments**

*2013 Amendment:* Chapter 96 in (2) after "verified by" deleted "the oath of"; and made minor changes in style. Amendment effective October 1, 2013.

### 77-3-322. Obligation to pay royalties under coal lease contract — interest.

**Compiler's Comments**

*Saving Clause:* Section 4, Ch. 243, L. 2011, was a saving clause.

*Effective Date:* Section 5, Ch. 243, L. 2011, provided that this section is effective on passage and approval. Approved April 21, 2011.

### 77-3-323. Audit — notice — action to compel payment.

**Compiler's Comments**

*Saving Clause:* Section 4, Ch. 243, L. 2011, was a saving clause.

*Effective Date:* Section 5, Ch. 243, L. 2011, provided that this section is effective on passage and approval. Approved April 21, 2011.

## Part 4
## Oil and Gas

**Part Administrative Rules**

Title 36, chapter 25, subchapter 2, ARM Rules governing oil and gas leases on state lands.

**Part Case Notes**

*Natural Gas As Ferae Naturae — No Ownership in Situ:* The natural gas underlying state and other lands included in a proposed pooling agreement is considered ferae naturae and may be reduced to ownership by the party who captures it. It is highly fugitive in character, and a well drilled on either class of lands may drain the gas from land surrounding it. There is no actual ownership of gas in situ. Toomey v. St. Bd. of Land Comm'rs, 106 M 547, 81 P2d 407 (1938).

### 77-3-401. Oil and gas leases authorized.

**Administrative Rules**

Title 36, chapter 25, subchapter 1, ARM Surface management rules.

Title 36, chapter 25, subchapter 2, ARM Rules governing oil and gas leases on state lands.

### 77-3-402. Rules.

**Administrative Rules**

Title 36, chapter 2, subchapter 10, ARM General state land rules.

Title 36, chapter 25, subchapter 2, ARM Rules governing oil and gas leases on state lands.

## 77-3-403. Hearings on questions related to leases.

**Administrative Rules**

Title 36, chapter 25, subchapter 2, ARM Rules governing oil and gas leases on state lands.

## 77-3-404. Limitation on area under single lease.

**Administrative Rules**

Title 36, chapter 25, subchapter 2, ARM Rules governing oil and gas leases on state lands.

**Case Notes**

*Pooling Agreements Embracing More Than a Section — Unit Operation:* While this section provides that no oil or gas lease issued on state lands shall embrace more than 640 acres, in view of provisions in 77-3-430, it is apparent that the Legislature realized that such a restriction is inconsistent with the principles of unit operation and therefore excepted such unit agreements from the operation of the restriction as to acreage. Toomey v. St. Bd. of Land Comm'rs, 106 M 547, 81 P2d 407 (1938).

## 77-3-405. Leased lands to be generally compact and contiguous.

**Administrative Rules**

Title 36, chapter 25, subchapter 2, ARM Rules governing oil and gas leases on state lands.

## 77-3-407. New leases on lands leased prior to February 28, 1953.

**Administrative Rules**

Title 36, chapter 25, subchapter 2, ARM Rules governing oil and gas leases on state lands.

**Case Notes**

*Time for Exercise of Preferential Right to Renew:* Since this section giving original lessee of mineral interest in state land preferential right to renew does not say when prior lessee shall exercise his right of preference, the matter of fixing the time is left open for action by the state Board of Land Commissioners. State ex rel. Handel Oil Co. v. St., 118 M 465, 167 P2d 844 (1946).

*Loss of Preferential Right to Renew:* Prior lessee of state oil lands lost its preferential right to renew lease when lessee's representatives who were present at the bidding on the land declined to make any decision as to whether lessee would match highest bid. Prior lessee made no effort to renew the lease until a personal check equal in amount to the bid of the highest bidder was presented at the Board of Land Commissioners' meeting 8 days later. State ex rel. Handel Oil Co. v. St., 118 M 465, 167 P2d 844 (1946).

## 77-3-408. Certain state officers not to be interested in leases.

**Administrative Rules**

Title 36, chapter 25, subchapter 2, ARM Rules governing oil and gas leases on state lands.

## 77-3-409. Misconduct of officers in relation to oil and gas leases.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

## 77-3-411. Notice of lease sale required.

**Compiler's Comments**

*2019 Amendment:* Chapter 206 in (3) and (7) after "sales will be by competitive" deleted "oral". Amendment effective April 30, 2019.

*Effective Date:* This section is effective October 1, 2009.

## 77-3-421. Duration of lease.

**Compiler's Comments**

*1989 Amendment:* Inserted (3) relating to extension of the primary term of state oil and gas leases. Amendment effective March 23, 1989.

*1983 Amendment:* In first sentence of (1), after "gas leases" inserted "entered by the board", and after "granted for" substituted "a primary term of not more than 10 years or less than 5 years" for "a primary term or period of 10 years"; and inserted last sentence of (1) allowing issuance of leases for less than 5 years in certain cases.

**Administrative Rules**

Title 36, chapter 25, subchapter 2, ARM Rules governing oil and gas leases on state lands.

**Case Notes**

*Term of Leases:* The term of a gas or oil lease under this section being 10 years and "as long thereafter as oil or gas in paying quantities is produced" is not in violation of sec. 11 of The Enabling Act requiring that such leases shall be for a "term of years". State ex rel. Johnson v. St. Bd. of Land Comm'rs, 348 US 961, 99 L Ed 750, 75 S Ct 524 (1955), reversing and remanding State ex rel. Jones v. St. Bd. of Land Comm'rs, 128 M 462, 279 P2d 393 (1954).

### 77-3-422. Lease extension clause.

**Administrative Rules**

Title 36, chapter 25, subchapter 2, ARM Rules governing oil and gas leases on state lands.

### 77-3-423. Annual rental.

**Compiler's Comments**

*1997 Amendment:* Chapter 34 in (1), after "leases", deleted "issued on and after July 1, 1975"; in (4), in third sentence, inserted references to a well currently being drilled and to a shut-in well approved by the Department; and made minor changes in style. Amendment effective February 24, 1997.

*1989 Amendment:* At end of (4), after "terminates", inserted "unless there is a producing well on the lease. Rental paid for any year shall be credited against any royalty that accrues during that year"; and made minor change in punctuation. Amendment effective July 1, 1989.

*Applicability:* Section 7, Ch. 163, L. 1989, provided: "[This act] applies to all leases entered into after [the effective date of this act]." Effective July 1, 1989.

**Administrative Rules**

Title 36, chapter 25, subchapter 2, ARM Rules governing oil and gas leases on state lands.

### 77-3-424. Power to terminate lease in absence of commencement of drilling or payment of delay drilling penalty.

**Compiler's Comments**

*1989 Amendment:* Inserted second sentence of (3) that read: "The board shall refund delay drilling penalties paid on a lease for any year in which the lessee commences drilling on that lease"; and made minor changes in phraseology. Amendment effective July 1, 1989.

*Applicability:* Section 7, Ch. 163, L. 1989, provided: "[This act] applies to all leases entered into after [the effective date of this act]." Effective July 1, 1989.

**Administrative Rules**

Title 36, chapter 25, subchapter 2, ARM Rules governing oil and gas leases on state lands.

### 77-3-425. Dry hole clause.

**Compiler's Comments**

*1989 Amendment:* Near end of first sentence, after "resumes", substituted "payment of any delay drilling penalties imposed by the board" for "the payments of penalties in the amounts provided in 77-3-424"; and near beginning of second sentence, after "payment of", inserted "any required". Amendment effective July 1, 1989.

*Applicability:* Section 7, Ch. 163, L. 1989, provided: "[This act] applies to all leases entered into after [the effective date of this act]." Effective July 1, 1989.

**Administrative Rules**

Title 36, chapter 25, subchapter 2, ARM Rules governing oil and gas leases on state lands.

### 77-3-426. Lessee to prevent waste.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

**Administrative Rules**

Title 36, chapter 25, subchapter 2, ARM Rules governing oil and gas leases on state lands.

### 77-3-427. Provision for offset wells — compensatory royalties.

**Compiler's Comments**

*1989 Amendment:* At end of introductory phrase in (2) substituted "following options in lieu of drilling an offset well" for "option of"; inserted (2)(a) that read: "releasing the lands in question"; near beginning of (2)(b), after "lease", deleted "in lieu of drilling an offset well" and substituted "the board" for "it"; and inserted (3) regarding damages upon lease termination. Amendment effective July 1, 1989.

*Applicability:* Section 7, Ch. 163, L. 1989, provided: "[This act] applies to all leases entered into after [the effective date of this act]." Effective July 1, 1989.

*1981 Amendment:* Added subsection (2) relating to option of allowing compensatory royalties.

## 77-3-428. Additional development following completion of productive well.

### Administrative Rules

Title 36, chapter 25, subchapter 2, ARM Rules governing oil and gas leases on state lands.

## 77-3-429. Operating agreements.

### Administrative Rules

Title 36, chapter 25, subchapter 2, ARM Rules governing oil and gas leases on state lands.

## 77-3-430. Pooling agreements and unit operations.

### Compiler's Comments

*2009 Amendment:* Chapter 474 near middle of first sentence after "operations for the" inserted "storage of carbon dioxide in a geologic storage reservoir or the"; and made minor changes in style. Amendment effective on occurrence of contingency.

*Saving Clause:* Section 29, Ch. 474, L. 2009, was a saving clause.

*Transition — Contingent Implementation:* Section 30, Ch. 474, L. 2009, provided: "If the United States environmental protection agency adopts regulations allowing states to apply for primacy over carbon dioxide sequestration wells under the federal underground injection control program adopted by the environmental protection agency, the board of oil and gas conservation shall in consultation with the department of environmental quality and the department of natural resources and conservation develop draft rules to implement [this act] [Chapter 474, L. 2009] and seek primacy." A final rule allowing states to apply for primacy over carbon dioxide sequestration wells under the federal underground injection control program was adopted by the environmental protection agency and is found at Volume 75 of the Federal Register, pages 77229 through 77303.

### Administrative Rules

Title 36, chapter 25, subchapter 2, ARM Rules governing oil and gas leases on state lands.

### Case Notes

*Constitutionality:* The provisions of this section authorizing pooling agreements covering private and state school lands do not violate sec. 11 of The Enabling Act or Art. XVII, sec. 2, 1889 Mont. Const. (now Art. X, sec. 11, 1972 Mont. Const.). Section 11 of The Enabling Act has application only where the land as a whole is sold, and not where merely an interest or estate therein is disposed of. Provision in lease as to free use of gas by lessee in development work was not a donation under Art. XIII, sec. 1, 1889 Mont. Const. Toomey v. St. Bd. of Land Comm'rs, 106 M 547, 81 P2d 407 (1938).

*Inclusion of Entire Geologic Structure Not Required:* A pooling agreement authorized by this section is not required to include the entire geologic structure in such agreement. Toomey v. St. Bd. of Land Comm'rs, 106 M 547, 81 P2d 407 (1938).

*Natural Gas as Ferae Naturae — No Ownership in Situ:* The natural gas underlying state and other lands included in a proposed pooling agreement is considered ferae naturae and may be reduced to ownership by the party who captures it. It is highly fugitive in character, and a well drilled on either class of lands may drain the gas from land surrounding it. There is no actual ownership of gas in situ. Toomey v. St. Bd. of Land Comm'rs, 106 M 547, 81 P2d 407 (1938).

*Protection of Interest of State:* An arrangement whereby the state will share in all the natural gas brought to the surface on a certain unified area in proportion to the acreage owned by the state in that area fully protects the rights of the state in securing to it its full share of the gas underlying its lands. Toomey v. St. Bd. of Land Comm'rs, 106 M 547, 81 P2d 407 (1938).

*Purpose of Pooling Agreements:* The purpose of agreements for the pooling of acreage for unit operations for the production of oil or gas is to conserve the natural resources of an oil or gas area, to promote its development in an orderly and economical manner to meet market conditions, to avoid waste, and to ensure a more equitable distribution of the proceeds of production. Toomey v. St. Bd. of Land Comm'rs, 106 M 547, 81 P2d 407 (1938).

## 77-3-431. Report of lessees.

### Administrative Rules

Title 36, chapter 25, subchapter 2, ARM Rules governing oil and gas leases on state lands.

## 77-3-432. Royalty.

**Compiler's Comments**

*1997 Amendment:* Chapter 34 in second sentence, after the second "12½% on", deleted "that portion of the average production of" and after "producing well" deleted "not exceeding 3,000 barrels"; and made minor changes in style. Amendment effective February 24, 1997.

*1989 Amendment:* Near beginning of first sentence, after "consideration therefor", deleted "in addition to the rentals as hereinbefore provided". Amendment effective July 1, 1989.

*Applicability:* Section 7, Ch. 163, L. 1989, provided: "[This act] applies to all leases entered into after [the effective date of this act]." Effective July 1, 1989.

*1987 Amendment:* At end of section inserted last sentence permitting state to share expenses of transporting oil to market in proportion to its royalty interest.

*Applicability:* Section 2, Ch. 136, L. 1987, provided: "Section 1 [77-3-432] is applicable to state oil and gas leases existing on [the effective date of this act] [October 1, 1987] and to state oil and gas leases entered into after [the effective date of this act] [October 1, 1987]; however, transportation charges paid before [the effective date] [October 1, 1987] shall not be refunded."

**Administrative Rules**

Title 36, chapter 25, subchapter 2, ARM Rules governing oil and gas leases on state lands.

**Case Notes**

*Royalty Rate:* When oil lands are leased on a royalty basis with a cash bonus, the bonus constitutes rental for an estate or interest in the land. In leasing oil lands, the Legislature is under obligation to obtain the full market value of the estate or interest disposed of on a rental basis, as well as for the sale of the land itself. State ex rel. Strandberg v. St. Bd. of Land Comm'rs, 131 M 65, 307 P2d 234 (1957).

## 77-3-433. Shut-in gas royalty.

**Compiler's Comments**

*1997 Amendment:* Chapter 34 in first sentence, after "$400 per", substituted "lease" for "well" and after "provided in the lease" deleted "in lieu of such per well rate" and in second sentence, after "production", inserted "in paying quantities"; and made minor changes in style. Amendment effective February 24, 1997.

**Administrative Rules**

Title 36, chapter 25, subchapter 2, ARM Rules governing oil and gas leases on state lands.

## 77-3-434. Manner of making royalty payment.

**Administrative Rules**

Title 36, chapter 25, subchapter 2, ARM Rules governing oil and gas leases on state lands.

## 77-3-435. Payments due to state — audit — notice — action.

**Compiler's Comments**

*1997 Amendment:* Chapter 34 inserted (3) and (4) regarding audit authority of the Department; and made minor changes in style. Amendment effective February 24, 1997.

## 77-3-436. Disposition of royalties and other money.

**Compiler's Comments**

*1985 Amendment:* In (4) after "credited", substituted "to the state general fund unless other disposition is provided by law" for "one-half to the state general fund and one-half to the state permanent revenue fund".

**Case Notes**

*Royalties and Bonuses:* The "royalties and bonuses" mentioned in this section are the same royalties and bonuses mentioned in 77-3-432 through 77-3-434 (formerly section 81-1704, R.C.M. 1947) and they become available only as and when the oil is produced and after "such oil . . . is run into any pipeline or storage tank to the credit of the lessee" (77-3-434). Thus the amount bid per acre for a lease, in excess of the minimum annual rental per acre, is not such a bonus but is part of the rental and is placed in the common School Interest and Income Fund to be apportioned and distributed annually to the several school districts as provided in Art. XI, sec. 5, 1889 Mont. Const. (now Art. X, sec. 2, 1972 Mont. Const.). State ex rel. Dickgraber v. Sheridan, 126 M 447, 254 P2d 390 (1953). (See, however, dissenting opinions of Justices Anderson and Angstman in 126 M 447, 254 P2d 390 (1953), on pages 397 and 403 respectively.)

**77-3-438. Assignments of leases.**

**Administrative Rules**

Title 36, chapter 25, subchapter 2, ARM Rules governing oil and gas leases on state lands.

**77-3-439. Surrender of leases.**

**Administrative Rules**

Title 36, chapter 25, subchapter 2, ARM Rules governing oil and gas leases on state lands.

**77-3-440. Forfeiture and cancellation of leases.**

**Administrative Rules**

Title 36, chapter 25, subchapter 2, ARM Rules governing oil and gas leases on state lands.

**77-3-441. Restriction on new lease following termination of old lease.**

**Administrative Rules**

Title 36, chapter 25, subchapter 2, ARM Rules governing oil and gas leases on state lands.

**77-3-442. Disposition of property of lessee upon termination of lease.**

**Compiler's Comments**

*2009 Amendment:* Chapter 472 in (1) at end of first sentence inserted "and the structures described in 77-1-134"; in (3) at beginning of first sentence and at beginning of third sentence inserted exception clauses; and made minor changes in style. Amendment effective May 6, 2009.

*Preamble:* The preamble attached to Ch. 472, L. 2009, provided: "WHEREAS, the Department of Natural Resources and Conservation has asserted regulatory jurisdiction over the beds of various rivers and streams based on the premise that the streams are navigable and that the state therefore owns the riverbeds and streambeds; and

WHEREAS, very few Montana rivers or streams have been adjudicated as navigable, either in whole or in part; and

WHEREAS, it is not economically feasible for either the Department of Revenue or the Department of Natural Resources and Conservation to obtain judicial determinations of riverbed or streambed ownership by statewide quiet title actions, yet that ownership determination may not be made legally by unilateral administrative decisions; and

WHEREAS, if the Department of Natural Resources and Conservation wishes to assert regulatory control over the bed of a river or stream that has not been adjudicated to be navigable and was not determined navigable at the time of the original federal government surveys of the public land as evidenced by the recorded and monumented surveys of the meander lines of the river, it is required to provide written notice of the claim of state ownership to the affected property owners; and

WHEREAS, because the present claims of state ownership of riverbeds and streambeds is contrary to longstanding administrative practice and because the test for navigability depends upon evidence concerning the log floating capability of a stream at the time of statehood, there is no presumption of correctness attached to a navigability claim made by any state agency."

*Legislative Findings:* Section 1, Ch. 472, L. 2009, provided: "The legislature finds that:

(1) for 120 years since the admission of Montana as a state in 1889, the department of revenue and its predecessor agencies have taxed some landowners whose property abuts a river or stream on the assumption that those riparian landowners owned the property to the middle of the river or stream;

(2) in Montana v. United States, 450 U.S. 544 (1981), the United States supreme court recognized that if a river or stream is not navigable, the abutting riparian landowners own the land in the bed of the stream to the middle of the stream, but if a river or stream is navigable, the state owns the bed of the river or stream, having acquired ownership from the United States when the state was admitted to the union, and therefore Montana owns the bed of the Bighorn River where it flows through the Crow reservation;

(3) for the purpose of determining the ownership of a riverbed or streambed, the test of navigability is whether logs could be floated in the stream at the time of statehood as stated in Montana Coalition for Stream Access v. Curran, 210 Mont. 38, 682 P.2d 163 (1984), based upon The Montello, 87 U.S. 430 (1874), Sierra Pacific Power Co. v. Federal Energy Regulatory Commission, 681 F.2d 1134 (9th Cir. 1982), and State of Oregon v. Riverfront Protection Association, 672 F.2d 792 (9th Cir. 1982);

(4) beginning with tax assessments that were effective January 1, 2008, the lien date for real property taxes, the department of revenue reassessed the property of riparian landowners whose land abuts various rivers and streams by reducing the amount of land assessed based

upon the premise that the landowners did not own to the middle of the river or stream because the river or stream was navigable and these reassessments, if correct, have enormous impact upon the riparian landowners because they affect land titles, acreage owned, qualification for various conservation and price support programs, and ownership of water diversion facilities and other structures that the riparian landowners have constructed for water usage;

(5) the 2008 reassessments were made by simply sending out tax bills without any notice that they were based upon a claim of state ownership of the riverbeds or streambeds and some riparian landowners have paid the first installment of 2008 real property taxes based upon the reassessments without realizing that a claim of state ownership of the riverbeds and streambeds was the basis for the reassessments;

(6) procedural due process requires that if a claim of change in ownership is involved, the state agency involved shall afford the affected property owners both notice of the claim and the opportunity to be heard;

(7) the 2008 real property tax assessments based upon claims of state ownership did not comply with the constitutional requirement for procedural due process and under that circumstance payment by the property owners of taxes based on the reassessment does not constitute acquiesence in the underlying state ownership claim;

(8) The department of revenue is required to provide written notice to the affected property owners of the state's claim of ownership so that the affected property owners have a fair opportunity to be heard and to dispute the government's claim."

*1997 Amendment:* Chapter 34 in (2), in first sentence after "the succeeding lessee or", inserted "if there is no succeeding lessee" and after "state" deleted "as the case may be" and inserted second sentence regarding departmental appointment of an appraiser; in (3), at beginning of first sentence, inserted "Unless the department gives written authorization", after "may" inserted "not", and at end deleted "until the value of the casing, equipment, and apparatus which the succeeding lessee or the state desires to have left upon the premises is fixed in the manner provided in this section and has been paid to him in cash"; and made minor changes in style. Amendment effective February 24, 1997.

### Administrative Rules

Title 36, chapter 25, subchapter 2, ARM Rules governing oil and gas leases on state lands.

## 77-3-444. Limitation on overriding royalties and payments out of production.

### Compiler's Comments

*1997 Amendment:* Chapter 42 in (1), in introductory clause, substituted "director of the department" for "commissioner"; and made minor changes in style. Amendment effective March 12, 1997.

*Filing of Prior Agreements:* Section 2, Ch. 157, L. 1985, was not codified because it was temporary. It provided: "The board of land commissioners may require that an agreement which created overriding royalties or payments out of production of oil and gas from state oil and gas leases prior to the effective date of this act be filed by the lessee with the department of state lands [now department of natural resources and conservation] during the 30-day period following the next anniversary date of the lease."

*Applicability:* Section 6, Ch. 157, L. 1985, was not codified because it was temporary. It provided: "Section 1 [77-3-444] does not apply to overriding royalties or payments out of production agreements entered into before the effective date of this act."

## 77-3-451. Limitation on public inspection rights.

### Compiler's Comments

*1989 Statement of Intent:* The statement of intent attached to Ch. 105, L. 1989, provided: "The legislature is extending the rulemaking authority of the board of land commissioners to allow the board to amend its existing mineral leasing rules to provide for protection of confidential information. The legislature intends that the rules be written broadly to cover all information that would legitimately be considered confidential by lessees, including, as appropriate, mineral quality and quantity, mineral location, mineral depth, cost of production, and the extent of the reserves. This information may include economic or engineering data. The legislature also intends that the rules establish a procedure whereby the lessee may notify the department of state lands [now department of natural resources and conservation] of information it considers to be confidential and to be notified whether the department agrees before the lessee submits the information. Furthermore, the legislature intends that the rules include a process to protect the lessee's interests if the department considers declassification of the information at a future date."

## Part 5
## Underground Storage of Natural Gas

**77-3-501. Lease for underground storage of natural gas authorized.**

**Case Notes**

*Constitutionality:* This statute is constitutional. State ex. rel Hughes v. St. Bd. of Land Comm'rs, 137 M 510, 353 P2d 331 (1960).

# CHAPTER 4
# RENEWABLE RESOURCES

## Part 1
## Geothermal Resources

**Part Compiler's Comments**

*Severability:* Section 13, Ch. 111, L. 1974, was a severability clause.

**Part Administrative Rules**

Title 36, chapter 25, subchapter 4, ARM Geothermal rules and regulations.

**77-4-101. Geothermal leases authorized.**

**Administrative Rules**

Title 36, chapter 25, subchapter 1, ARM Surface management rules.

Title 36, chapter 25, subchapter 4, ARM Geothermal rules and regulations.

**77-4-102. Definitions.**

**Administrative Rules**

Title 36, chapter 25, subchapter 4, ARM Geothermal rules and regulations.

**77-4-103. Rules.**

**Administrative Rules**

Title 36, chapter 25, subchapter 4, ARM Geothermal rules and regulations.

**77-4-106. Bonding requirements.**

**Administrative Rules**

Title 36, chapter 25, subchapter 4, ARM Geothermal rules and regulations.

**77-4-107. Compensation to surface lessee.**

**Administrative Rules**

Title 36, chapter 25, subchapter 4, ARM Geothermal rules and regulations.

**77-4-108. Water rights in connection with geothermal development.**

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

**77-4-109. Conflicting leases.**

**Administrative Rules**

Title 36, chapter 25, subchapter 4, ARM Geothermal rules and regulations.

**77-4-121. Provisions of the lease.**

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

**Administrative Rules**

Title 36, chapter 25, subchapter 4, ARM Geothermal rules and regulations.

**77-4-122. Duration of lease.**

**Administrative Rules**

Title 36, chapter 25, subchapter 4, ARM Geothermal rules and regulations.

### 77-4-123. Extension of lease.

**Administrative Rules**

Title 36, chapter 25, subchapter 4, ARM Geothermal rules and regulations.

### 77-4-124. Operating agreements.

**Administrative Rules**

Title 36, chapter 25, subchapter 4, ARM Geothermal rules and regulations.

### 77-4-125. Pooling agreements and unit operations.

**Administrative Rules**

Title 36, chapter 25, subchapter 4, ARM Geothermal rules and regulations.

### 77-4-126. Royalties and rentals.

**Administrative Rules**

Title 36, chapter 25, subchapter 4, ARM Geothermal rules and regulations.

### 77-4-128. Permission for and disposition of improvements.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 77-4-129. Procedure to fix value of improvements.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

## Part 2
## Hydroelectric Resources

**Part Case Notes**

*Navigability for Title Test for Missouri, Clark Fork, and Madison Rivers — Equal Footing Doctrine — State Ownership of Riverbeds — Montana Supreme Court Reversed:* The District Court granted the state's motion for summary judgment on the issue of whether the Missouri, Clark Fork, and Madison Rivers were navigable for determining whether title to the riverbeds resided with the state. The concept of navigability for title means that a river does not have to experience actual use at or before the time of statehood, as long as the river was susceptible of providing a channel for commerce. Commerce is very broadly construed, and emerging and newly discovered forms of commerce can be applied retroactively to considerations of navigability. Thus, present day use of a river may be probative of its status as a navigable river at the time of statehood. Under the navigability for title test, the state has held title to the riverbeds beginning at statehood in 1889, and according to the equal footing doctrine, the disposition, use, and ownership interests in the beds of the rivers in question have been governed by state law since that time. The evidence presented by the state was clearly sufficient to demonstrate navigability in fact, and the state was therefore entitled to judgment as a matter of law. The District Court was affirmed. PPL Mont., LLC v. St., 2010 MT 64, 355 Mont. 402, 229 P.3d 421.

Following the Montana Supreme Court's decision, PPL appealed to the United States Supreme Court. The United States Supreme Court reversed the Montana court's ruling, holding that the Montana court had not properly considered the rivers in question on a segment-by-segment basis and had not determined whether they were navigable in fact at the time of statehood. The United States Supreme Court remanded the case for proceedings consistent with its opinion. PPL Montana, LLC v. Montana, 565 US 576, 132 S Ct 1215 (2012).

*No Right of Hydroelectric Facility to Make Free Appropriation of Water on State-Owned Land:* A hydroelectric facility does not have the right to make free appropriation of water on and within state-owned land without paying compensation to the state. PPL Mont., LLC v. St., 2010 MT 64, 355 Mont. 402, 229 P.3d 421, distinguishing Smith v. Deniff, 24 Mont. 20, 60 P 398 (1900), U.S. v. Conrad Invest. Co., 156 F 123 (D.C. Mont. 1907), and Mattson v. Mont. Power Co., 2009 MT 286, 352 Mont. 212, 215 P.3d 675. See also Prentice v. McKay, 38 Mont. 114, 98 P 1081 (1909).

Following the Montana Supreme Court's decision, PPL appealed to the United States Supreme Court. The United States Supreme Court reversed the Montana court's ruling, holding that the Montana court had not properly considered the rivers in question on a segment-by-segment basis and had not determined whether they were navigable in fact at the time of statehood. The United States Supreme Court remanded the case for proceedings consistent with its opinion. PPL Montana, LLC v. Montana, 565 US 576, 132 S Ct 1215, 182 L Ed 2d 77 (2012).

### 77-4-201. Lease or license of power sites.

**Compiler's Comments**

*2001 Amendment:* Chapter 7 in second sentence substituted "electrical energy" for "electric energy"; and made minor changes in style. Amendment effective October 1, 2001.

**Case Notes**

*Beds of Navigable Rivers Considered Public Trust Lands, Not School Trust Lands — Administration by Board of Land Commissioners:* A question arose as to whether the beds of navigable Montana rivers are school trust lands or public trust lands. The District Court concluded that the riverbeds were public trust lands but then went on to hold that the riverbeds were school trust lands on the theory that the Board of Land Commissioners had authority to classify the riverbeds as school trust lands. The Supreme Court agreed that the beds of navigable rivers are public trust lands pursuant to Art. X, sec. 11, Mont. Const., but reversed the decision that the riverbeds are school trust lands. However, the Board is still required to administer the riverbeds in accordance with the trust obligations imposed by Art. X, sec. 11, Mont. Const. PPL Mont., LLC v. St., 2010 MT 64, 355 Mont. 402, 229 P.3d 421, reversed and remanded on other grounds in PPL Montana, LLC v. Montana, 565 US 576, 132 S Ct 1215 (2012). See also Mont. Coalition for Stream Access, Inc. v. Curran, 210 Mont. 38, 682 P.2d 163 (1984).

### 77-4-202. Power site defined.

**Case Notes**

*Beds of Navigable Rivers Considered Public Trust Lands, Not School Trust Lands — Administration by Board of Land Commissioners:* A question arose as to whether the beds of navigable Montana rivers are school trust lands or public trust lands. The District Court concluded that the riverbeds were public trust lands but then went on to hold that the riverbeds were school trust lands on the theory that the Board of Land Commissioners had authority to classify the riverbeds as school trust lands. The Supreme Court agreed that the beds of navigable rivers are public trust lands pursuant to Art. X, sec. 11, Mont. Const., but reversed the decision that the riverbeds are school trust lands. However, the Board is still required to administer the riverbeds in accordance with the trust obligations imposed by Art. X, sec. 11, Mont. Const. PPL Mont., LLC v. St., 2010 MT 64, 355 Mont. 402, 229 P.3d 421, reversed and remanded on other grounds in PPL Montana, LLC v. Montana, 565 US 576, 132 S Ct 1215 (2012). See also Mont. Coalition for Stream Access, Inc. v. Curran, 210 Mont. 38, 682 P.2d 163 (1984).

### 77-4-203. Restrictions and regulations.

**Case Notes**

*Beds of Navigable Rivers Considered Public Trust Lands, Not School Trust Lands — Administration by Board of Land Commissioners:* A question arose as to whether the beds of navigable Montana rivers are school trust lands or public trust lands. The District Court concluded that the riverbeds were public trust lands but then went on to hold that the riverbeds were school trust lands on the theory that the Board of Land Commissioners had authority to classify the riverbeds as school trust lands. The Supreme Court agreed that the beds of navigable rivers are public trust lands pursuant to Art. X, sec. 11, Mont. Const., but reversed the decision that the riverbeds are school trust lands. However, the Board is still required to administer the riverbeds in accordance with the trust obligations imposed by Art. X, sec. 11, Mont. Const. PPL Mont., LLC v. St., 2010 MT 64, 355 Mont. 402, 229 P.3d 421, reversed and remanded on other grounds in PPL Montana, LLC v. Montana, 565 US 576, 132 S Ct 1215 (2012). See also Mont. Coalition for Stream Access, Inc. v. Curran, 210 Mont. 38, 682 P.2d 163 (1984).

### 77-4-204. Examination of power sites.

**Case Notes**

*State Allowed Compensation for Hydroelectric Use of Riverbeds — No Preemption by Federal Law:* Plaintiff PPL sought a declaratory judgment that the state was precluded from seeking compensation for the use of riverbeds at PPL's federally licensed hydroelectric dams on the Missouri, Clark Fork, and Madison Rivers. PPL asserted that the state law regulating the use of riverbeds was preempted by federal law and by the federal navigational servitude, which is the power of the U.S. Congress to ensure that navigable rivers remain open to interstate and foreign commerce. The state denied that federal law or the servitude preempted the state Hydroelectric Resources Act (HRA), Title 77, ch. 4, part 2, and counterclaimed for compensation for PPL's past and ongoing use of state riverbeds, as well as damages under theories of uncompensated use of state land, unjust enrichment, trespass, and negligence. The District Court agreed with the state, holding that the Federal Power Act (FPA) recognized the property rights of parties whose land is affected by federally licensed hydroelectric projects and specifically prohibits the use of private property without compensation, so the state was allowed to seek compensation. The court also concluded that the FPA explicitly permits the operation of state law regarding proprietary rights affected by a federally licensed facility, so the HRA was not preempted by the FPA. PPL Mont., LLC v. St., 2010 MT 64, 355 Mont. 402, 229 P.3d 421.

Following the Montana Supreme Court's decision, PPL appealed to the United States Supreme Court. The United States Supreme Court reversed the Montana court's ruling in part, holding that the Montana court had not properly considered the rivers in question on a segment-by-segment basis and had not determined whether they were navigable in fact at the time of statehood. The United States Supreme Court remanded the case for proceedings consistent with its opinion. PPL Montana, LLC v. Montana, 565 US 576, 132 S Ct 1215 (2012).

## 77-4-206. Meeting of board on proposed lease or license.

### Case Notes

*State Allowed Compensation for Hydroelectric Use of Riverbeds — No Preemption by Federal Law:* Plaintiff PPL sought a declaratory judgment that the state was precluded from seeking compensation for the use of riverbeds at PPL's federally licensed hydroelectric dams on the Missouri, Clark Fork, and Madison Rivers. PPL asserted that the state law regulating the use of riverbeds was preempted by federal law and by the federal navigational servitude, which is the power of the U.S. Congress to ensure that navigable rivers remain open to interstate and foreign commerce. The state denied that federal law or the servitude preempted the state Hydroelectric Resources Act (HRA), Title 77, ch. 4, part 2, and counterclaimed for compensation for PPL's past and ongoing use of state riverbeds, as well as damages under theories of uncompensated use of state land, unjust enrichment, trespass, and negligence. The District Court agreed with the state, holding that the Federal Power Act (FPA) recognized the property rights of parties whose land is affected by federally licensed hydroelectric projects and specifically prohibits the use of private property without compensation, so the state was allowed to seek compensation. The court also concluded that the FPA explicitly permits the operation of state law regarding proprietary rights affected by a federally licensed facility, so the HRA was not preempted by the FPA. PPL Mont., LLC v. St., 2010 MT 64, 355 Mont. 402, 229 P.3d 421.

Following the Montana Supreme Court's decision, PPL appealed to the United States Supreme Court. The United States Supreme Court reversed the Montana court's ruling in part, holding that the Montana court had not properly considered the rivers in question on a segment-by-segment basis and had not determined whether they were navigable in fact at the time of statehood. The United States Supreme Court remanded the case for proceedings consistent with its opinion. PPL Montana, LLC v. Montana, 565 US 576, 132 S Ct 1215 (2012).

## 77-4-208. Rental for power sites — deposit of rental money in proper accounts.

### Compiler's Comments

*2011 Amendment:* Chapter 371 in (2) at beginning substituted "Beginning July 1, 2011, all" for "Ninety-five percent of all" and after "deposited" substituted "in accordance with 17-3-1003(5)" for "in the school facility and technology account provided for in 20-9-516. The remaining 5% of the rental payments received must be deposited annually in the public school permanent fund provided for in 20-9-621". Amendment effective July 1, 2011.

*Applicability — Coordination:* Section 6, Ch. 371, L. 2011, amended sec. 32, Ch. 486, L. 2009, to provide that the 2009 amendments to this section apply to rental payments beginning July 1, 2011.

*2009 Amendment:* Chapter 377 in (1) near beginning substituted "rental payment to the state for power sites" for "rental to the state"; inserted (2) relating to the deposit of percentages of rental payments; and made minor changes in style. Amendment effective April 28, 2009.

*Preamble:* The preamble attached to Ch. 377, L. 2009, provided: "WHEREAS, in keeping with Montana's constitutional requirements for school funding and the Montana Supreme Court's decision in Columbia Falls Elementary School District No. 6 v. State, 2005 MT 69, 326 Mont. 304, 109 P.3d 257 (2005), the 2005 Legislature directed that a school funding system providing a "basic system of free quality public elementary and secondary schools" must include, among other things, consideration of funding for school facilities; and

WHEREAS, in its December 2005 Special Session, the Legislature appropriated $2.5 million from the general fund to the Department of Administration for the completion of a condition and needs assessment and energy audit of K-12 public school facilities; and

WHEREAS, in the May 2007 Special Session, the Legislature established a school facility improvement account in the state special revenue fund to provide money to schools to implement the recommendations of the school facility condition and needs assessment and energy audit following its completion and provided for the transfer of money into the account to be used as determined by the 2009 Legislature; and

WHEREAS, the Department of Administration has completed its conditions and needs assessment and energy audit of Montana's K-12 public schools and has made recommendations for improvements related to safety and energy conservation and to extend the life of school facilities; and

WHEREAS, the Department of Commerce efficiently and effectively administers the Treasure State Endowment Program to assist local governments in funding infrastructure projects; and

WHEREAS, the Legislature seeks to commit ongoing state resources to school facilities by establishing a program to administer the award to public school districts for school facility project grants, matching planning grants, and emergency grants using the Treasure State Endowment Program as a model."

*Severability:* Section 20, Ch. 377, L. 2009, was a severability clause.

*Applicability — Coordination:* Section 22, Ch. 377, L. 2009, as amended by sec. 32, Ch. 486, L. 2009, provided that this section applies to rental payments beginning January 1, 2012.

**Case Notes**

*Proper Application of Profitability Method of Determining Fair Market Value of Hydroelectric Facility's Damages Owed to State for Past Use of State-Owned Riverbeds — Future Lease Terms Left to Board of Land Commissioners:*

After holding that the state was entitled to compensation for use of state-owned riverbeds by plaintiff hydroelectric utility, the District Court applied a profitability methodology to determine the productive value of the land in order to arrive at a fair market value for plaintiff's use of the riverbeds. Plaintiff contested the methodology, but the Supreme Court affirmed. The state uses productive value of the land in determining lease rates, and nothing in Montana law barred an award of damages based on plaintiff's profits, so income-based leasing was an appropriate method to calculate past damages in this case. Use of the Hydroelectric Resources Act (HRA), Title 77, ch. 4, part 2, was a proper mechanism to assess past damages, and the District Court's findings in support of the award were not clearly erroneous. The District Court also correctly left to the discretion of the Board of Land Commissioners the terms of any future lease with plaintiff and properly held that the Board was not bound by the same method used to calculate past damages in developing future lease terms. PPL Mont., LLC v. St., 2010 MT 64, 355 Mont. 402, 229 P.3d 421, following State ex rel. Thompson v. Babcock, 147 Mont. 46, 409 P.2d 808 (1966).

Following the Montana Supreme Court's decision, PPL appealed to the United States Supreme Court. The United States Supreme Court reversed the Montana court's ruling in part, holding that the Montana court had not properly considered the rivers in question on a segment-by-segment basis and had not determined whether they were navigable in fact at the time of statehood. The United States Supreme Court remanded the case for proceedings consistent with its opinion. PPL Montana, LLC v. Montana, 565 US 576, 132 S Ct 1215 (2012). See also St. v. Avista Corp., 2023 MT 6, 411 Mont. 192, 523 P.3d 44, in which the Supreme Court reversed the District Court's order interpreting a retroactivity clause in the parties' consent judgment as being unripe and constituting an advisory opinion.

### 77-4-210. Joint development with United States.

**Compiler's Comments**

*2001 Amendment:* Chapter 7 in (1) near middle substituted "electrical energy" for "electric energy"; and made minor changes in style. Amendment effective October 1, 2001.

## Part 3

## Wind and Solar Resources

**Part Compiler's Comments**

*Effective Date:* This part is effective October 1, 2021.

# CHAPTER 5
# TIMBER RESOURCES

**Chapter Compiler's Comments**

*Functions of Department of Natural Resources and Conservation Transferred to Department of State Lands (Now Abolished):* Section 1, Ch. 529, L. 1981, provided: "(1) The functions of protecting natural resources from fire in Title 76, chapter 11, part 1 [now repealed and renumbered]; of protection of forest resources in Title 76, chapter 13; of appraising, protecting, and selling state timberlands in Title 77, chapter 5; and of recommending closing lands to hunting and fishing in fire danger areas under 87-3-106 are transferred from the department of natural resources and conservation to the department of state lands [department of state lands now abolished—functions were returned to department of natural resources and conservation].

(2) Unless inconsistent with this act, any reference to "department of natural resources and conservation" in those sections is changed to "department of state lands" [now abolished].

(3) Any corresponding internal references shall be changed by the code commissioner."

*Severability:* Section 9, Ch. 529, L. 1981, was a severability section.

*Transition:* Section 10, Ch. 529, L. 1981, provided: "The provisions of 2-15-131 through 2-15-137 apply to the transfer of functions under this act."

**Chapter Case Notes**

*Negligence in Fighting Fire:* Where plaintiff's property was damaged by fire retardant dropped from defendant's airplane which was hired to aid in fighting a forest fire and plaintiff could not show the lack of proper care under the circumstances, the cause failed under the doctrine of "damnum absque injuria" (injury without redressable breach of duty). Stocking v. Johnson Flying Serv., 143 M 61, 387 P2d 312 (1963).

## Part 1
## State Forests

### 77-5-103. Role of department.

**Compiler's Comments**

*2007 Amendment:* Chapter 336 in (3)(b) deleted "have charge of all firewardens of the state and direct and aid them in their duties"; in (3)(c) substituted "wildland" for "forest, brush, and grass"; in (3)(d) substituted "nonforest" for "brushcover"; deleted former (4) that read: "(4) The department shall establish and maintain forest fire control training programs for state firefighters and other persons requiring training"; and made minor changes in style. Amendment effective June 1, 2007.

*1981 Amendment:* Changed the department of natural resources and conservation to the department of state lands (now abolished). "Department" means department of state lands (now department of natural resources and conservation). See 77-1-101.

*Severability:* Section 9, Ch. 529, L. 1981, was a severability section.

### 77-5-116. State forest lands — deferral of management prohibited.

**Compiler's Comments**

*Preamble:* The preamble attached to Ch. 259, L. 2001, provided: "WHEREAS, no interest in state trust lands or proceeds may be diverted from the trust without payment of the full market value of that use to the trust pursuant to section 11 of the state's Enabling Act and Article X, sections 3 and 11, of the Montana Constitution; and

WHEREAS, the Montana Supreme Court, in Montanans for the Responsible Use of the School Trust v. State, 296 Mont. 402, 989 P.2d 800 (1999), held that state trust land could not be held idle without the production of revenue pending the arbitration of lease improvements and referenced an earlier Supreme Court ruling that declared that a "trustee must act with the utmost good faith towards the beneficiary, and may not act in his own interest, or in the interest of a third person"; and

WHEREAS, Attorney General Robert Woodahl, in an opinion issued on July 7, 1976, 36 A.G. Op. 92, held that in order for the state to avoid a breach of trust under the Enabling Act and the Montana Constitution, the state is required to actually compensate the state school trust with funds for the full appraised value of any state trust lands designated or exchanged for natural areas pursuant to the Montana Natural Areas Act of 1974."

*Effective Date:* Section 3, Ch. 259, L. 2001, provided: "[This act] is effective on passage and approval." Approved April 16, 2001.

**Administrative Rules**

Title 36, chapter 11, subchapter 4, ARM State forest land management.

## Part 2
## Timber Sales and Removal

**Part Case Notes**

*Failure to Distinguish Between Commercially Valuable and Nonvaluable Timber as Firewood on State Lands Violative of Trust Duty of Undivided Loyalty:* Pursuant to 77-5-211 (now repealed), the state discretionarily issued free permits for the gathering of dead, down, or inferior wood from school trust lands for use as firewood. The District Court concluded that 77-5-211 (now repealed) authorized the Department of Natural Resources and Conservation to act in violation of the school trust by allowing the Department to give away commercially valuable timber, in violation of its trust duty of undivided loyalty. The state argued on appeal that the District Court's conclusions were incorrect because the Department retained discretion to issue permits and because plaintiff failed to show that dead wood had commercial value in all instances. The Supreme Court affirmed, citing Wild W. Motors, Inc. v. Lingle, 224 M 76, 728 P2d 412, 43 St. Rep. 2030 (1986), in considering the state's duty of undivided loyalty as trustee of school trust lands, noting that a trustee must act with the utmost good faith toward the beneficiary and may not act in the trustee's own interest or in the interest of a third party. In failing to distinguish between commercially valuable timber and timber that lacks commercial value, the statute allows the Department to issue permits to third parties without charging them for any commercially valuable wood that they collect, violating both the mandate that full market value be obtained for school trust lands and the state's trust duty of undivided loyalty. Montanans for Responsible Use of School Trust v. State ex rel. Bd. of Land Comm'rs, 1999 MT 263, 296 M 402, 989 P2d 800, 56 St. Rep. 1065 (1999).

**77-5-201. Sale of timber.**

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 1, Ch. 143, L. 2023. Amendment effective October 1, 2023.

*2019 Amendment:* Chapter 82 in (2) substituted "500,000 board feet" for "100,000 board feet". Amendment effective March 20, 2019.

*2017 Amendment:* Chapter 116 in (3)(b)(i) after "timber not in excess of" substituted "2 million board feet" for "1 million board feet". Amendment effective March 30, 2017.

*2007 Amendment:* Chapter 494 in (1) inserted second sentence concerning timber or forest products sold from state trust lands; in (3)(a) in first sentence after "blowdown" inserted "or to address forest health concerns"; and made minor changes in style. Amendment effective May 16, 2007.

*Severability:* Section 12, Ch. 494, L. 2007, was a severability clause.

*1995 Amendment:* Chapter 223 in (3)(a), after "blowdown", inserted "or in cases when the department is required to act immediately to take advantage of access granted by permission of an adjoining landowner"; inserted (3)(b)(i) concerning immediate action; inserted (3)(b)(ii) concerning access controlled by purchaser; inserted (3)(c) concerning limited time for sales opportunities; and made minor changes in style.

*1991 Amendment of Administrative Rule:* In Ch. 372, L. 1991, the Legislature directed the Department of State Lands (now Department of Natural Resources and Conservation) to amend ARM 26.6.411 (now 36.11.111) by inserting (2)(a)(iii) to prohibit use of unprocessed timber from state lands as a substitute for unprocessed timber exported from the United States, inserting definition of substitution, and making minor changes in style.

*Preamble:* The preamble attached to Ch. 372, L. 1991, provided: "WHEREAS, the forest products industry accounts for 46% of the economic base of Montana's seven western counties; and

WHEREAS, the jobs of American mill workers are lost when raw logs are exported overseas; and

WHEREAS, the United States Congress enacted the Forest Resources Conservation and Shortage Relief Act of 1990 to prohibit the export of unprocessed timber originating from federally owned and state-owned lands; and

WHEREAS, the Department of State Lands [now Department of Natural Resources and Conservation] has promulgated rules prohibiting the export of unprocessed timber originating from state-owned lands in Montana; and

WHEREAS, existing law creates a loophole that allows private landowners in Montana to export unprocessed timber from their own lands and then substitute timber purchased from state lands for the exported supply; and

WHEREAS, the decrease in timber available for export from the states of Oregon and Washington may increase the pressure to export unprocessed timber from private lands in Montana."

*1983 Amendment:* In (3), substituted "1 million" for "200,000".

*1981 Amendment:* Changed the department of natural resources and conservation to the department of state lands (now abolished). "Department" means department of state lands (now department of natural resources and conservation). See 77-1-101.

*Severability:* Section 9, Ch. 529, L. 1981, was a severability section.

**Case Notes**

*Failure to Include Adequate Cumulative Impacts Analysis — Insufficient Environmental Impact Statement:* The District Court held that the environmental impact statement (EIS) prepared for the Middle Soup Creek logging project was insufficient because it did not adequately analyze and discuss the cumulative impacts of the project in accordance with the definitions of cumulative impact and human environment in ARM 36.2.522 or include discussion of reconciliation of the proposed project with the state forest land management plan (SFLMP). The Department of Natural Resources and Conservation (DNRC) argued on appeal that the court failed to comprehend that a new course filter ecological analysis took into account all of the prevailing conditions of the affected lands and therefore incorporated a cumulative effects analysis into the EIS. The DNRC also contended that even though ARM 36.2.529 requires a cumulative impacts analysis, the rule does not dictate a particular methodology. The Supreme Court disagreed. ARM 36.2.529 clearly states that the EIS must contain a description of the cumulative impacts and does not allow a mere analysis implicit within the EIS. The public is not benefited by reviewing an EIS that does not explicitly set forth the actual cumulative impacts analysis and the facts that form the basis for the analysis. Further, ARM 36.2.524 requires consideration of potential conflicts with formal plans, such as the SFLMP. Here, the EIS discussed old growth and fragmentation as concerns, but did not discuss the SFLMP objective to preserve old growth, reduce fragmentation, and protect unique habitat. The District Court did not err when it held that the DNRC violated MEPA as a result of its failure to include an adequate cumulative impacts analysis in the EIS. Friends of the Wild Swan v. Dept. of Natural Resources and Conservation, 2000 MT 209, 301 M 1, 6 P3d 972, 57 St. Rep. 816 (2000).

*Substantial Economic Change as Basis for Supplemental EIS:* The District Court held that a supplemental environmental impact statement (EIS) was required for the Middle Soup Creek logging project in light of changed economic circumstances of the sale. The sale was originally proposed as a revenue source for the school trust, before revenue reestimation revealed that the sale would actually cost the state about $150,000. The state contended that a supplemental EIS was not required absent proof that a reduction in the total timber sale revenue would result in physical impact to the environment, arguing that ARM 36.2.522 does not compel preparation of a supplemental EIS based on economic impacts alone. The Supreme Court disagreed, noting that nothing in ARM 36.2.533 requires that a substantial change must result in additional environmental impact before a supplemental EIS is required, nor is there a limitation on what may be considered a substantial change. Thus, a substantial economic change in a project can serve as the basis for requiring a supplemental EIS. Here, a timber sale that would ultimately cost the state money rather than raise revenue as originally anticipated was considered a substantial change sufficient to warrant a supplemental EIS, and the state erred in not preparing one. Friends of the Wild Swan v. Dept. of Natural Resources and Conservation, 2000 MT 209, 301 M 1, 6 P3d 972, 57 St. Rep. 816 (2000).

**77-5-202. Agreement with purchaser — bond.**

**Compiler's Comments**

*1989 Amendment:* At beginning of (2)(a) inserted exception clause and at end substituted "the potential loss to the state, as determined by the department" for "at least 20% of the estimated value of timber sold"; and inserted (2)(b) relating to required amount of bond.

### 77-5-203. Breach of timber sale agreement.

**Compiler's Comments**

*1981 Amendment:* Changed the department of natural resources and conservation to the department of state lands (now abolished). "Department" means department of state lands (now department of natural resources and conservation). See 77-1-101.

*Severability:* Section 9, Ch. 529, L. 1981, was a severability section.

### 77-5-204. Sale of timber — fee for forest improvement.

**Compiler's Comments**

*2009 Amendment:* Chapter 465 in (4) in introductory clause near end substituted "deposited in the forest improvement account, established in 77-5-224" for "deposited in the state special revenue fund"; and made minor changes in style. Amendment effective July 1, 2009.

*2007 Amendments — Composite Section:* Chapter 247 in (4) in first sentence at end inserted "unless the timber is to be harvested from land granted to the state pursuant to the Morrill Act of 1862, 7 U.S.C. 301 through 308, and the Morrill Act of 1890, 7 U.S.C. 321 through 329". Amendment effective April 26, 2007.

Chapter 494 in (1) after "state lands" substituted reference to other forest products removed from state lands as provided in 77-5-214 through 77-5-219 at per-unit price for "at a price per 1,000 board feet, when appropriate, that"; in (3) in second sentence substituted "per-unit value" for "value per 1,000 board feet" and at end substituted "forest products" for "timber"; in (4) in first sentence near beginning substituted "forest products" for "timber" and after "timber" inserted "or other forest product"; and made minor changes in style. Amendment effective May 16, 2007.

*Severability:* Section 12, Ch. 494, L. 2007, was a severability clause.

*1995 Amendment:* Chapter 157 in (1) and (3) substituted "1,000 board feet, when appropriate" for "1,000 feet"; at end of (1) substituted "full market value" for (1)(a) and (1)(b) that read: "(a) $3 per 1,000 feet for white pine, yellow pine, and spruce; or

(b) $1.50 per 1,000 feet for all other timber species"; and deleted (3)(b) through (3)(d) that read: "(b) the condition of the timber relative to risk from fires or other damage;

(c) the timber's distance from the nearest lake, stream, or railroad; and

(d) the timber's value as a protection to a watershed."

*1993 Amendment:* Chapter 446 in (3), in first sentence before "appraised", deleted "estimated and" and at beginning of second sentence substituted "An appraisal" for "These estimates and appraisals"; in (4) substituted first sentence establishing a forest improvement fee for former language that read: "The board may set fees for brush disposal on state lands. The board may also establish a fee for timber stand improvement on timber cut on state lands"; inserted (4)(a) through (4)(d) regarding uses of fee revenue that may be funded by legislative appropriation; and made minor changes in style. Amendment effective July 1, 1993.

*1983 Amendment:* Substituted reference to state special revenue fund for reference to earmarked revenue fund.

*1981 Amendment:* Changed the department of natural resources and conservation to the department of state lands (now abolished) in two places. "Department" means department of state lands (now department of natural resources and conservation). See 77-1-101.

*Severability:* Section 9, Ch. 529, L. 1981, was a severability section.

### 77-5-206. Management of timber by department.

**Compiler's Comments**

*1991 Amendment:* In (2) deleted second sentence that required Department to use the Scribner Decimal C log scale for measuring volume for state timber sales.

*1981 Amendment:* Changed the department of natural resources and conservation to the department of state lands (now abolished) in two places. "Department" means department of state lands [now department of natural resources and conservation). See 77-1-101.

*Severability:* Section 9, Ch. 529, L. 1981, was a severability section.

**Administrative Rules**

Title 36, chapter 11, subchapter 4, ARM State forest land management.

### 77-5-207. Salvage timber program.

**Compiler's Comments**

*1993 Statement of Intent:* The statement of intent attached to Ch. 285, L. 1993, provided: "It is the intent of the legislature that the department of state lands [now department of natural resources and conservation] establish and implement an aggressive salvage timber program for state lands that removes dead and dying timber before the timber decays and wood value is lost. However, the direction to establish a salvage timber program in this bill should not take precedence over the timely sale of green timber."

### 77-5-212. Commercial permits for timber sale.

**Compiler's Comments**

*2019 Amendment:* Chapter 82 in (1) near beginning inserted "for quantities of 500,000 board feet or less" and deleted former (1)(a) and (1)(b) that read: "(a) in quantities of less than 100,000 board feet; and

(b) in cases of emergency due to fire, insect, fungus, parasite, or blowdown and no other, in quantities of less than 500,000 board feet"; in (8) near beginning substituted "for timber sales in cases of emergency due to fire, insect, fungus, parasite, or blowdown, and no other" for "pursuant to subsection (1)(b)"; and made minor changes in style. Amendment effective March 20, 2019.

*2009 Amendment:* Chapter 108 in (1)(b) near end substituted "500,000 board feet" for "200,000 board feet". Amendment effective April 1, 2009.

*Saving Clause:* Section 2, Ch. 108, L. 2009, was a saving clause.

*2005 Amendment:* Chapter 101 in (1) near end after "for" inserted "the sale of"; in (1)(a) and (1)(b) at end substituted "board feet" for "feet board measure"; inserted (2) concerning applying for permit; inserted (3) concerning vehicle liability insurance for sales of less than 30,000 board feet; inserted (4) concerning vehicle liability insurance for sales of 30,000 board feet or more; inserted (5) concerning time for review of permit applications; inserted (6) concerning time for permit issuance; inserted (8) concerning categorical exclusions; inserted (9) concerning precedence of sale and harvest of green timber; inserted (10) concerning further environmental review for cumulative effect; and made minor changes in style. Amendment effective October 1, 2005.

**Administrative Rules**

Title 36, chapter 11, subchapter 4, ARM State forest land management.

### 77-5-214. Statement of policy.

**Compiler's Comments**

*Severability:* Section 12, Ch. 494, L. 2007, was a severability clause.

*Effective Date:* Section 14, Ch. 494, L. 2007, provided: "[This act] is effective on passage and approval." Approved May 16, 2007.

### 77-5-215. Definitions.

**Compiler's Comments**

*Severability:* Section 12, Ch. 494, L. 2007, was a severability clause.

*Effective Date:* Section 14, Ch. 494, L. 2007, provided: "[This act] is effective on passage and approval." Approved May 16, 2007.

### 77-5-216. Contract harvesting authorized.

**Compiler's Comments**

*2009 Amendment:* Chapter 116 in (3) near middle substituted "10%" for "5%". Amendment effective April 1, 2009.

*Severability:* Section 12, Ch. 494, L. 2007, was a severability clause.

*Effective Date:* Section 14, Ch. 494, L. 2007, provided: "[This act] is effective on passage and approval." Approved May 16, 2007.

### 77-5-217. Contract harvesting to address forest health concerns.

**Compiler's Comments**

*Severability:* Section 12, Ch. 494, L. 2007, was a severability clause.

*Effective Date:* Section 14, Ch. 494, L. 2007, provided: "[This act] is effective on passage and approval." Approved May 16, 2007.

### 77-5-218. Rules.

**Compiler's Comments**

*Severability:* Section 12, Ch. 494, L. 2007, was a severability clause.

*Effective Date:* Section 14, Ch. 494, L. 2007, provided: "[This act] is effective on passage and approval." Approved May 16, 2007.

### 77-5-219. Contract harvesting account — authorized expenditures — termination.

**Compiler's Comments**

*2009 Amendment:* Chapter 465 in (1) in first sentence substituted "trust land administration account established in 77-1-108" for "timber sale account established in 77-1-613"; in (4) substituted "trust land administration account" for "timber sale account"; and in (5) in second sentence substituted "trust land administration account provided for in 77-1-108" for "timber sale account provided for in 77-1-613". Amendment effective July 1, 2009.

*Severability:* Section 12, Ch. 494, L. 2007, was a severability clause.

*Effective Date:* Section 14, Ch. 494, L. 2007, provided: "[This act] is effective on passage and approval." Approved May 16, 2007.

### 77-5-221. Definition.

**Compiler's Comments**

*Effective Date:* Section 8, Ch. 517, L. 1995, provided that this section is effective July 1, 1995.

*Code Commissioner Correction:* The Code Commissioner deleted a reference to 77-1-222 pursuant to the authority in sec. 73, Ch. 18, L. 1995.

### 77-5-222. Determination of annual sustainable yield.

**Compiler's Comments**

*2013 Amendment:* Chapter 288 in (1)(a) inserted "On July 1, 2013"; inserted (1)(b) concerning new studies; substituted (2) concerning determination of annual sustainable yield for former (2) that read: "(2) Until the new study required by subsection (1) is completed, the department is directed to set the annual timber sale target at 50 million board feet a year"; and made minor changes in style. Amendment effective April 24, 2013.

*2003 Amendment:* Chapter 440 in (1) in first sentence near middle before "study" inserted "new" and inserted second sentence requiring the department to direct a third party to determine the annual sustainable yield on forested state lands; and in (2) near beginning before "study" inserted "new" and at end after "is completed" substituted "the department is directed to set the annual timber sale target at 50 million board feet a year" for "the annual sustainable yield is considered to be a range of 45 million board feet to 55 million board feet". Amendment effective April 21, 2003.

*Effective Date:* Section 8, Ch. 517, L. 1995, provided that this section is effective July 1, 1995.

### 77-5-223. Annual sustainable yield as timber sale requirement.

**Compiler's Comments**

*2013 Amendment:* Chapter 288 at end inserted "based on a determination under 77-5-222"; deleted former (2) that read: "(2) After it is determined under 77-5-222, the annual sustainable yield must be reviewed and redetermined by the department, under the direction of the board at least once every 10 years"; and made minor changes in style. Amendment effective April 24, 2013.

*Effective Date:* Section 8, Ch. 517, L. 1995, provided that this section is effective July 1, 1995.

### 77-5-224. Forest improvement account.

**Compiler's Comments**

*Effective Date:* Section 29, Ch. 465, L. 2009, provided that this section is effective July 1, 2009.

## Part 3
## Streamside Management Zones

**Part Compiler's Comments**

*1991 Statement of Intent:* The statement of intent attached to Ch. 608, L. 1991, provided: "It is the intent of the legislature that the streamside management zone be an area of closely managed activity, but not a zone where timber harvest is excluded. Timber harvest activities must be managed within the zone to achieve objectives relating to water quality, beneficial water uses, management of wildlife habitat, and the long-term stability of the stream system, in addition to timber harvest objectives.

It is the intent of the legislature that the department of state lands [now department of natural resources and conservation] adopt rules to implement the management standards provided for in [section 3] [77-5-303] as enforceable standards for streamside management zones. These standards are to be coordinated with the objectives and guidelines contained in the existing system of voluntary best management practices, which will still guide forest practices outside of the streamside management zone. The department shall adopt rules governing the harvest of timber in streamside management zones to ensure the retention of merchantable and submerchantable timber necessary to maintain the integrity of the streamside management zone. The department shall also adopt rules under which owners and operators may receive approval for alternative practices for the standards provided in [section 3] [77-5-303].

It is the intent of the legislature that the department develop voluntary, nonenforceable guidelines concerning the selection and retention of trees and vegetation, including snags, for wildlife habitat within the streamside management zone.

It is the intent of the legislature that the department establish an interdisciplinary technical committee to assist the department in adopting rules, developing voluntary guidelines for the management of wildlife habitat, and monitoring the implementation of this bill. The members of the committee should have technical knowledge or expertise in water quality, wildlife management, or forest management and include representatives from the U.S. forest service; U.S. bureau of land management; the Montana departments of health and environmental sciences [now department of environmental quality] and fish, wildlife, and parks; conservation districts; the Montana state university [now Montana state university-Bozeman] extension forestry program; the Montana forest and conservation experiment station; the forest products industry; and the conservation community.

To the extent practical, the department should conduct onsite consultations under [section 4] [77-5-304] in conjunction with consultations or inspections conducted pursuant to Title 76, chapter 13, parts 1 and 4. It is also the intent of the legislature that whenever department personnel in the field notice a probable water quality or 310 permit violation that they notify the appropriate authority.

It is the intent of the legislature that the department, with the assistance of the technical committee, evaluate the implementation of this bill, develop recommendations to address problems, if any, that arise, and report its findings and recommendations to the environmental quality council.

Finally, the legislature recognizes that appropriate limitations on activities in streamside zones, which comprise only a very small percentage of Montana forests, can achieve substantial watershed and wildlife benefits."

**Part Administrative Rules**

Title 36, chapter 11, subchapter 3, ARM Streamside management zone.

### 77-5-301. Findings and purpose.

**Administrative Rules**

Title 36, chapter 11, subchapter 3, ARM Streamside management zone.

### 77-5-302. Definitions.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 in definition of Department substituted "department of natural resources and conservation provided for in 2-15-3301" for "department of state lands provided for in 2-15-3201"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1993 Amendment:* Chapter 320 in definition of timber sale, after "harvest", substituted "or" for "and".

**Administrative Rules**

Title 36, chapter 11, subchapter 3, ARM Streamside management zone.

### 77-5-303. Standards for forest practices in streamside management zones.

**Administrative Rules**

Title 36, chapter 11, subchapter 3, ARM Streamside management zone.

### 77-5-305. Responsibility for compliance — penalties — administrative orders.

**Compiler's Comments**

*1997 Amendment:* Chapter 422 inserted (5) relating to fines and penalties deposited in state general fund. Amendment effective July 1, 1997.

### 77-5-307. Rulemaking.

**Administrative Rules**

Title 36, chapter 11, subchapter 3, ARM Streamside management zone.

## Part 4
## Community and Urban Forestry Program

**Part Compiler's Comments**

*1993 Statement of Intent:* The statement of intent attached to Ch. 321, L. 1993, provided: "A statement of intent is required for this bill because [section 3] [77-5-403] authorizes the department of state lands [now department of natural resources and conservation] to adopt rules for the implementation of [sections 1 through 4] [Title 77, ch. 5, part 4]. Although implementation by the department is discretionary, it would require the adoption of rules.

At a minimum, the rules must address the following:

(1) the types of trees and vegetative cover best suited to the Montana environment;
(2) instructions for the planting and maintenance of trees and vegetation; and
(3) criteria for the selection of suitable sites for planting."

**77-5-402. Definitions.**

**Compiler's Comments**

*1995 Amendment:* Chapter 418 in definition of Department substituted "department of natural resources and conservation provided for in 2-15-3301" for "department of state lands provided for in 2-15-3201". Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

# CHAPTER 6
# AGRICULTURAL, GRAZING, AND OTHER SURFACE LEASES

**Chapter Administrative Rules**

Title 36, chapter 25, subchapter 1, ARM Surface management rules.

**Chapter Case Notes**

*School Trust Land Water Rights Owned by State:* In a case involving a dispute over ownership of water rights on state school trust lands, the Supreme Court ruled that title to the surface and ground water rights on school trust lands vests in the state and that the lessee, in making appropriations on and for school trust sections, is acting on behalf of the state. It is only through state action that the lessee is on the land, and Montana law expressly provides that the lessee must be reimbursed for all capital expenditures made in putting the water to beneficial use. The state is the beneficial user of the water, and its duty as trustee of the school trust lands prohibits it from alienating any interest in the land without receiving full compensation for it or from giving up control over the water rights. Dept. of State Lands v. Pettibone, 216 M 361, 702 P2d 948, 42 St. Rep. 869 (1985). However, see Advocates for School Trust Lands v. St., 2022 MT 46, 408 Mont. 39, 505 P.3d 825, holding that 85-2-441, which allows a water right owner to put water from a well or developed spring located on private land to beneficial use on state trust land and presumes against a state ownership in that water right, was not facially unconstitutional.

**Chapter Law Review Articles**

Going Once, Going Twice, Sold: Implications for Leasing State Trust Lands to Environmental Organizations and Other High Bidders, Allison, 25 Pub. Land & Resources L. Rev. 39 (2004).

## Part 1
## General Provisions

**Part Administrative Rules**

Title 36, chapter 25, subchapter 1, ARM Surface management rules.

**77-6-102. Surface leases authorized.**

**Compiler's Comments**

*1985 Amendment:* Near end substituted "town lots, city lots, and lands valuable for commercial development" for "town and city lots".

### 77-6-103. Lease of state land to United States for military purposes authorized.

**Administrative Rules**

Title 36, chapter 25, subchapter 1, ARM Surface management rules.

### 77-6-105. Criteria for determining land to be included in single lease.

**Administrative Rules**

Title 36, chapter 25, subchapter 1, ARM Surface management rules.

### 77-6-108. Who may lease.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

**Case Notes**

*No Proscription That Previously Canceled Lessee May Not Bid or May Not Lease State Lands — Written Findings Required When High Bid Rejected:* Winchell's state land lease was canceled for gross mismanagement of the leased property. The lease was subsequently reclassified and advertised for bids, and Winchell submitted the high bid. Rather than make written findings as to why the bid was not in the best interests of the state, the Department of State Lands (now Department of Natural Resources and Conservation) relied on ARM 26.3.142(6) (now 36.25.115) to dismiss Winchell's bid out-of-hand. This administrative rule, which purports to give the Department the ability to refuse to even consider a bid, is in derogation of law because there is no statutory proscription disallowing the bid or ability to lease of a person whose lease has been previously canceled. Absent written findings that the high bid was too high for community standards, would cause damage to the land, or would impair long-term productivity, the automatic refusal to consider the bid, based on an overbroad and unlawful administrative regulation, was in excess of the Department's jurisdiction and an abuse of its discretion. Winchell v. Dept. of State Lands, 262 M 328, 865 P2d 249, 50 St. Rep. 1580 (1993).

*Unincorporated Association Not Considered Legal Entity Capable of Having Title to Real Property — Lease of State Land Precluded:* Montana recognizes two types of associations as legal entities: cooperative associations and agricultural associations. Both of these entities have the statutory authorization to hold real property interests. However, at common law, an unincorporated association is not considered a legal entity capable of acquiring or holding title to real property in the association's name. Therefore, an unincorporated association may not lease state lands in its own name. Winchell v. Dept. of State Lands, 262 M 328, 865 P2d 249, 50 St. Rep. 1580 (1993). See also Edwards v. Burke, 2004 MT 350, 324 M 358, 102 P3d 1271 (2004).

### 77-6-109. Duration of agricultural or grazing lease.

**Compiler's Comments**

*2003 Amendment:* Chapter 404 deleted former second sentence that read: "Leases for city lots, town lots, and lands valuable for commercial development may not exceed 40 years." Amendment effective July 1, 2003.

*Saving Clause:* Section 18, Ch. 404, L. 2003, was a saving clause.

*Severability:* Section 19, Ch. 404, L. 2003, was a severability clause.

*Applicability:* Section 21, Ch. 404, L. 2003, provided: "[This act] applies to all leases for commercial purposes made or renewed on or after July 1, 2003."

*1989 Amendment:* At beginning inserted exception clause; and made minor changes in phraseology. Amendment effective April 15, 1989.

*1985 Amendment:* In second sentence substituted "city lots, town lots, and lands valuable for commercial development" for "city and town lots", and increased lease period limitation from 25 to 40 years.

**Administrative Rules**

Title 36, chapter 25, subchapter 1, ARM Surface management rules.

### 77-6-110. Lease expiration dates.

**Compiler's Comments**

*1989 Amendment:* At beginning inserted exception clause. Amendment effective April 15, 1989.

## 77-6-112. Liens on crops and improvements.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

## 77-6-113. Lease conditions — cancellation.

**Compiler's Comments**

*2009 Amendment:* Chapter 472 inserted (3) concerning right of property owner to control weeds on land adjacent to a navigable river or stream; and made minor changes in style. Amendment effective May 6, 2009.

*Preamble:* The preamble attached to Ch. 472, L. 2009, provided: "WHEREAS, the Department of Natural Resources and Conservation has asserted regulatory jurisdiction over the beds of various rivers and streams based on the premise that the streams are navigable and that the state therefore owns the riverbeds and streambeds; and

WHEREAS, very few Montana rivers or streams have been adjudicated as navigable, either in whole or in part; and

WHEREAS, it is not economically feasible for either the Department of Revenue or the Department of Natural Resources and Conservation to obtain judicial determinations of riverbed or streambed ownership by statewide quiet title actions, yet that ownership determination may not be made legally by unilateral administrative decisions; and

WHEREAS, if the Department of Natural Resources and Conservation wishes to assert regulatory control over the bed of a river or stream that has not been adjudicated to be navigable and was not determined navigable at the time of the original federal government surveys of the public land as evidenced by the recorded and monumented surveys of the meander lines of the river, it is required to provide written notice of the claim of state ownership to the affected property owners; and

WHEREAS, because the present claims of state ownership of riverbeds and streambeds is contrary to longstanding administrative practice and because the test for navigability depends upon evidence concerning the log floating capability of a stream at the time of statehood, there is no presumption of correctness attached to a navigability claim made by any state agency."

*Legislative Findings:* Section 1, Ch. 472, L. 2009, provided: "The legislature finds that:

(1) for 120 years since the admission of Montana as a state in 1889, the department of revenue and its predecessor agencies have taxed some landowners whose property abuts a river or stream on the assumption that those riparian landowners owned the property to the middle of the river or stream;

(2) in Montana v. United States, 450 U.S. 544 (1981), the United States supreme court recognized that if a river or stream is not navigable, the abutting riparian landowners own the land in the bed of the stream to the middle of the stream, but if a river or stream is navigable, the state owns the bed of the river or stream, having acquired ownership from the United States when the state was admitted to the union, and therefore Montana owns the bed of the Bighorn River where it flows through the Crow reservation;

(3) for the purpose of determining the ownership of a riverbed or streambed, the test of navigability is whether logs could be floated in the stream at the time of statehood as stated in Montana Coalition for Stream Access v. Curran, 210 Mont. 38, 682 P.2d 163 (1984), based upon The Montello, 87 U.S. 430 (1874), Sierra Pacific Power Co. v. Federal Energy Regulatory Commission, 681 F.2d 1134 (9th Cir. 1982), and State of Oregon v. Riverfront Protection Association, 672 F.2d 792 (9th Cir. 1982);

(4) beginning with tax assessments that were effective January 1, 2008, the lien date for real property taxes, the department of revenue reassessed the property of riparian landowners whose land abuts various rivers and streams by reducing the amount of land assessed based upon the premise that the landowners did not own to the middle of the river or stream because the river or stream was navigable and these reassessments, if correct, have enormous impact upon the riparian landowners because they affect land titles, acreage owned, qualification for various conservation and price support programs, and ownership of water diversion facilities and other structures that the riparian landowners have constructed for water usage;

(5) the 2008 reassessments were made by simply sending out tax bills without any notice that they were based upon a claim of state ownership of the riverbeds or streambeds and some riparian landowners have paid the first installment of 2008 real property taxes based upon the reassessments without realizing that a claim of state ownership of the riverbeds and streambeds was the basis for the reassessments;

(6) procedural due process requires that if a claim of change in ownership is involved, the state agency involved shall afford the affected property owners both notice of the claim and the opportunity to be heard;

(7) the 2008 real property tax assessments based upon claims of state ownership did not comply with the constitutional requirement for procedural due process and under that circumstance payment by the property owners of taxes based on the reassessment does not constitute acquiesence in the underlying state ownership claim;

(8) The department of revenue is required to provide written notice to the affected property owners of the state's claim of ownership so that the affected property owners have a fair opportunity to be heard and to dispute the government's claim."

**Administrative Rules**

Title 36, chapter 25, subchapter 1, ARM Surface management rules.

**Case Notes**

*Lease Canceled Due to Overgrazing:* The plaintiffs had a land lease with the Department of State Lands (now Department of Natural Resources and Conservation). The Supreme Court held that there was sufficient evidence of overgrazing that mandated the cancellation of the lease and that the cancellation was necessary to do justice to all parties concerned and to protect the interests of the state. Winchell v. St., 241 M 94, 785 P2d 212, 47 St. Rep. 110 (1990).

### 77-6-115. Acquisition of water right by lessee — limitation.

**Compiler's Comments**

*2009 Amendments — Composite Section:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Chapter 472 in (1) at beginning of first sentence and in (2) at beginning inserted "Subject to subsection (4)"; inserted (4) providing that a water right acquired under this section may not interfere with a water right used in conjunction with a structure described in 77-1-134; and made minor changes in style. Amendment effective May 6, 2009.

Style changes were slightly different in the chapters. In each case, the codifier chose appropriate text.

*Preamble:* The preamble attached to Ch. 472, L. 2009, provided: "WHEREAS, the Department of Natural Resources and Conservation has asserted regulatory jurisdiction over the beds of various rivers and streams based on the premise that the streams are navigable and that the state therefore owns the riverbeds and streambeds; and

WHEREAS, very few Montana rivers or streams have been adjudicated as navigable, either in whole or in part; and

WHEREAS, it is not economically feasible for either the Department of Revenue or the Department of Natural Resources and Conservation to obtain judicial determinations of riverbed or streambed ownership by statewide quiet title actions, yet that ownership determination may not be made legally by unilateral administrative decisions; and

WHEREAS, if the Department of Natural Resources and Conservation wishes to assert regulatory control over the bed of a river or stream that has not been adjudicated to be navigable and was not determined navigable at the time of the original federal government surveys of the public land as evidenced by the recorded and monumented surveys of the meander lines of the river, it is required to provide written notice of the claim of state ownership to the affected property owners; and

WHEREAS, because the present claims of state ownership of riverbeds and streambeds is contrary to longstanding administrative practice and because the test for navigability depends upon evidence concerning the log floating capability of a stream at the time of statehood, there is no presumption of correctness attached to a navigability claim made by any state agency."

*Legislative Findings:* Section 1, Ch. 472, L. 2009, provided: "The legislature finds that:

(1) for 120 years since the admission of Montana as a state in 1889, the department of revenue and its predecessor agencies have taxed some landowners whose property abuts a river or stream on the assumption that those riparian landowners owned the property to the middle of the river or stream;

(2) in Montana v. United States, 450 U.S. 544 (1981), the United States supreme court recognized that if a river or stream is not navigable, the abutting riparian landowners own the land in the bed of the stream to the middle of the stream, but if a river or stream is navigable, the state owns the bed of the river or stream, having acquired ownership from the United States when the state was admitted to the union, and therefore Montana owns the bed of the Bighorn River where it flows through the Crow reservation;

(3) for the purpose of determining the ownership of a riverbed or streambed, the test of navigability is whether logs could be floated in the stream at the time of statehood as stated in Montana Coalition for Stream Access v. Curran, 210 Mont. 38, 682 P.2d 163 (1984), based upon The Montello, 87 U.S. 430 (1874), Sierra Pacific Power Co. v. Federal Energy Regulatory Commission, 681 F.2d 1134 (9th Cir. 1982), and State of Oregon v. Riverfront Protection Association, 672 F.2d 792 (9th Cir. 1982);

(4) beginning with tax assessments that were effective January 1, 2008, the lien date for real property taxes, the department of revenue reassessed the property of riparian landowners whose land abuts various rivers and streams by reducing the amount of land assessed based upon the premise that the landowners did not own to the middle of the river or stream because the river or stream was navigable and these reassessments, if correct, have enormous impact upon the riparian landowners because they affect land titles, acreage owned, qualification for various conservation and price support programs, and ownership of water diversion facilities and other structures that the riparian landowners have constructed for water usage;

(5) the 2008 reassessments were made by simply sending out tax bills without any notice that they were based upon a claim of state ownership of the riverbeds or streambeds and some riparian landowners have paid the first installment of 2008 real property taxes based upon the reassessments without realizing that a claim of state ownership of the riverbeds and streambeds was the basis for the reassessments;

(6) procedural due process requires that if a claim of change in ownership is involved, the state agency involved shall afford the affected property owners both notice of the claim and the opportunity to be heard;

(7) the 2008 real property tax assessments based upon claims of state ownership did not comply with the constitutional requirement for procedural due process and under that circumstance payment by the property owners of taxes based on the reassessment does not constitute acquiesence in the underlying state ownership claim;

(8) The department of revenue is required to provide written notice to the affected property owners of the state's claim of ownership so that the affected property owners have a fair opportunity to be heard and to dispute the government's claim."

**Administrative Rules**

Title 36, chapter 25, subchapter 1, ARM Surface management rules.

**Case Notes**

*No Implied Severance of Water From School Trust Lands:* Neither this section, nor the principles of the Water Use Act set forth in 85-2-101, nor the prior appropriation doctrine gives rise to an implied severance of water from land in the school trust land leases or estops the state from claiming title to the water rights on school trust land. Dept. of State Lands v. Pettibone, 216 M 361, 702 P2d 948, 42 St. Rep. 869 (1985). See also Advocates for School Trust Lands v. St., 2022 MT 46, 408 Mont. 39, 505 P.3d 825, holding that 85-2-441, which allows a water right owner to put water from a well or developed spring located on private land to beneficial use on state trust land and presumes against a state ownership in that water right, was not facially unconstitutional.

*School Trust Land Water Rights Owned by State:* In a case involving a dispute over ownership of water rights on state school trust lands, the Supreme Court ruled that title to the surface and ground water rights on school trust lands vests in the state and that the lessee, in making appropriations on and for school trust sections, is acting on behalf of the state. It is only through state action that the lessee is on the land, and Montana law expressly provides that the lessee must be reimbursed for all capital expenditures made in putting the water to beneficial use. The state is the beneficial user of the water, and its duty as trustee of the school trust lands prohibits it from alienating any interest in the land without receiving full compensation for it or from giving up control over the water rights. Dept. of State Lands v. Pettibone, 216 M 361, 702 P2d 948, 42 St. Rep. 869 (1985). However, see Advocates for School Trust Lands v. St., 2022 MT 46, 408 Mont. 39, 505 P.3d 825, holding that 85-2-441, which allows a water right owner to put water from a well or developed spring located on private land to beneficial use on state trust land and presumes against a state ownership in that water right, was not facially unconstitutional.

### 77-6-116. Voluntary termination of lease to allow concurrence with federal conservation reserve program — competitive bidding required.

**Compiler's Comments**

*Effective Date:* Section 8, Ch. 555, L. 1989, provided that this section is effective April 15, 1989.

## Part 2
## Leasing Procedure

### 77-6-201. Appraisal of grazing lands.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

**Case Notes**

*Allowance of Change in Grazing Permit Not Ministerial Act — EIS Required:* Shoberg transferred his grazing permit to Madden, and Madden changed from grazing cattle to grazing sheep. The Department of State Lands (now Department of Natural Resources and Conservation) allowed the grazing of sheep to continue, notwithstanding that the Department had information indicating that the grazing of sheep would adversely impact upon bighorn sheep reintroduced into the area. The plaintiffs brought an action to require the completion of an environmental impact statement (EIS). The Supreme Court held that an EIS was required because the Department was allowing an action, grazing of sheep, to go forward that could have a significant effect upon the quality of the human environment, notwithstanding statutes requiring the Department to protect the best interests of the state, including consideration of consequences to environment and wildlife. Ravalli County Fish & Game Ass'n, Inc. v. Dept. of State Lands, 273 M 371, 903 P2d 1362, 52 St. Rep. 996 (1995).

### 77-6-202. Lease by competitive bidding — full market value required.

**Compiler's Comments**

*1997 Amendment:* Chapter 42 at end of third sentence, after "market value", deleted "determined by taking into account recommendations of the state land board advisory council"; and made minor changes in style. Amendment effective March 12, 1997.

*1993 Amendment:* Chapter 586 inserted third sentence concerning bid below fair market value; and made minor changes in style. Amendment effective July 1, 1993.

**Administrative Rules**

Title 36, chapter 25, subchapter 1, ARM Surface management rules.

**Case Notes**

*Market Value of State Land Rights-of-Way Set by Statute at 1972 Levels — Unconstitutionality:* The plain language of 77-1-130 requires that full market valuations of right-of-way acreage for historic deeds on state trust lands be based on the median values for the classifications of land at 1972 levels, leaving the Department of Natural Resources and Conservation no choice but to use those levels instead of current market value. The state argued that pursuant to 40 A.G. Op. 24 (1983), the figures in 77-1-130 are merely a minimum above which the Department may charge full market value. However, the statutory language is mandatory rather than discretionary and violates the provisions of the Montana Constitution and The Enabling Act, which require the state to receive full market value for school trust lands, and thus is unconstitutional. Montanans for Responsible Use of School Trust v. State ex rel. Bd. of Land Comm'rs, 1999 MT 263, 296 M 402, 989 P2d 800, 56 St. Rep. 1065 (1999).

*No Proscription That Previously Canceled Lessee May Not Bid or May Not Lease State Lands — Written Findings Required When High Bid Rejected:* Winchell's state land lease was canceled for gross mismanagement of the leased property. The lease was subsequently reclassified and advertised for bids, and Winchell submitted the high bid. Rather than make written findings as to why the bid was not in the best interests of the state, the Department of State Lands (now department of natural resources and conservation) relied on ARM 26.3.142(6) (now 36.25.115) to dismiss Winchell's bid out-of-hand. This administrative rule, which purports to give the Department the ability to refuse to even consider a bid, is in derogation of law because there is no statutory proscription disallowing the bid or ability to lease of a person whose lease has been previously canceled. Absent written findings that the high bid was too high for community standards, would cause damage to the land, or would impair long-term productivity, the automatic refusal to consider the bid, based on an overbroad and unlawful administrative regulation, was in excess of the Department's jurisdiction and an abuse of its discretion. Winchell v. Dept. of State Lands, 262 M 328, 865 P2d 249, 50 St. Rep. 1580 (1993).

*Grazing District — Preference Right Denied to Sublessor:* A preference right under 77-6-205 allows a lessee contracting with the Department of State Lands (now Department of Natural Resources and Conservation) to renew his lease by meeting the high bid of other applicants upon expiration of his lease. However, this preference right was held unconstitutionally applied when exercised by a grazing district which did not use the land itself but instead subleased to whomever it wished. The only way full market value can be obtained in such a situation is by pure competitive bidding. Jerke v. Dept. of St. Lands, 182 M 294, 597 P2d 49 (1979).

### 77-6-203. Bid deposit.

**Compiler's Comments**

*2005 Amendment:* Chapter 89 in (1) near middle increased bid deposit for a state land lease from 20% to 100% of the annual rental bid on grazing land and from $1 to $20 per acre on agricultural land; and made minor changes in style. Amendment effective March 24, 2005.

*1985 Amendment:* Near end of second sentence of (2) inserted "bona fide" before "bidders", inserted last two sentences of (2) providing for forfeiture of bid deposits in some cases; in (3), after "forfeited", deleted "and deposited by the department to the credit of the proper interest and income account in the agency fund"; and inserted (4) providing for crediting of forfeited deposits to the proper trust.

*1983 Amendment:* At end of section, substituted "agency fund" for "federal and private revenue fund".

**Administrative Rules**

Title 36, chapter 25, subchapter 1, ARM Surface management rules.

### 77-6-204. Notification of termination of lease.

**Compiler's Comments**

*1989 Amendment:* Near beginning inserted "or is voluntarily terminated under 77-6-116"; near end inserted "or terminated"; and made minor changes in phraseology. Amendment effective April 15, 1989.

**Administrative Rules**

Title 36, chapter 25, subchapter 1, ARM Surface management rules.

### 77-6-205. Renewal leases.

**Compiler's Comments**

*1993 Amendment:* Chapter 586 in (1), in second sentence, substituted "full market rental rate established by the board[, taking into account recommendations of the state land board advisory council [now terminated],]" for "rental rate provided by law"; and made minor changes in style. Amendment effective July 1, 1993.

*1991 Amendment:* At end of third sentence of (2), after "best interest", deleted "and must be accompanied by a deposit equal to 20% of the competitive bid in the case of grazing lands and $1 per acre in the case of agricultural lands"; and made minor changes in style.

*1989 Amendment:* In first sentence of (1), after "state", inserted "or who has voluntarily terminated a lease under 77-6-116" and in two places inserted "or within 30 days following voluntary termination"; inserted (4) relating to voluntary termination of leases under 77-6-116; and made minor change in phraseology. Amendment effective April 15, 1989.

*1987 Amendment:* In next-to-last sentence of (1) inserted exception relating to 77-6-212.

*1985 Amendments:* Chapter 488 in (1) in first sentence, after "city lot", inserted "or land valuable for commercial development", and near middle after "renewed for", substituted "a period not to exceed the maximum lease period provided in 77-6-109" for "a 5- or 10-year period".

Chapter 687 inserted (3) allowing cancellation of renewal leases in certain cases.

*1983 Amendment:* Near beginning of (1), after "who has paid all rentals due from him to the state" deleted "and who has not violated the terms of his lease".

**Administrative Rules**

Title 36, chapter 25, subchapter 1, ARM Surface management rules.

**Case Notes**

*State Land Cabin Site Renewal Policy Not Violative of Obligation to Obtain Full Market Value:* Plaintiff contended that 77-1-208 is facially invalid because the use of a cabin site renewal policy that did not employ competitive bidding was calculated to keep cabin site rental rates below full market value. However, nothing in the plain language of 77-1-208 abrogates the mandate that full market value be obtained for school trust lands. Plaintiff failed to show that the statute violates the duty of undivided loyalty or that the preference accorded lessees on cabin site leases on state lands resulted in renewal rates below market value. The statute legislatively establishes a method by which full market value is obtained, which is allowed pursuant to Jerke v. Dept. of State Lands, 182 M 294, 597 P2d 49 (1979), but the language of 77-1-208 nevertheless requires that full market value be obtained, by whatever method is used, and therefore on its face does not violate the trust. Thus, the District Court correctly held that the renewal preference in 77-1-208 does not violate the school trust requirements of the Montana Constitution or The Enabling Act of 1889. Montanans for Responsible Use of School Trust v. State ex rel. Bd. of Land Comm'rs, 1999 MT 263, 296 M 402, 989 P2d 800, 56 St. Rep. 1065 (1999).

*State Land Cabin Site Rental Policy Violative of School Trust Obligation to Obtain Fair Market Value:* The policy employed by the Department of Natural Resources and Conservation in renting cabin sites on state lands, in a manner that resulted in below-market rentals, violated the state's school trust obligations under the Montana Constitution and The Enabling Act of 1889, even though 77-1-208 is facially valid because it requires that full market value be obtained. Montanans for Responsible Use of School Trust v. State ex rel. Bd. of Land Comm'rs, 1999 MT 263, 296 M 402, 989 P2d 800, 56 St. Rep. 1065 (1999), following State ex rel. Thompson v. Babcock, 147 M 46, 409 P2d 808 (1966), and Jerke v. Dept. of State Lands, 182 M 294, 597 P2d 49 (1979).

*Allowance of Change in Grazing Permit Not Ministerial Act — EIS Required:* Shoberg transferred his grazing permit to Madden, and Madden changed from grazing cattle to grazing sheep. The Department of State Lands (now Department of Natural Resources and Conservation) allowed the grazing of sheep to continue, notwithstanding that the Department had information indicating that the grazing of sheep would adversely impact upon bighorn sheep reintroduced into the area. The plaintiffs brought an action to require the completion of an environmental impact statement (EIS). The Supreme Court held that an EIS was required because the Department was allowing an action, grazing of sheep, to go forward that could have a significant effect upon the quality of the human environment, notwithstanding statutes requiring the Department to protect the best interests of the state, including consideration of consequences to environment and wildlife. Ravalli County Fish & Game Ass'n, Inc. v. Dept. of State Lands, 273 M 371, 903 P2d 1362, 52 St. Rep. 996 (1995).

*No Obligation of State to Third Parties in Lease of State Lands:* Plaintiffs sued the state for negligence based on the Department of State Lands' management of a parcel of leased land, claiming that this section imposed upon the state a duty to the public to investigate potential lessees. The Supreme Court held that the statutory duty is to secure the maximum return to the state with the least injury to the land, but there is no statutorily created obligation to third parties. Sebena v. St., 267 M 359, 883 P2d 1263, 51 St. Rep. 1101 (1994). See also Jeppeson v. Dept. of State Lands, 205 M 282, 667 P2d 428 (1983).

*Evidentiary Hearing Allowed on Renewal Lease but Not on New Lease:* The only provision for a hearing after a bid is rejected is in the case of the renewal of leases. In that case, the prior leaseholder may exercise the preferential right and request a hearing if the high bid is felt to be excessive. However, when a prior lease was canceled, the former lessee lost the preferential right and the option to request an evidentiary hearing. Winchell v. Dept. of State Lands, 262 M 328, 865 P2d 249, 50 St. Rep. 1580 (1993).

*No Proscription That Previously Canceled Lessee May Not Bid or May Not Lease State Lands — Written Findings Required When High Bid Rejected:* Winchell's state land lease was canceled for gross mismanagement of the leased property. The lease was subsequently reclassified and advertised for bids, and Winchell submitted the high bid. Rather than make written findings as to why the bid was not in the best interests of the state, the Department of State Lands (now Department of Natural Resources and Conservation) relied on ARM 26.3.142(6) (now 36.25.115) to dismiss Winchell's bid out-of-hand. This administrative rule, which purports to give the Department the ability to refuse to even consider a bid, is in derogation of law because there is no statutory proscription disallowing the bid or ability to lease of a person whose lease has been previously canceled. Absent written findings that the high bid was too high for community standards, would cause damage to the land, or would impair long-term productivity, the automatic refusal to consider the bid, based on an overbroad and unlawful administrative regulation, was in excess of the Department's jurisdiction and an abuse of its discretion. Winchell v. Dept. of State Lands, 262 M 328, 865 P2d 249, 50 St. Rep. 1580 (1993).

*Sublessor Entitled to Preference Right:* When a sublessor retained significant responsibility and control over leased land throughout the sublease period, the Supreme Court ruled that he was entitled to his preference right to meet any competitive bid and renew his lease. Steffen v. Dept. of State Lands, 223 M 176, 724 P2d 713, 43 St. Rep. 1636 (1986).

*No Preference — Sublease Form Not Filed:* Foster held a state lease of grazing land. He applied to renew his lease at $7.50 per AUM (animal unit month), and Skillman applied to lease the land at $18.75 per AUM. Foster, as the current lessee, was entitled to meet the other bid, which he did. It was discovered that Foster had subleased the land without filing a sublease form with the Board of Land Commissioners. The District Court held that Foster was not entitled to a preference and directed the Board of Land Commissioners to cancel the Foster lease and lease the land without a preference right, citing Jerke v. St. Dept. of Lands, 182 M 294, 597 P2d 49 (1979). On appeal, the judgment of the District Court was affirmed. Skillman v. Dept. of State Lands, 188 M 383, 613 P2d 1389, 37 St. Rep. 1320 (1980).

*Grazing District — Preference Right Denied to Sublessor:* A preference right allows a lessee contracting with the Department of State Lands (now Department of Natural Resources and Conservation) to renew his lease by meeting the high bid of other applicants upon expiration of his lease. However, this preference right was held unconstitutionally applied when exercised by a grazing district which did not use the land itself but instead subleased to whomever it wished. The only way full market value can be obtained in such a situation is by pure competitive bidding. Jerke v. Dept. of St. Lands, 182 M 294, 597 P2d 49 (1979).

*Discretion as to Risk:* Board of Land Commissioners had discretion to award a 10-year lease to bidder at 33⅓% crop share, rather than to another who bid 50%, especially where lessee had farmed the land before and the Board was taking less risk. State ex rel. Thompson v. Babcock, 147 M 46, 409 P2d 808 (1966).

**Attorney General's Opinions**

*Grazing Leases — Duty of Board to Seek Fair Market Value in Establishing Grazing Fees:* The Board of Land Commissioners has an affirmative duty under section 10 of The Enabling Act of 1889 and under Art. X, sec. 11, Mont. Const., to obtain the full market value for any grazing lease it enters into. The Legislature may establish a formula for calculating the lease price of state lands where application of the formula results in obtaining fair market value. The formula established by statute based upon the price of beef therefore establishes a minimum lease price, and any interpretation of that statute by the Department of State Lands (now Department of Natural Resources and Conservation) so as to prevent the procurance of fair market value for a lease could result in the statutory formula being held unconstitutional. 40 A.G. Op. 24 (1983). However, see Montanans for Responsible Use of School Trust v. State ex rel. Bd. of Land Comm'rs, 1999 MT 263, 296 M 402, 989 P2d 800, 56 St. Rep. 1065 (1999), wherein the Supreme Court held that statutory provisions leaving the Department no discretion but to charge less than full market value for certain uses of state lands were unconstitutional.

*Right of Lease Violator and Lease Assignee to Preference Right Renewal:* Because the language of this section allowing a lessee who has paid his rent and not violated the terms of the lease to renew that lease applies both to renewal by simple renewal and to renewal by preference right, a lessee who has violated the terms of the lease is ineligible for preference right renewal. However, the board may determine that the violation is not serious enough to warrant cancellation and thereby preserve the preference right. As a lawful assignment of a lease under 77-6-208 also transfers the preference right of renewal, an assignee may renew by exercising the preference right as long as the assignee himself has not violated the terms of the lease. 39 A.G. Op. 1 (1981).

*Right of Sublessee of State Lands to Exercise Renewal Preference Right — Application to Current Leases:* A sublessee of state lands who subleases less than all of the land of the lessee for all or a portion of the term of the original lease is entitled to exercise the renewal preference granted to a lessee only if it can be shown that the renewal by the sublessee is not violative of the purposes of this section, as announced in Jerke v. Dept. of State Lands, 182 M 294, 597 P2d 49 (1979), that purpose being to further the state policy of sustained yield. Whether the sublease furthers the state policy can only be determined on a case-by-case review of the facts and terms of the lease. This test to determine compliance with the purposes of 77-6-205 must be applied by the Department of State Lands (now Department of Natural Resources and Conservation) to all subleases at the time of expiration of the primary lease. 39 A.G. Op. 1 (1981).

## 77-6-206. Withdrawal of lands from leasing.

**Administrative Rules**

Title 36, chapter 25, subchapter 1, ARM Surface management rules.

**Case Notes**

*Allowance of Change in Grazing Permit Not Ministerial Act — EIS Required:* Shoberg transferred his grazing permit to Madden, and Madden changed from grazing cattle to grazing sheep. The Department of State Lands (now Department of Natural Resources and Conservation) allowed the grazing of sheep to continue, notwithstanding that the Department had information indicating that the grazing of sheep would adversely impact upon bighorn sheep reintroduced into the area. The plaintiffs brought an action to require the completion of an environmental impact statement (EIS). The Supreme Court held that an EIS was required because the Department was allowing an action, grazing of sheep, to go forward that could have a significant effect upon the quality of the human environment, notwithstanding statutes requiring the Department to protect the best interests of the state, including consideration of consequences to environment and wildlife. Ravalli County Fish & Game Ass'n, Inc. v. Dept. of State Lands, 273 M 371, 903 P2d 1362, 52 St. Rep. 996 (1995).

### 77-6-207. Form of lease — bond optional.

**Administrative Rules**

Title 36, chapter 25, subchapter 1, ARM Surface management rules.

### 77-6-208. Assignment of leases — subleasing — loss of preference right.

**Compiler's Comments**

*1993 Amendment:* Chapter 96 near beginning of (3)(a), after "lessee", inserted "other than a holder of a commercial lease"; inserted (3)(c) allowing a commercial leaseholder to sublease state land for a profit; and made minor changes in style.

*1987 Amendment:* In (3), in first sentence after "by the state", deleted "or subleases state lands without filing a copy of the sublease with the department and without receiving its approval" and inserted second sentence concerning cancellation; inserted (4) relating to loss of preference right because of subleasing; and inserted (5) to eliminate avoidance of loss of preference by assignment.

**Administrative Rules**

Title 36, chapter 2, subchapter 10, ARM General state land rules.

Title 36, chapter 25, subchapter 1, ARM Surface management rules.

**Case Notes**

*Allowance of Change in Grazing Permit Not Ministerial Act — EIS Required:* Shoberg transferred his grazing permit to Madden, and Madden changed from grazing cattle to grazing sheep. The Department of State Lands (now Department of Natural Resources and Conservation) allowed the grazing of sheep to continue, notwithstanding that the Department had information indicating that the grazing of sheep would adversely impact upon bighorn sheep reintroduced into the area. The plaintiffs brought an action to require the completion of an environmental impact statement (EIS). The Supreme Court held that an EIS was required because the Department was allowing an action, grazing of sheep, to go forward that could have a significant effect upon the quality of the human environment, notwithstanding statutes requiring the Department to protect the best interests of the state, including consideration of consequences to environment and wildlife. Ravalli County Fish & Game Ass'n, Inc. v. Dept. of State Lands, 273 M 371, 903 P2d 1362, 52 St. Rep. 996 (1995).

*Cancellation of Lease for Nonpayment of Rent — Assignment Ineffective:* Pursuant to the clear terms of a state land lease, on April 1, 1992, the state automatically terminated a land lease for nonpayment of rent. A purported assignment of the lease in November 1992 was ineffective because the lease had already been canceled. Sebena v. St., 267 M 359, 883 P2d 1263, 51 St. Rep. 1101 (1994).

*Measure of Damages in Eminent Domain Proceeding for Loss of Use of Land Leased From State:* In an eminent domain proceeding, the landowner was entitled to compensation for loss of use of land leased from the state only in the amount of her lease payments to the state. This section provides that any sublease of state leased lands may not be upon terms less advantageous to the sublessee than the terms given by the state. Since the landowner herself was not using the land, the only possible compensable loss she suffered was the amount for which she could have subleased the land. St. v. Donnes, 219 M 182, 711 P2d 805, 42 St. Rep. 1938 (1985).

*Failure to File Sublease — Knowledge Controls:* Aye, the holder of a lease of state lands, executed a sublease to Fix, along with an unenforceable oral promise to assign the lease. Aye then assigned the same lease to Bruski. Section 81-419, R.C.M. 1947 (now this section), at the time of the sublease, provided that a sublease of state land was illegal unless a copy of the sublease had been filed in the state land office and approved by the Commissioner. This statute did not override 70-21-102, which provides that an unrecorded instrument is valid as between the parties and those who have notice thereof. The purpose of this section is to facilitate the management of state lands, but it does not abrogate general principles of property law. The Bruskis were aware of the sublease, as Fix was farming the leased land at the time the lease was assigned to them. Because of this knowledge, the Bruskis had notice and the sublease was valid. Aye v. Fix, 192 M 141, 626 P2d 1259, 38 St. Rep. 578A (1981), remanded on other grounds.

*Sharecropping:* A sublease providing for a share of crops to a lessee of state lands is not a sublease to another on terms less advantageous to the sublessee than terms given by the state to the lessee. Schneider v. Nelson, 111 M 377, 110 P2d 972 (1940).

**Attorney General's Opinions**

*Right of Lease Violator and Lease Assignee to Preference Right Renewal:* Because the language of 77-6-205 allowing a lessee who has paid his rent and not violated the terms of the lease to renew that lease applies both to renewal by simple renewal and to renewal by preference right, a lessee who has violated the terms of the lease is ineligible for preference right renewal. However, the board may determine that the violation is not serious enough to warrant cancellation and thereby preserve the preference right. As a lawful assignment of a lease under this section also transfers the preference right of renewal, an assignee may renew by exercising the preference right as long as the assignee himself has not violated the terms of the lease. 39 A.G. Op. 1 (1981).

### 77-6-209. Change from grazing lease to agricultural lease.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

**Administrative Rules**

Title 36, chapter 25, subchapter 1, ARM Surface management rules.

### 77-6-210. Cancellation of leases.

**Compiler's Comments**

*1989 Amendment:* Inserted (1)(d) relating to convictions for certain drug offenses.

*Preamble:* The preamble to Ch. 319, L. 1989, provided: "WHEREAS, the drug problem in Montana is growing and every effort should be made to curb drug traffic in the state; and

WHEREAS, rural areas in Montana are prime drug cultivation and processing areas for marijuana, hashish, and related products; and

WHEREAS, both privately deeded land and land leased from the state that are under the control of one manager, operator, or family should be considered a unit."

*Applicability:* Section 5, Ch. 319, L. 1989, provided: "[This act] applies to state leases entered into on or after [the effective date of this act]." Effective October 1, 1989.

*1987 Amendment:* Inserted (1)(b) allowing lease cancellation in certain cases of subleasing; and in (2) substituted "Cancellation of a lease under this section" for "Such cancellation".

**Administrative Rules**

Title 36, chapter 25, subchapter 1, ARM Surface management rules.

**Case Notes**

*Allowance of Change in Grazing Permit Not Ministerial Act — EIS Required:* Shoberg transferred his grazing permit to Madden, and Madden changed from grazing cattle to grazing sheep. The Department of State Lands (now Department of Natural Resources and Conservation) allowed the grazing of sheep to continue, notwithstanding that the Department had information indicating that the grazing of sheep would adversely impact upon bighorn sheep reintroduced into the area. The plaintiffs brought an action to require the completion of an environmental impact statement (EIS). The Supreme Court held that an EIS was required because the Department was allowing an action, grazing of sheep, to go forward that could have a significant effect upon the quality of the human environment, notwithstanding statutes requiring the Department to protect the best interests of the state, including consideration of consequences to environment and wildlife. Ravalli County Fish & Game Ass'n, Inc. v. Dept. of State Lands, 273 M 371, 903 P2d 1362, 52 St. Rep. 996 (1995).

*Cancellation of Lease for Nonpayment of Rent — Assignment Ineffective:* Pursuant to the clear terms of a state land lease, on April 1, 1992, the state automatically terminated a land lease for nonpayment of rent. A purported assignment of the lease in November 1992 was ineffective because the lease had already been canceled. Sebena v. St., 267 M 359, 883 P2d 1263, 51 St. Rep. 1101 (1994).

*Lease Canceled Due to Overgrazing:* The plaintiffs had a land lease with the Department of State Lands (now Department of Natural Resources and Conservation). The Supreme Court held that there was sufficient evidence of overgrazing that mandated the cancellation of the lease and that the cancellation was necessary to do justice to all parties concerned and to protect the interests of the state. Winchell v. St., 241 M 94, 785 P2d 212, 47 St. Rep. 110 (1990).

### 77-6-211. Procedure to cancel lease — appeal.

**Administrative Rules**

Title 36, chapter 25, subchapter 1, ARM Surface management rules.

**Case Notes**

*Cancellation of State Agricultural Lease for Nonpayment — Hearing Not Required — District Court Jurisdiction to Review Cancellation:* There is no provision in 77-6-506 requiring the Department to conduct a hearing when canceling a state land lease for nonpayment, nor is a hearing required pursuant to the due process clause of Art. II, sec. 17, Mont. Const. The District Court thus has no jurisdiction to review a lease cancellation for nonpayment under contested case procedures because lease cancellation for nonpayment does not constitute a contested case. However, the District Court does retain inherent jurisdiction to review administrative decisions and erred in deciding that it did not have jurisdiction. The standard of review is whether the agency acted arbitrarily, capriciously, or unlawfully. Johansen v. St., 1998 MT 51, 288 M 39, 955 P2d 653, 55 St. Rep. 211 (1998), following N. Fork Preservation Ass'n v. Dept. of State Lands, 238 M 451, 778 P2d 862 (1989).

**Attorney General's Opinions**

*Right of Lease Violator and Lease Assignee to Preference Right Renewal:* Because the language of 77-6-205 allowing a lessee who has paid his rent and not violated the terms of the lease to renew that lease applies both to renewal by simple renewal and to renewal by preference right, a lessee who has violated the terms of the lease is ineligible for preference right renewal. However, the board may determine that the violation is not serious enough to warrant cancellation and thereby preserve the preference right. As a lawful assignment of a lease under 77-6-208 also transfers the preference right of renewal, an assignee may renew by exercising the preference right as long as the assignee himself has not violated the terms of the lease. 39 A.G. Op. 1 (1981).

### 77-6-212. Loss of preference right — cancellation of lease — subleasing — pasturing agreements.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

*1989 Amendment:* Inserted (6) relating to convictions for certain drug offenses.

*Preamble:* The preamble to Ch. 319, L. 1989, provided: "WHEREAS, the drug problem in Montana is growing and every effort should be made to curb drug traffic in the state; and

WHEREAS, rural areas in Montana are prime drug cultivation and processing areas for marijuana, hashish, and related products; and

WHEREAS, both privately deeded land and land leased from the state that are under the control of one manager, operator, or family should be considered a unit."

*Applicability:* Section 5, Ch. 319, L. 1989, provided: "[This act] applies to state leases entered into on or after [the effective date of this act]." Effective October 1, 1989.

*Preamble:* The preamble to Ch. 383, L. 1987, which enacted this section and amended 77-6-205, 77-6-208, and 77-6-210, provided: "WHEREAS, section 77-6-205, MCA, provides an existing lessee of state land a preference right to renew the lease; and

WHEREAS, the Montana Supreme Court in Jerke v. State Department of Lands, 182 Mont. 294, 597 P.2d 49 (1979), held that it is an unconstitutional application of the preference right statute to allow a lessee to exercise a preference right if the lessee subleases the land and does not use it himself; and

WHEREAS, in Skillman v. Department of State Lands, 188 Mont. 383, 613 P.2d 1389 (1980), the Supreme Court applied the rule in Jerke to deny a lessee a preference right to lease state grazing land when the lessee did not himself use such land; and

WHEREAS, state lands are to be held in trust for the people of Montana; and

WHEREAS, allowing the preference right to be exercised by a lessee who subleases the land would be to install the lessee as the trustee of state land; and

WHEREAS, there are situations where a lessee permits another person to use all or a portion of a lease that should not result in the loss of the preference right.

THEREFORE, the Legislature of the State of Montana finds it appropriate to enact legislation to limit the preference right if a lessee subleases state land in certain circumstances."

*Saving Clause:* Chapter 383, L. 1987, which enacted this section and amended 77-6-205, 77-6-208, and 77-6-210, provided that: "This act does not affect rights and duties that matured, penalties that were incurred, or proceedings that were begun before the effective date of this act."

*Applicability:* Chapter 383, L. 1987, which enacted this section and amended 77-6-205, 77-6-208, and 77-6-210, provided that: "(1) Except as provided in subsection (2), this act does not apply to a lessee who has subleased state land during the term of an existing state lease.

(2) This act applies to a lessee of state agricultural or grazing land if, after the effective date of this act, the lessee enters into an agreement to sublease the land to another person." Effective April 7, 1987.

**Administrative Rules**

Title 36, chapter 25, subchapter 1, ARM Surface management rules.

**77-6-221. Unit of land defined.**

**Compiler's Comments**

*Preamble:* The preamble to Ch. 319, L. 1989, provided: "WHEREAS, the drug problem in Montana is growing and every effort should be made to curb drug traffic in the state; and

WHEREAS, rural areas in Montana are prime drug cultivation and processing areas for marijuana, hashish, and related products; and

WHEREAS, both privately deeded land and land leased from the state that are under the control of one manager, operator, or family should be considered a unit."

*Applicability:* Section 5, Ch. 319, L. 1989, provided: "[This act] applies to state leases entered into on or after [the effective date of this act]." Effective October 1, 1989.

## Part 3
## Improvements

**Part Administrative Rules**

Title 36, chapter 25, subchapter 1, ARM Surface management rules.

**Part Case Notes**

*Department Approval of Movable Improvement — Immaterial for Purposes of Payment by Subsequent Lessee:* Pursuant to administrative rules implementing this part, the Department of Natural Resources and Conservation (Department) approves or disapproves the installation of improvements on leased land to ensure that any improvements that a lessee seeks to install relate to the purposes of the lease. The fact that a movable improvement was approved by the Department does not constitute a requirement that a subsequent lessee who does not wish to purchase the movable improvement must nonetheless pay the prior lessee compensation for the improvement. Grenz v. Dept. of Natural Resources and Conservation, 2011 MT 17, 359 Mont. 154, 248 P.3d 785.

*Valuation of Improvements — Standard of Review — All Factors Including Decision of Arbitrators to Be Reviewed De Novo by Department — Arbitration Act Inapplicable:* After the Department of Natural Resources and Conservation (DNRC) awarded a lease to Hagemeister, a three-person panel of arbitrators was appointed by the DNRC to appraise the value of improvements made by the previous lessee, Winchell. Two arbitrators agreed to a value in excess of $20,000, while a third valued the improvements at $1,407.35. The DNRC then conducted its own appraisal, set aside the higher values, and established a value of $1,564 for the improvements. The Winchells appealed the valuation to the District Court pursuant to 77-6-306(4), and the District Court granted summary judgment for the DNRC. The Supreme Court affirmed, holding that: (1) the correct standard for a de novo review of the District Court's judgment is the standard applicable to the review of a case that is not a "contested" case under the Montana Administrative Procedure Act, the standard applicable in this case being whether the DNRC exceeded its statutory authority under 77-6-306(3) or whether its decision is wholly unsupported by the evidence; (2) even though the District Court applied the wrong standard of review, the standard applicable to a contested case, the District Court reached the correct result; (3) the language in 77-6-303 and 77-6-306(3) and (4), which are to be read together, indicate that the Legislature intended that the DNRC do more than review the paper records of the arbitrators in order to "fix" the value of the improvements, and the DNRC was therefore correct in using an independent valuation procedure conducted by its own appraiser in addition to considering the work of the three arbitrators; and (4) the Uniform Arbitration Act does not apply to this case because that Act establishes a District Court's standard of review in an appellate procedure. Winchell v. Dept. of Natural Resources and Conservation, 1999 MT 11, 293 M 89, 972 P2d 1132, 56 St. Rep. 48 (1999).

**77-6-302. Compensation for improvements — actual costs.**

**Compiler's Comments**

*2009 Amendment:* Chapter 472 in (1) at beginning of first and third sentences inserted exception clauses; in (2) near end of fourth sentence after "improvements" inserted "except those described in 77-1-134"; and made minor changes in style. Amendment effective May 6, 2009.

*Preamble:* The preamble attached to Ch. 472, L. 2009, provided: "WHEREAS, the Department of Natural Resources and Conservation has asserted regulatory jurisdiction over the beds of various rivers and streams based on the premise that the streams are navigable and that the state therefore owns the riverbeds and streambeds; and

WHEREAS, very few Montana rivers or streams have been adjudicated as navigable, either in whole or in part; and

WHEREAS, it is not economically feasible for either the Department of Revenue or the Department of Natural Resources and Conservation to obtain judicial determinations of riverbed or streambed ownership by statewide quiet title actions, yet that ownership determination may not be made legally by unilateral administrative decisions; and

WHEREAS, if the Department of Natural Resources and Conservation wishes to assert regulatory control over the bed of a river or stream that has not been adjudicated to be navigable and was not determined navigable at the time of the original federal government surveys of the public land as evidenced by the recorded and monumented surveys of the meander lines of the river, it is required to provide written notice of the claim of state ownership to the affected property owners; and

WHEREAS, because the present claims of state ownership of riverbeds and streambeds is contrary to longstanding administrative practice and because the test for navigability depends upon evidence concerning the log floating capability of a stream at the time of statehood, there is no presumption of correctness attached to a navigability claim made by any state agency."

*Legislative Findings:* Section 1, Ch. 472, L. 2009, provided: "The legislature finds that:

(1) for 120 years since the admission of Montana as a state in 1889, the department of revenue and its predecessor agencies have taxed some landowners whose property abuts a river or stream on the assumption that those riparian landowners owned the property to the middle of the river or stream;

(2) in Montana v. United States, 450 U.S. 544 (1981), the United States supreme court recognized that if a river or stream is not navigable, the abutting riparian landowners own the land in the bed of the stream to the middle of the stream, but if a river or stream is navigable, the state owns the bed of the river or stream, having acquired ownership from the United States when the state was admitted to the union, and therefore Montana owns the bed of the Bighorn River where it flows through the Crow reservation;

(3) for the purpose of determining the ownership of a riverbed or streambed, the test of navigability is whether logs could be floated in the stream at the time of statehood as stated in Montana Coalition for Stream Access v. Curran, 210 Mont. 38, 682 P.2d 163 (1984), based upon The Montello, 87 U.S. 430 (1874), Sierra Pacific Power Co. v. Federal Energy Regulatory Commission, 681 F.2d 1134 (9th Cir. 1982), and State of Oregon v. Riverfront Protection Association, 672 F.2d 792 (9th Cir. 1982);

(4) beginning with tax assessments that were effective January 1, 2008, the lien date for real property taxes, the department of revenue reassessed the property of riparian landowners whose land abuts various rivers and streams by reducing the amount of land assessed based upon the premise that the landowners did not own to the middle of the river or stream because the river or stream was navigable and these reassessments, if correct, have enormous impact upon the riparian landowners because they affect land titles, acreage owned, qualification for various conservation and price support programs, and ownership of water diversion facilities and other structures that the riparian landowners have constructed for water usage;

(5) the 2008 reassessments were made by simply sending out tax bills without any notice that they were based upon a claim of state ownership of the riverbeds or streambeds and some riparian landowners have paid the first installment of 2008 real property taxes based upon the reassessments without realizing that a claim of state ownership of the riverbeds and streambeds was the basis for the reassessments;

(6) procedural due process requires that if a claim of change in ownership is involved, the state agency involved shall afford the affected property owners both notice of the claim and the opportunity to be heard;

(7) the 2008 real property tax assessments based upon claims of state ownership did not comply with the constitutional requirement for procedural due process and under that

circumstance payment by the property owners of taxes based on the reassessment does not constitute acquiesence in the underlying state ownership claim;

(8) The department of revenue is required to provide written notice to the affected property owners of the state's claim of ownership so that the affected property owners have a fair opportunity to be heard and to dispute the government's claim."

*2005 Amendment:* Chapter 476 in (1) inserted first two sentences relating to the lessee providing a list of improvements on the land before a lease is renewed and allowing a party bidding on the lease to get the information; and in (2) inserted third sentence requiring the notification to include an explanation of the requirements in 77-6-306. Amendment effective April 28, 2005.

*2001 Amendment:* Chapter 270 in (1) at end of first sentence after "the improvements" deleted "at the time the new lessee takes possession"; in (2) inserted second and third sentences regarding initiation of valuation process; inserted (3) regarding removable of movable improvements; and made minor changes in style. Amendment effective April 20, 2001.

*1993 Amendment:* Chapter 586 in (1) inserted second sentence concerning reasonable value as full market value of improvements; in (2), after "lessee", inserted "is unable to produce records establishing the reasonable value or if the former lessee"; and made minor changes in style. Amendment effective July 1, 1993.

**Case Notes**

*Administrative Rules Valid Relating to Purchase of Certain Movable Improvements:* The Supreme Court determined that the administrative rules implementing 77-6-302 and 77-6-303, relating to limiting compensation for movable improvements to just those that a lessee decides to purchase, were valid and did not contradict those sections as provided in 2-4-305. The Supreme Court made the determination by reading the statutes in their entirety, examining the legislative history of amendments to 77-6-302 and 77-6-303, considering prior case law, and recognizing that the rules were in effect during the time the sections were amended. Grenz v. Dept. of Natural Resources and Conservation, 2011 MT 17, 359 Mont. 154, 248 P.3d 785.

*Applicability to Movable Improvements:* Compensation for improvements provided under 77-6-302 and 77-6-303 applies only to permanent improvements and to movable improvements that the new lessee decides to purchase as provided under the administrative rules implementing these sections. Grenz v. Dept. of Natural Resources and Conservation, 2011 MT 17, 359 Mont. 154, 248 P.3d 785.

*Statute Allowing State Lands to Remain Idle While Lessees Determine Value of Improvements — Unconstitutionality:* Under 77-6-305 (now repealed), the value of improvements placed on the leasehold by a former lessee is required to be paid by the new lessee before the new lease may be issued if the former lessee chose not to remove the improvements. The District Court found the provision constitutional even though it might result in less revenue because of delay caused by lease delays, concluding that the Department of Natural Resources and Conservation must have latitude to administer school trust lands. The Supreme Court disagreed, holding that portion of 77-6-305 (now repealed) unconstitutional on its face. The state's discretion to administer the trust is broad, but not unlimited, and must conform to the requirements of the trust. The statute allows trust lands to idle indefinitely while former and new lessees determine the value of the improvements, which is inconsistent with the trust mandate that full market value be received for the lands. Montanans for Responsible Use of School Trust v. State ex rel. Bd. of Land Comm'rs, 1999 MT 263, 296 M 402, 989 P2d 800, 56 St. Rep. 1065 (1999).

## 77-6-303. Determination of compensation.

**Compiler's Comments**

*2009 Amendment:* Chapter 472 in (1) near beginning of first sentence after "improvements" inserted "described in 77-6-302"; throughout (2) substituted "original plowing" or "plowing" for "breaking" and substituted "improvement" for "breaking"; and made minor changes in style. Amendment effective May 6, 2009.

*Preamble:* The preamble attached to Ch. 472, L. 2009, provided: "WHEREAS, the Department of Natural Resources and Conservation has asserted regulatory jurisdiction over the beds of various rivers and streams based on the premise that the streams are navigable and that the state therefore owns the riverbeds and streambeds; and

WHEREAS, very few Montana rivers or streams have been adjudicated as navigable, either in whole or in part; and

WHEREAS, it is not economically feasible for either the Department of Revenue or the Department of Natural Resources and Conservation to obtain judicial determinations of riverbed or streambed ownership by statewide quiet title actions, yet that ownership determination may not be made legally by unilateral administrative decisions; and

WHEREAS, if the Department of Natural Resources and Conservation wishes to assert regulatory control over the bed of a river or stream that has not been adjudicated to be navigable and was not determined navigable at the time of the original federal government surveys of the public land as evidenced by the recorded and monumented surveys of the meander lines of the river, it is required to provide written notice of the claim of state ownership to the affected property owners; and

WHEREAS, because the present claims of state ownership of riverbeds and streambeds is contrary to longstanding administrative practice and because the test for navigability depends upon evidence concerning the log floating capability of a stream at the time of statehood, there is no presumption of correctness attached to a navigability claim made by any state agency."

*Legislative Findings:* Section 1, Ch. 472, L. 2009, provided: "The legislature finds that:

(1) for 120 years since the admission of Montana as a state in 1889, the department of revenue and its predecessor agencies have taxed some landowners whose property abuts a river or stream on the assumption that those riparian landowners owned the property to the middle of the river or stream;

(2) in Montana v. United States, 450 U.S. 544 (1981), the United States supreme court recognized that if a river or stream is not navigable, the abutting riparian landowners own the land in the bed of the stream to the middle of the stream, but if a river or stream is navigable, the state owns the bed of the river or stream, having acquired ownership from the United States when the state was admitted to the union, and therefore Montana owns the bed of the Bighorn River where it flows through the Crow reservation;

(3) for the purpose of determining the ownership of a riverbed or streambed, the test of navigability is whether logs could be floated in the stream at the time of statehood as stated in Montana Coalition for Stream Access v. Curran, 210 Mont. 38, 682 P.2d 163 (1984), based upon The Montello, 87 U.S. 430 (1874), Sierra Pacific Power Co. v. Federal Energy Regulatory Commission, 681 F.2d 1134 (9th Cir. 1982), and State of Oregon v. Riverfront Protection Association, 672 F.2d 792 (9th Cir. 1982);

(4) beginning with tax assessments that were effective January 1, 2008, the lien date for real property taxes, the department of revenue reassessed the property of riparian landowners whose land abuts various rivers and streams by reducing the amount of land assessed based upon the premise that the landowners did not own to the middle of the river or stream because the river or stream was navigable and these reassessments, if correct, have enormous impact upon the riparian landowners because they affect land titles, acreage owned, qualification for various conservation and price support programs, and ownership of water diversion facilities and other structures that the riparian landowners have constructed for water usage;

(5) the 2008 reassessments were made by simply sending out tax bills without any notice that they were based upon a claim of state ownership of the riverbeds or streambeds and some riparian landowners have paid the first installment of 2008 real property taxes based upon the reassessments without realizing that a claim of state ownership of the riverbeds and streambeds was the basis for the reassessments;

(6) procedural due process requires that if a claim of change in ownership is involved, the state agency involved shall afford the affected property owners both notice of the claim and the opportunity to be heard;

(7) the 2008 real property tax assessments based upon claims of state ownership did not comply with the constitutional requirement for procedural due process and under that circumstance payment by the property owners of taxes based on the reassessment does not constitute acquiesence in the underlying state ownership claim;

(8) The department of revenue is required to provide written notice to the affected property owners of the state's claim of ownership so that the affected property owners have a fair opportunity to be heard and to dispute the government's claim."

**Case Notes**

*Administrative Rules Valid Relating to Purchase of Certain Movable Improvements:* The Supreme Court determined that the administrative rules implementing 77-6-302 and 77-6-303, relating to limiting compensation for movable improvements to just those that a lessee decides to purchase, were valid and did not contradict those sections as provided in 2-4-305. The Supreme Court made the determination by reading the statutes in their entirety, examining the legislative history of amendments to 77-6-302 and 77-6-303, considering prior case law, and recognizing that the rules were in effect during the time the sections were amended. Grenz v. Dept. of Natural Resources and Conservation, 2011 MT 17, 359 Mont. 154, 248 P.3d 785.

*Applicability to Movable Improvements:* Compensation for improvements provided under 77-6-302 and 77-6-303 applies only to permanent improvements and to movable improvements that the new lessee decides to purchase as provided under the administrative rules implementing these sections. Grenz v. Dept. of Natural Resources and Conservation, 2011 MT 17, 359 Mont. 154, 248 P.3d 785.

*Professional Appraiser Not Required — Valuation Not Based on Replacement Cost:* Inquiry under this section does not require the expertise of a professional appraiser. The credibility and weight to be given to opinion testimony are matters for the District Court's determination in a nonjury proceeding. An opinion on land valuation may be based upon hearsay if it is found to be reliable. This section refers to cost and present condition as starting points for valuation. The District Court did not err in refusing to use replacement cost in its valuation. Evertz v. St., 249 M 193, 815 P2d 135, 48 St. Rep. 637 (1991).

### 77-6-306. Arbitrators to fix value of improvements.

**Compiler's Comments**

*2005 Amendment:* Chapter 476 in (4) at end before "for judicial review of the decision" deleted "or the district court of Lewis and Clark County". Amendment effective April 28, 2005.

*1995 Amendment:* Chapter 418 in (1), in three places, substituted "director" for "commissioner"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1993 Amendment:* Chapter 586 in (1), near middle of first sentence after "value", substituted "of the improvements pursuant to 77-6-302" for "thereof" and at end of last sentence, after "fixed", substituted "pursuant to 77-6-302" for "as this part provides"; in (3), in second sentence after "examine the", inserted "records pertaining to the costs of the"; and made minor changes in style. Amendment effective July 1, 1993.

*1983 Amendment:* In (1), inserted provision for appointment of an arbitrator by the commissioner of state lands when any party refuses to do so; in (2), inserted "for their services"; in (3), inserted "except as provided in subsection (4)"; and inserted (4) allowing judicial review of disputed departmental valuations.

**Case Notes**

*Judicial Review Not Trial De Novo — No Denial of Due Process:* In a judicial review, the District Court properly considered all documentation constituting the record below and was not restricted solely to depositions of the former lessee and a Department employee. Judicial review under this section is not a trial de novo. The former lessee was not denied due process when he had the opportunity to present evidence on his behalf, both at the Department review of arbitration proceedings and at the District Court level. Evertz v. St., 249 M 193, 815 P2d 135, 48 St. Rep. 637 (1991).

## Part 4
## Pledges and Mortgages of Leasehold Interests

### 77-6-401. Pledge or mortgage of leasehold interest in state lands.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

**Administrative Rules**

Title 36, chapter 25, subchapter 1, ARM Surface management rules.

### 77-6-402. Filing with department required.

**Administrative Rules**

Title 36, chapter 25, subchapter 1, ARM Surface management rules.

### 77-6-403. Transfer of lease.

**Compiler's Comments**

*1991 Amendment:* In (1), at beginning, inserted exception clause, after "proof" substituted "that a person has acquired through foreclosure or conveyance the pledgor's or mortgagor's leasehold interest" for "of the acquisition of such lease or leasehold interest by any person under or pursuant to such pledge agreement or mortgage", and inserted last two sentences providing requirements for decree of foreclosure to authorize transfer of a lease; inserted (2) allowing Board to determine if assignee is qualified; and made minor changes in style.

*Saving Clause:* Section 2, Ch. 679, L. 1991, was a saving clause.

**Administrative Rules**

Title 36, chapter 25, subchapter 1, ARM Surface management rules.

**77-6-404. Proof of termination of pledge or mortgage to be filed.**

**Administrative Rules**

Title 36, chapter 25, subchapter 1, ARM Surface management rules.

## Part 5
## Rental Provisions

**77-6-501. Agricultural leases.**

**Compiler's Comments**

*2021 Codification:* Section 1, Ch. 397, L. 2021, concerning the setting of annual hay prices, was codified as subsection (5) of 77-6-501.

*2009 Amendment:* Chapter 472 in (3) at beginning inserted "Subject to 77-1-134"; and made minor changes in style. Amendment effective May 6, 2009.

*Preamble:* The preamble attached to Ch. 472, L. 2009, provided: "WHEREAS, the Department of Natural Resources and Conservation has asserted regulatory jurisdiction over the beds of various rivers and streams based on the premise that the streams are navigable and that the state therefore owns the riverbeds and streambeds; and

WHEREAS, very few Montana rivers or streams have been adjudicated as navigable, either in whole or in part; and

WHEREAS, it is not economically feasible for either the Department of Revenue or the Department of Natural Resources and Conservation to obtain judicial determinations of riverbed or streambed ownership by statewide quiet title actions, yet that ownership determination may not be made legally by unilateral administrative decisions; and

WHEREAS, if the Department of Natural Resources and Conservation wishes to assert regulatory control over the bed of a river or stream that has not been adjudicated to be navigable and was not determined navigable at the time of the original federal government surveys of the public land as evidenced by the recorded and monumented surveys of the meander lines of the river, it is required to provide written notice of the claim of state ownership to the affected property owners; and

WHEREAS, because the present claims of state ownership of riverbeds and streambeds is contrary to longstanding administrative practice and because the test for navigability depends upon evidence concerning the log floating capability of a stream at the time of statehood, there is no presumption of correctness attached to a navigability claim made by any state agency."

*Legislative Findings:* Section 1, Ch. 472, L. 2009, provided: "The legislature finds that:

(1) for 120 years since the admission of Montana as a state in 1889, the department of revenue and its predecessor agencies have taxed some landowners whose property abuts a river or stream on the assumption that those riparian landowners owned the property to the middle of the river or stream;

(2) in Montana v. United States, 450 U.S. 544 (1981), the United States supreme court recognized that if a river or stream is not navigable, the abutting riparian landowners own the land in the bed of the stream to the middle of the stream, but if a river or stream is navigable, the state owns the bed of the river or stream, having acquired ownership from the United States when the state was admitted to the union, and therefore Montana owns the bed of the Bighorn River where it flows through the Crow reservation;

(3) for the purpose of determining the ownership of a riverbed or streambed, the test of navigability is whether logs could be floated in the stream at the time of statehood as stated in Montana Coalition for Stream Access v. Curran, 210 Mont. 38, 682 P.2d 163 (1984), based upon The Montello, 87 U.S. 430 (1874), Sierra Pacific Power Co. v. Federal Energy Regulatory Commission, 681 F.2d 1134 (9th Cir. 1982), and State of Oregon v. Riverfront Protection Association, 672 F.2d 792 (9th Cir. 1982);

(4) beginning with tax assessments that were effective January 1, 2008, the lien date for real property taxes, the department of revenue reassessed the property of riparian landowners whose land abuts various rivers and streams by reducing the amount of land assessed based upon the premise that the landowners did not own to the middle of the river or stream because

the river or stream was navigable and these reassessments, if correct, have enormous impact upon the riparian landowners because they affect land titles, acreage owned, qualification for various conservation and price support programs, and ownership of water diversion facilities and other structures that the riparian landowners have constructed for water usage;

(5) the 2008 reassessments were made by simply sending out tax bills without any notice that they were based upon a claim of state ownership of the riverbeds or streambeds and some riparian landowners have paid the first installment of 2008 real property taxes based upon the reassessments without realizing that a claim of state ownership of the riverbeds and streambeds was the basis for the reassessments;

(6) procedural due process requires that if a claim of change in ownership is involved, the state agency involved shall afford the affected property owners both notice of the claim and the opportunity to be heard;

(7) the 2008 real property tax assessments based upon claims of state ownership did not comply with the constitutional requirement for procedural due process and under that circumstance payment by the property owners of taxes based on the reassessment does not constitute acquiesence in the underlying state ownership claim;

(8) The department of revenue is required to provide written notice to the affected property owners of the state's claim of ownership so that the affected property owners have a fair opportunity to be heard and to dispute the government's claim."

*1999 Amendment:* Chapter 5 inserted (4) requiring a minimum annual guarantee on a competitive bid greater than a one-third crop share; and made minor changes in style. Amendment effective July 1, 1999.

*Saving Clause:* Section 3, Ch. 5, L. 1999, was a saving clause.

*Applicability:* Section 5(1), Ch. 5, L. 1999, provided: "[Section 1] [amending 77-6-501] applies to all agricultural leases made or renewed on or after [the effective date of this act]." Effective July 1, 1999.

*1993 Amendment:* Chapter 168 near beginning of (1) inserted exception clause; at beginning of (2) inserted exception clause; inserted (3) authorizing cash lease renewal in cases in which lessee has made substantial irrigation improvements at lessee's own expense; and made minor changes in style.

*1985 Amendment:* In (1) at end of second sentence, inserted "or for high production cost methods when these methods would result in more income to the state"; and in (2) at beginning of sentence, substituted "If it is in the best interests of the state" for "In unusual cases", near middle of sentence, before "cases", deleted "unusual", near end of sentence, after "district", inserted "under similar circumstances", and before "conditions of the case" deleted "unusual".

*Statement of Intent:* The statement of intent attached to HB 70 (Ch. 54, L. 1985) provided: "The purpose of the extension of rulemaking authority contained in section 2 is to allow the department of state lands [now department of natural resources and conservation] and board of land commissioners to amend their surface leasing rules, specifically ARM 26.3.112 [repealed 1987], to reflect the statutory amendments made by this bill."

**Administrative Rules**

Title 36, chapter 25, subchapter 1, ARM Surface management rules.

## 77-6-502. Grazing leases.

**Compiler's Comments**

*1993 Amendment:* Chapter 586 in (1), after "lands must", inserted "[, taking into account recommendations of the state land board advisory council [now terminated],] attain full market value"; in (2) substituted "board" for "legislature"; and made minor changes in style. Amendment effective July 1, 1993.

*Applicability:* Section 16(3), Ch. 586, L. 1993, provided: "[Sections 8 and 12] [77-6-502 and 77-6-507] apply to leases issued or renewed after July 1, 1993."

**Administrative Rules**

Title 36, chapter 25, subchapter 1, ARM Surface management rules.

**Case Notes**

*Cancellation of State Agricultural Lease for Nonpayment — Hearing Not Required — District Court Jurisdiction to Review Cancellation:* There is no provision in 77-6-506 requiring the Department to conduct a hearing when canceling a state land lease for nonpayment, nor is a hearing required pursuant to the due process clause of Art. II, sec. 17, Mont. Const. The District Court thus has no jurisdiction to review a lease cancellation for nonpayment under contested case procedures because lease cancellation for nonpayment does not constitute a contested case.

However, the District Court does retain inherent jurisdiction to review administrative decisions and erred in deciding that it did not have jurisdiction. The standard of review is whether the agency acted arbitrarily, capriciously, or unlawfully. Johansen v. St., 1998 MT 51, 288 M 39, 955 P2d 653, 55 St. Rep. 211 (1998), following N. Fork Preservation Ass'n v. Dept. of State Lands, 238 M 451, 778 P2d 862 (1989).

## 77-6-503. Leases of city lots, town lots, and commercial property.

### Compiler's Comments

*2003 Amendment:* Chapter 404 at end substituted "99 years" for "40 years"; and made minor changes in style. Amendment effective July 1, 2003.

*Saving Clause:* Section 18, Ch. 404, L. 2003, was a saving clause.

*Severability:* Section 19, Ch. 404, L. 2003, was a severability clause.

*Applicability:* Section 21, Ch. 404, L. 2003, provided: "[This act] applies to all leases for commercial purposes made or renewed on or after July 1, 2003."

*1985 Amendment:* Near beginning substituted "town lots, city lots, and land valuable for commercial development" for "town and city lots"; near end after "city property", inserted "or land valuable for commercial development"; and at end increased lease period limitation from 25 to 40 years.

### Case Notes

*No Genuine Issue of Fact Regarding State Land Lessee's Rental of Property in Contravention of Zoning Regulations — Summary Judgment Proper:* Stewart leased a parcel of state land for a residence in an area that was zoned for single-family dwellings. The state commenced a civil action challenging Stewart's use of a single-family unit as a multiple-family unit and seeking injunctive relief. The District Court granted the state's motion for summary judgment and issued an injunction against Stewart, and Stewart appealed. Stewart maintained that the residence had not been modified in any way following approval of architectural plans, so the residence was still in compliance with zoning restrictions. The state responded that it was not the structure itself but Stewart's use of the structure that violated zoning regulations. The Supreme Court agreed with the state. Testimony of former residents confirmed that Stewart's home was being used as a multiple-family residence, and Stewart offered no proof other than mere denial and speculation that a material question of fact existed regarding use of the structure as a multiple-family residence. Thus, summary judgment for the state was proper, and the grant of injunctive relief against Stewart was affirmed. St. v. Stewart, 2003 MT 108, 315 M 335, 68 P3d 712 (2003).

## 77-6-504. Lease rentals for part year.

### Administrative Rules

Title 36, chapter 25, subchapter 1, ARM Surface management rules.

## 77-6-506. Date when rental due — penalty — cancellation for nonpayment.

### Compiler's Comments

*1999 Amendment:* Chapter 5 in (1) near beginning of third sentence inserted "after July 1, 1999"; in (5) deleted former second sentence that read: "The land is then open for lease to applicants"; inserted (6) allowing the department to reinstate a lease under certain conditions; inserted (7) regarding availability of a canceled lease that is not reinstated; and made minor changes in style. Amendment effective July 1, 1999.

*Saving Clause:* Section 3, Ch. 5, L. 1999, was a saving clause.

*Applicability:* Section 5(2), Ch. 5, L. 1999, provided: "[Section 2] [amending 77-6-506] applies to all rentals due on or after [the effective date of this act]." Effective July 1, 1999.

*1991 Amendment:* Inserted (3) extending the $25 penalty for failure to make timely rental payment to all state land leases and licenses not currently subject to the penalty.

*Applicability:* Section 2, Ch. 140, L. 1991, provided: "[This act] applies to state land lease and license payments due after December 31, 1991."

*1989 Amendment:* In (1), at end, substituted "before March 1. If the rental is not paid before March 1, a $25 penalty shall be imposed on the lessee. If the full rental and the $25 penalty are not paid by April 1, the entire lease is canceled" for "before March 1, and if not paid by April 1 the entire lease is canceled"; in (2) inserted second sentence relating to rental payment before November 15, in third sentence substituted "full rental and the $25 penalty are" for "rental is", and inserted last sentence relating to rental payments made after November 15; in (3) inserted "and the $25 penalty are"; inserted (5) providing for deposit of penalties; and made minor change in grammar.

*1985 Amendment:* In (1), at beginning inserted "For grazing leases, the grazing portion of leases containing both agricultural and grazing land, and agricultural leases not based on a crop share", near end before "lease", inserted "entire", and at end deleted "The department shall notify the lessee by letter addressed to the post-office address given in the lease of the cancellation, and the land is then open for lease to other applicants"; inserted (2) providing for cancellation of agricultural leases and the agricultural portion of leases containing both grazing and agricultural land due to nonpayment of rental; inserted (3) requiring notice of impending cancellation to lessee; and inserted (4) requiring notice to lessee of actual cancellation, whereupon the land is open for lease to applicants.

*Applicability:* Section 2, Ch. 473, L. 1985, provided: "This act applies to all leases of state agricultural lands in effect on the effective date of this act and to all future leases of state agricultural lands."

*Severability Clause:* Section 3, Ch. 473, L. 1985, was a severability clause.

**Administrative Rules**

Title 36, chapter 25, subchapter 1, ARM Surface management rules.

**Case Notes**

*Payment of State Lease Authorized on Day After Holiday:* Johansen's rental payment on a state agricultural lease was due on or before December 31. Johansen placed the payment in his rural mailbox on December 29, but for various reasons, the carrier left the payment in the mailbox on the 29th and 30th. There was no mail service on Sunday the 31st, and the post office was closed January 1 for the holiday. On January 2, Johansen took the letter to the post office for mailing, as evidenced by affidavit of the postmaster, but it did not receive a postmark until January 3. The Department canceled the lease for nonpayment. Although the letter did not receive a postmark until January 3, the Department had uncontroverted evidence that Johansen had timely mailed the rental payment. The Department's decision to cancel the lease was arbitrary and capricious, and the District Court's holding that the payment was timely made was affirmed. Johansen v. St., 1999 MT 187, 295 M 339, 983 P2d 962, 56 St. Rep. 731 (1999).

*Cancellation of State Agricultural Lease for Nonpayment — Hearing Not Required — District Court Jurisdiction to Review Cancellation:* There is no provision in this section requiring the Department to conduct a hearing when canceling a state land lease for nonpayment, nor is a hearing required pursuant to the due process clause of Art. II, sec. 17, Mont. Const. The District Court thus has no jurisdiction to review a lease cancellation for nonpayment under contested case procedures because lease cancellation for nonpayment does not constitute a contested case. However, the District Court does retain inherent jurisdiction to review administrative decisions and erred in deciding that it did not have jurisdiction. The standard of review is whether the agency acted arbitrarily, capriciously, or unlawfully. Johansen v. St., 1998 MT 51, 288 M 39, 955 P2d 653, 55 St. Rep. 211 (1998), following N. Fork Preservation Ass'n v. Dept. of State Lands, 238 M 451, 778 P2d 862 (1989).

*Lease Rental Affected by Land Reclassification — Writ of Prohibition Proper:* Lessees developed a water spreading project on a portion of their state grazing lease, and the Department of State Lands (now Department of Natural Resources and Conservation) reclassified 32 acres of the lease as agricultural. Lessees later concluded that the project was inadequate for producing a profitable crop at the higher agricultural rental rates. They negotiated to pay back a loan for the project and reverted the land to grazing. After the loan was repaid, there were no other agreements supplementing the original lease. However, the Department subsequently determined that the 32 acres should retain the agricultural classification, sought rental at the agricultural rate, and canceled the lease upon nonpayment. The District Court properly filed a writ of prohibition restraining the Department from canceling the lease, re-leasing the property to other parties, and taking action against lessees for trespass after finding the Department was in excess of its jurisdiction for canceling the lease for nonpayment of agricultural rental when the property was leased for grazing only. Winchell v. Dept. of State Lands, 235 M 10, 764 P2d 1267, 45 St. Rep. 2121 (1988).

*Improper to Enjoin Department From Complying With This Section:* The Department canceled a lease for nonpayment pursuant to this section. Because of the restrictions on issuance of injunctions set forth in 27-19-103, a court may not issue an injunction to prevent the Department from re-leasing the land. Jeppeson v. St., 205 M 282, 667 P2d 428, 40 St. Rep. 1272 (1983).

## 77-6-507. Formula for fixing annual rental.

### Compiler's Comments

*1993 Amendment:* Chapter 586 in (2), after "establish the", deleted "minimum" and after "multiplying" substituted "a factor established by the board pursuant to 77-6-502" for "six"; and inserted (5) concerning elements to be considered in establishing rental rate. Amendment effective July 1, 1993.

*Applicability:* Section 16(3), Ch. 586, L. 1993, provided: "[Sections 8 and 12] [77-6-502 and 77-6-507] apply to leases issued or renewed after July 1, 1993."

*1991 Amendment:* Near beginning of (2), before "per annum", inserted "minimum" and after "state" deleted "upon the animal-unit-month basis as provided in this section"; deleted introduction to former (3) regarding fixing of a formula for annual rental per section; deleted former (3)(b) through (3)(d) that established minimum annual rental rates for grazing lands; and made minor changes in style.

### Attorney General's Opinions

*Grazing Leases — Duty of Board to Seek Fair Market Value in Establishing Grazing Fees:* The Board of Land Commissioners has an affirmative duty under section 10 of The Enabling Act of 1889 and under Art. X, sec. 11, Mont. Const., to obtain the full market value for any grazing lease it enters into. The Legislature may establish a formula for calculating the lease price of state lands where application of the formula results in obtaining fair market value. The formula established by statute based upon the price of beef therefore establishes a minimum lease price, and any interpretation of that statute by the Department of State Lands (now Department of Natural Resources and Conservation) so as to prevent the procurance of fair market value for a lease could result in the statutory formula being held unconstitutional. 40 A.G. Op. 24 (1983). However, see Montanans for Responsible Use of School Trust v. State ex rel. Bd. of Land Comm'rs, 1999 MT 263, 296 M 402, 989 P2d 800, 56 St. Rep. 1065 (1999), wherein the Supreme Court held that statutory provisions leaving the Department no discretion but to charge less than full market value for certain uses of state lands were unconstitutional.

## 77-6-508. Effect of competitive bidding.

### Compiler's Comments

*1993 Amendment:* Chapter 586 after "established by the" substituted "board" for "above formula"; and made minor changes in style. Amendment effective July 1, 1993.

# TITLES 78 AND 79

## RESERVED

# TITLE 80
# AGRICULTURE

## CHAPTER 1
## DEPARTMENT OF AGRICULTURE

**Chapter Law Review Articles**

The Legal Needs of Farmers: An Analysis of the Family Farm Legal Needs Survey, Endres, Johnson, Uchtmann, & Silvis, 71 Mont. L. Rev. 135 (2010).

Captive Regulators, Captive Shippers: The Legacy of McCarty Farms, Johnstone, 70 Mont. L. Rev. 239 (2009).

**Chapter Collateral References**

State Laboratories: An Analysis of State Laboratory Facilities Related to Wildlife, Livestock, Agriculture, and Public Health. A Report to the Legislative Economic Affairs Interim Committee, Mont. Leg. Serv. Div. (2010).

### Part 1
### General Provisions

### 80-1-101. Definition.

**Compiler's Comments**

*Sections Not Codified:* Section 3-228.1(6), R.C.M. 1947, was not codified in the MCA because it is redundant with 80-1-101. This section has not been repealed and is still valid law. Citation may be made to sec. 1, Ch. 39, L. 1973, as amended by sec. 3, Ch. 43, L. 1977.

Section 3-310(1), R.C.M. 1947, was not codified in the MCA because it is redundant with 80-1-101. This section has not been repealed and is still valid law. Citation may be made to sec. 1, Ch. 442, L. 1973, as amended by sec. 1, Ch. 315, L. 1977.

Section 3-3501(5), R.C.M. 1947, was not codified in the MCA because it is redundant with 80-1-101. This section has not been repealed and is still valid law. Citation may be made to sec. 1, Ch. 443, L. 1975, as amended by sec. 27, Ch. 13, L. 1977, and by sec. 1, Ch. 362, L. 1977.

### 80-1-102. Duties of department.

**Compiler's Comments**

*Montana Food Policy Modernization Project — Guidelines:* Section 1, Ch. 300, L. 2013, required the departments of public health and human services, agriculture, and livestock to coordinate and conduct a project to assess Montana's food laws and develop a report for the economic affairs interim committee, including any proposed legislation for the 2015 legislature. Chapter 300 was effective April 25, 2013, and terminates June 30, 2014, or upon completion of the duties described in the chapter, whichever occurs first.

*Preamble:* The preamble attached to Ch. 300, L. 2013, provided: "WHEREAS, current Montana law contains a complex food code with jurisdiction spread between multiple departments and levels of government; and

WHEREAS, there is a growing movement to support locally sourced and community-based food production, sometimes referred to as "cottage food", which benefits local communities, small businesses, public health, and environmental sustainability; and

WHEREAS, numerous states have passed laws that allow small business entrepreneurs to use their home kitchens to prepare for sale foods that are not potentially hazardous, while Montana has not; and

WHEREAS, new federal rules and regulations under the Food Safety Modernization Act will require updates to Montana food safety laws."

*Name Change — Directions to Code Commissioner:* Pursuant to sec. 36, Ch. 308, L. 1995, in this section the Code Commissioner changed "Montana state university" to "Montana state university-Bozeman".

**Administrative Rules**

Title 4, chapter 20, ARM Mediation services.

### 80-1-103. Restriction on use of revenue to include department fees.

**Compiler's Comments**

*Effective Date:* Section 3, Ch. 71, L. 2003, provided that this section is effective on passage and approval. Approved March 17, 2003.

### 80-1-104. Analytical laboratory services — rulemaking authority — deposit of fees.

**Compiler's Comments**

*2021 Amendment — Purported Amendment:* Chapter 576 deleted former (1)(c) that read: "(c) providers and marijuana-infused products providers as those terms are defined in 50-46-302"; in (1)(c) substituted reference to department of revenue for reference to department of public health and human services and deleted reference to Title 50, chapter 46, part 3; and made minor changes in style. Amendment effective January 1, 2022.

In addition to the amendments described above, sec. 99, Ch. 576, L. 2021, purported to amend this section by deleting language that was inserted by sec. 51, Initiative Measure No. 190, approved November 3, 2020. Because the deletion made by sec. 99, Ch. 576, L. 2021, was effective on the same day as the insertion made by sec. 51, I.M. No. 190, the final version of the text does not reflect either the insertion or the deletion.

*Extension of Effective Date:* Section 107, Ch. 576, L. 2021, amended sec. 56, Initiative Measure No. 190, by extending the effective date imposed by I.M. No. 190 to January 1, 2022. Effective May 18, 2021.

*Severability:* Section 113, Ch. 576, L. 2021, was a severability clause.

*2020 Amendment by Initiative:* Initiative Measure No. 190 inserted (1)(d) concerning adult-use marijuana providers; and made minor changes in style. Amendment effective October 1, 2021.

*Severability:* Section 55, Initiative Measure No. 190, was a severability clause.

*2017 Amendment:* Chapter 408 inserted (1)(c) allowing the department to provide analytical laboratory services to medical marijuana providers for certain purposes as allowed by federal law; and made minor changes in style. Amendment effective May 19, 2017.

*Severability:* Section 30, Ch. 408, L. 2017, was a severability clause.

*Effective Date:* Section 3, Ch. 31, L. 2015, provided that this section is effective on passage and approval. Approved February 18, 2015.

**Administrative Rules**

Title 4, chapter 22, ARM Analytical laboratory fees.

# CHAPTER 2
# AGRICULTURAL SERVICES

## Part 1
## Rural Rehabilitation

### 80-2-101. Trust assets of rural rehabilitation corporation — department of agriculture designated to make application.

**Compiler's Comments**

*Federal Act Not Codified:* Public Law 499, referred to in this section, was formerly compiled in the United States Code as Title 40, sec. 440 through 444. These sections are now omitted because the law has been executed. See the codification comment at U.S.C., Title 40, sec. 436 through 444.

**Administrative Rules**

ARM 4.3.101 Funding for rural development loans — assets.

ARM 4.3.102 Use of rural development loans funds.

### 80-2-102. Agreements with United States secretary of agriculture authorized.

**Compiler's Comments**

*Repeal of Federal Act:* The Bankhead-Jones Farm Tenant Act referred to in 80-2-102 was originally codified at 7 U.S.C. 1000, et seq. Title I, II, and IV of the Act, referenced in 80-2-102(1), were repealed by Pub. L. No. 87-128, Title III, sec. 341(a), on August 8, 1961. Section 341(a) also provided that reference to any provision of the Bankhead-Jones Farm Tenant Act superseded by any provision of Title III of Pub. L. No. 87-128 shall be construed as referring to the appropriate provision of such title.

*1985 Amendment:* Inserted (2) relating to program funding.

**80-2-103. Administration of trust assets.**

**Compiler's Comments**

*2001 Amendment:* Chapter 34 near middle after "deposit in the" substituted "state special revenue fund" for "expendable trust fund". Amendment effective July 1, 2001.

*1999 Amendment:* Chapter 389 near middle after "trust fund" deleted "and are statutorily appropriated, as provided in 17-7-502"; deleted second sentence that read: "Expenditures for actual and necessary expenses required for the efficient administration of this part must be made from temporary appropriations, as described in 17-7-501(1) or (2), made for that purpose"; and made minor changes in style. Amendment effective July 1, 1999.

*1989 Amendment:* At end inserted provision that expenditures for administration of this part must be from temporary appropriations made for that purpose; and made minor changes in punctuation and phraseology. Amendment effective July 1, 1989.

*1985 Amendment:* Near middle of section, after "trust fund and", inserted "shall be statutorily appropriated as provided in 17-7-502 to be".

*1983 Amendment:* In middle of section, substituted "expendable trust fund" for "federal and private grant clearance fund".

**Administrative Rules**

ARM 4.3.101 Funding for rural development loans — assets.
ARM 4.3.102 Use of rural development loans funds.
Title 4, chapter 3, subchapter 2, ARM Junior agriculture loan rules.
Title 4, chapter 3, subchapter 6, ARM Rural assistance loan program.

**80-2-104. Powers of department — claims and obligations — property acquired at foreclosure.**

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

**Administrative Rules**

Title 4, chapter 3, subchapter 5, ARM Participation loans.

**80-2-106. Rules.**

**Administrative Rules**

Title 4, chapter 3, subchapter 2, ARM Junior agriculture loan rules.
Title 4, chapter 3, subchapter 5, ARM Participation loans.
Title 4, chapter 3, subchapter 6, ARM Rural assistance loan program.

## Part 2
## Hail Insurance

**Part Administrative Rules**

Title 4, chapter 4, ARM Hail insurance program.

**Part Case Notes**

*Crop Adjusters as Employees, Not Independent Contractors — Administrative Findings Improperly Reversed:* The Unemployment Insurance Division of the Department of Labor and Industry, a Department hearings office, and the Board of Labor Appeals (now Unemployment Insurance Appeals Board) successively determined that crop adjusters were employees of American Agrijusters Co. (American) for unemployment insurance tax purposes. The District Court reversed, holding that the crop adjusters were independent contractors. The Supreme Court applied the four-part test used in Sharp v. Hoerner Waldorf Corp., 178 M 419, 584 P2d 1298 (1978), to determine whether a right of control existed sufficient to give rise to an employer-employee relationship. The factors do not constitute a balancing test, however, so employee status may be established on the strength of evidence under one of the factors standing alone. Here, American exercised a right of control over the means and methods by which crop adjusters completed their job assignments through training, supervision, and review of completed job assignments. Further, payment by a unit of time and the right to terminate the work relationship without liability also evidenced employment status. The District Court erred in finding that crop adjusters were independent contractors, and the Supreme Court reversed. Am. Agrijusters Co. v. Dept. of Labor and Industry, 1999 MT 241, 296 M 176, 988 P2d 782, 56 St. Rep. 948 (1999). See also 3 Larson & Larson, Larson's Workers' Compensation Law §§ 61.04, 61.06, 61.07 (1999).

*State Auditor as Member of Hail Board — No Conflict of Interest:* The State Auditor as ex officio Commissioner of Insurance is required to approve the form of all hail insurance policies issued in Montana and at the same time is required by law to sit as a member of the Board of Hail Insurance (Hail Board). The State Auditor is not compensated for service on the Hail Board, nor is there any compensation from any source for such duties. Thus, the Supreme Court held that the State Auditor as ex officio Commissioner of Insurance is not financially interested in the Hail Board within the meaning of 2-2-102. Mtn. States Ins. Co. v. St., 218 M 365, 708 P2d 564, 42 St. Rep. 1657 (1985).

*State Auditor as Member of Hail Board — Not Dual Office Holding:* The State Auditor is a constitutional office with "such duties as are provided by law" (Art. VI, sec. 4, Mont. Const.). One of these prescribed duties is being a member of the Board of Hail Insurance established under 2-15-3003. The State Auditor does not hold dual offices by carrying out legislatively imposed duties. The only limitation on the Legislature in prescribing such duties is that the duties may not pertain to the Legislative or Judicial Branch of government. Mtn. States Ins. Co. v. St., 218 M 365, 708 P2d 564, 42 St. Rep. 1657 (1985).

**Part Attorney General's Opinions**

*Hail Insurance Levy Not a Tax:* A hail insurance levy is a contract obligation, not a tax, although administered as a tax. 34 A.G. Op. 43 (1972).

### 80-2-201. Powers and duties of board of hail insurance.

**Compiler's Comments**

*2001 Amendment:* Chapter 574 in (4) near end after "risk to all" substituted "persons" for "taxpayers"; and made minor changes in style. Amendment effective July 1, 2001.

*1983 Amendment:* At end of (1), after "business" deleted "at the state capitol in the office of the director of agriculture, who is secretary of the board"; in (4), at beginning substituted "shall use any appropriate means of communication to inform Montana producers of the purposes, scope, and benefits of this part" for "shall prescribe a special form outlining the purposes, scope, and benefits of this part", and at end, deleted ", the form to be submitted by the agent of the department of revenue in each county at the time in which the regular assessments of property are made by the agents to each farmer in each county in the state engaged in growing of crops subject to injury or destruction by hail. Each such farmer taxpayer shall signify on such forms whether he desires to become subject to the provisions of this part or not."

**Administrative Rules**

Title 4, chapter 4, ARM Hail insurance program.

### 80-2-202. Compensation of presiding officer and officers.

**Compiler's Comments**

*2015 Amendment:* Chapter 30 in (1) substituted "are entitled to compensation as provided in 2-15-122" for "must receive a per diem of $25". Amendment effective February 18, 2015.

*2009 Amendment:* Chapter 56 made minor changes in style. Amendment effective October 1, 2009.

### 80-2-203. Participation in program — fee.

**Compiler's Comments**

*2013 Amendment:* Chapter 399 in (2) in two places after "department" deleted "of revenue" and substituted "submission of the application to" for "the acceptance of the application by"; and made minor changes in style. Amendment effective January 1, 2014.

*2007 Amendment:* Chapter 275 in (1) in first sentence after "crops" deleted "other than those specified in this part"; and made minor changes in style. Amendment effective April 26, 2007.

*2001 Amendment:* Chapter 574 throughout section substituted reference to person for reference to taxpayer and references to fee for references to tax; and in (1) in second sentence after "suitable" substituted "fees" for "levies". Amendment effective July 1, 2001.

*1993 Special Session Amendment:* Chapter 27 in (2), in two places, substituted "department of revenue" for "county assessor"; and made minor changes in style. Amendment effective January 1, 1994.

*Applicability:* Section 171(2), Ch. 27, Sp. L. November 1993, provided that the amendments to this section apply to tax years after December 31, 1993.

*1993 Amendment:* Chapter 451 in second sentence of (2) substituted "12:01 a.m." for "noon" and after "day" inserted "immediately"; and made minor changes in style. Amendment effective April 21, 1993.

**Administrative Rules**

ARM 4.4.306 Application for insurance.
ARM 4.4.316 Liability on all crops.
ARM 4.4.317 Request for insurance on hail damaged grain.

**Attorney General's Opinions**

*Hail Insurance Levy Not a Tax:* A hail insurance levy is a contract obligation, not a tax, although administered as a tax. (See 2001 amendment.) 34 A.G. Op. 43 (1972).

### 80-2-204. Duty of department — election of benefits of law.

**Compiler's Comments**

*2013 Amendment:* Chapter 399 in two places after "department" deleted "of revenue", in last sentence after "contract" inserted "or the lessee of the land under lease or contract", after "insurance" substituted "and" for "or the lessee of the land", after "payment" deleted "in cash", and substituted "charged" for "levied"; and made minor changes in style. Amendment effective January 1, 2014.

*2001 Amendment:* Chapter 574 throughout section substituted "person" for "taxpayer"; in second sentence after "liable for the" substituted "fee" for "tax levies"; in third sentence after "liable for the" substituted "fees" for "taxes levied"; in fourth sentence after "tender payment" substituted "in cash, of the fee levied" for "of the tax levied" and after "insurance" deleted "to protect the lessee's crops, in cash"; and made minor changes in style. Amendment effective July 1, 2001.

*1993 Special Session Amendment:* Chapter 27 at beginning of first sentence substituted "The department of revenue shall" for "It shall be the duty of the agent of the department of revenue in each county in the state"; in second sentence, after "policies", deleted "on forms provided for such purpose"; in fourth sentence substituted "may make the election" for "shall elect if such lands shall be subject to the tax levies herein provided for and the crops grown thereon protected" and at end deleted "whereupon such crops shall become eligible to the benefits and protection afforded by this part for hail insurance"; and made minor changes in style. Amendment effective January 1, 1994.

*Applicability:* Section 171(2), Ch. 27, Sp. L. November 1993, provided that the amendments to this section apply to tax years after December 31, 1993.

*1983 Amendment:* Near beginning of first sentence before "to explain", substituted "upon request" for ", at the time in which the annual assessment of property is made,"; and near middle of first sentence after "afforded thereby and to", substituted "issue insurance policies" for "request each such taxpayer to certify".

### 80-2-205. What crops subject to provisions of law.

**Compiler's Comments**

*2001 Amendment:* Chapter 574 near beginning of first sentence after "all" substituted "persons" for "taxpayers" and at end substituted "fees for hail insurance have been imposed" for "taxes for hail insurance will have been levied"; and made minor changes in style. Amendment effective July 1, 2001.

**Administrative Rules**

ARM 4.4.303 Insured crops.
ARM 4.4.304 Hay crops.

### 80-2-206. Payment.

**Compiler's Comments**

*2013 Amendment:* Chapter 399 substituted current language for "When an applicant for hail insurance tenders cash for the insurance to the department of revenue, the applicant is allowed a discount of 4%. The hail insurance must be issued upon the cash payment less the 4%. The charge for the insurance must be based on the maximum rates shown on the application for hail insurance. If the current rates are reduced later, the board of hail insurance shall arrange for the proper refund to the insured. All cash received by the department of revenue must be deposited with the state treasurer." Amendment effective January 1, 2014.

*2001 Amendment:* Chapter 574 at end of last sentence substituted "deposited with the state treasurer" for "promptly turned over to the county treasurer, who shall furnish the insured with a current receipt and place the money in the hail insurance fund"; and made minor changes in style. Amendment effective July 1, 2001.

*1993 Special Session Amendment:* Chapter 27 in first sentence substituted "department of revenue" for "county assessor"; in last sentence substituted "department of revenue" for "assessor"; and made minor changes in style. Amendment effective January 1, 1994.

*Applicability:* Section 171(2), Ch. 27, Sp. L. November 1993, provided that the amendments to this section apply to tax years after December 31, 1993.

## 80-2-207. Delinquent fees — application by delinquent — crop lien.

### Compiler's Comments

*2013 Amendment:* Chapter 399 in (1) substituted "is delinquent in paying fees pursuant to this part" for "has more than 1 year's delinquent fees on the land" and substituted "a payment for the delinquent amount, including interest imposed under 80-2-230, plus the amount" for "a cash payment for the amount"; in (2) in four places after "department" deleted "of revenue", before "accept the application" deleted "receive and", in two places after "rules" deleted "and requirements", and substituted "lien with the secretary of state" for "original in the office of the clerk and recorder of the county"; in (3) substituted "but not by real estate is not allowed" for "and was not secured by real estate may not be allowed", after "amount" inserted "including interest imposed pursuant to 80-2-230", and after "paid" deleted "or until the tenant pays cash for the current hail insurance"; in (4) after "delinquent" inserted "in paying", after "reduction" inserted "in the fee initially charged", and in last sentence substituted "fee" for "charge"; and made minor changes in style. Amendment effective January 1, 2014.

*2007 Amendment:* Chapter 275 in (2) in first and fourth sentences before "grower" deleted "grain"; and made minor changes in style. Amendment effective April 26, 2007.

*2001 Amendment:* Chapter 574 in (1) near beginning after "delinquent" substituted "fees" for "taxes" and near end after "application" deleted "in the event of a maximum levy"; in (2) in first sentence after "delinquent" substituted "fees" for "taxes" and in last sentence at end substituted "sent a bill to the grain grower for the proper amount due for hail insurance under the provisions of this part" for "cause an assessment for the proper amount to be made on the property tax record in the same manner provided for in the case of other special levies or assessments"; in (3) after "delinquent" substituted "amount" for "account or accounts"; and made minor changes in style. Amendment effective July 1, 2001.

*1993 Special Session Amendment:* Chapter 27 in (2), in four places, substituted references to Department of Revenue for references to county assessor; in last sentence of (2) substituted "property tax record" for "assessment rolls"; and made minor changes in style. Amendment effective January 1, 1994.

*Applicability:* Section 171(2), Ch. 27, Sp. L. November 1993, provided that the amendments to this section apply to tax years after December 31, 1993.

## 80-2-208. Maximum insurance.

### Compiler's Comments

*2013 Amendments — Composite Section:* Chapter 242 in first sentence before "insurance" substituted "$75" for "$50" and near end substituted "$114" for "$76". Amendment effective October 1, 2013.

Chapter 399 at beginning deleted "When the reserve fund is determined actuarially sound, as provided in 80-2-228", after "$76" inserted "of insurance", after "irrigated land" inserted "except that the board may specify different maximums for specialty crops", and in last sentence substituted "Any" for "Either" and substituted "other parties" for "others"; and made minor changes in style. Amendment effective January 1, 2014.

*2007 Amendment:* Chapter 275 in first sentence increased fees on nonirrigated land from $40 to $50 and on irrigated land from $56 to $76 and substituted "acre of crops" for "acre of grain"; and made minor changes in style. Amendment effective April 26, 2007.

*2003 Amendment:* Chapter 97 in first sentence near middle increased insurance on an acre of nonirrigated land from $24 to $40 and near end increased insurance on an acre of irrigated land from $48 to $56; and made minor changes in style. Amendment effective March 24, 2003.

### Attorney General's Opinions

*Authority to Increase Maximum Coverage:* The Board of Hail Insurance has authority to increase the maximum coverage on each nonirrigated acre of grain (see 2007 and 2013 amendment) for the 1978 hail season from $12 to $18 only if its reserve fund contains a minimum of $3 million after payment of administrative expenses, interest owed on registered warrants, and claims for losses sustained during the 1977 hail season. 37 A.G. Op. 51 (1977).

## 80-2-209. Reinsurance.

**Compiler's Comments**

*2007 Amendment:* Chapter 275 in first sentence before "crops" deleted "grain"; and made minor changes in style. Amendment effective April 26, 2007.

*2001 Amendment:* Chapter 574 in last sentence after "hail insurance" substituted "fees" for "levies"; and made minor changes in style. Amendment effective July 1, 2001.

## 80-2-220. Rules — hail insurance fees.

**Compiler's Comments**

*Effective Date:* Section 18, Ch. 399, L. 2013, provided: "[This act] is effective January 1, 2014."

## 80-2-221. Fee for hail insurance.

**Compiler's Comments**

*2013 Amendment:* Chapter 399 in (1) substituted "if the owners of the land" for "the owners of which"; in (2) in first sentence after "recommend" inserted "to the department", after "land" deleted "respectively", and at end after "part" deleted "to the department of revenue" and in second sentence substituted "land" for "lands of owners" and before "insured" inserted "landowners"; and made minor changes in style. Amendment effective January 1, 2014.

*2001 Amendment:* Chapter 574 in (1) at beginning substituted "A fee is imposed" for "A tax is hereby authorized and directed to be levied"; in (2) near middle of first sentence after "recommend a" substituted "fee to be imposed" for "levy to be made" and in last sentence near end after "personal" deleted "assessment"; and made minor changes in style. Amendment effective July 1, 2001.

*1983 Amendment:* Deleted former (3) and (4), which read: "(3) It is hereby provided, however, that such tax may not exceed in any one year $2.40 per acre on lands sown to grain crops on nonirrigated lands, $4.80 per acre on irrigated lands, or $2.40 per acre on lands producing hay crops.

(4) If the tax required to pay the estimated losses, interest on warrants, and costs of administration is less than $1.20 per acre on lands sown to grain crops on nonirrigated lands and $2.40 per acre on irrigated lands and a proportionate amount on lands sown to hay crops, the board of hail insurance must recommend a tax levy sufficient to raise the full amount thereof."

**Attorney General's Opinions**

*Hail Insurance Levy Not a Tax:* A hail insurance levy is a contract obligation, not a tax, although administered as a tax. (See 2001 amendment.) 34 A.G. Op. 43 (1972).

## 80-2-222. Board to establish amount of rates — disposition of funds.

**Compiler's Comments**

*2013 Amendment:* Chapter 399 in (3) substituted "department" for "board of hail insurance". Amendment effective January 1, 2014.

*2001 Amendment:* Chapter 574 in (2) near middle after "determined and" substituted "imposed" for "levied"; in (4) substituted "establishing the rates provided in this section" for "making the levy provided in this section and 80-2-223"; in (5) near middle substituted "current year's rates than were estimated when the rates were established" for "current year's levies than were estimated when the levy was made" and near end substituted "persons" for "farmers"; and made minor changes in style. Amendment effective July 1, 2001.

*1993 Amendment:* Chapter 69 inserted (3) granting the Board of Hail Insurance spending authority, statutorily appropriating Board funds, and requiring administrative expenditures by temporary appropriation; in (6), in two places, substituted reference to enterprise fund for reference to expendable trust fund; and made minor changes in style. Amendment effective February 22, 1993.

*1983 Amendments:* Chapter 281, in (5), substituted "expendable trust fund" for "agency fund" in two places.

Chapter 691 made the following changes: in (1), deleted former last sentence, which read: "The highest of these rates shall be the same as the maximum established herein and the lowest may not be less than $1.20 per acre on lands sown to grain crops and a proportionate amount on lands sown to hay crops."; in (2) before "the rates for the year shall be determined", deleted "in any year when the requirements of the hail insurance law as herein provided do not require a levy of the maximum rates as established, then"; and near end of (3)(c) after "hail insurance law", deleted "during or subsequent to the year 1919".

**Administrative Rules**

ARM 4.4.311 Receipt of refund.

**Attorney General's Opinions**

*Board Authority to Withhold Refund:* The state Board of Hail Insurance has the authority to withhold refunds on delinquent hail insurance levies. 34 A.G. Op. 43 (1972).

### 80-2-224. Fee — notice — when payable.

**Compiler's Comments**

*2013 Amendment:* Chapter 399 substituted current language for "Notice of the fee must be mailed by the department of revenue to each person insured in the same manner and at the same time as notices of property taxes due. The fee is payable to the department of revenue." Amendment effective January 1, 2014.

*2001 Amendment:* Chapter 574 in first sentence near beginning substituted "the fee" for "such assessment" and near middle substituted "department of revenue" for "county treasurer"; substituted second sentence concerning paying fee to department of revenue for "The assessment shall be payable at the office of the county treasurer of each respective county"; and made minor changes in style. Amendment effective July 1, 2001.

*1983 Amendment:* In first sentence, substituted "in the same manner and at the same time as notices of property taxes due" for "in the same manner as are all other notices of taxes due".

**Attorney General's Opinions**

*Statute of Limitations for Collection of Past-Due Levy:* An 8-year statutory period of limitations applies to the collection of past-due levies. Any levies that have been delinquent more than 8 years should be canceled and written off pursuant to section 82-110, R.C.M. 1947 (now 17-4-107). 34 A.G. Op. 43 (1972).

### 80-2-225. Real estate lien — creation.

**Compiler's Comments**

*2013 Amendment:* Chapter 399 after "department" deleted "of revenue". Amendment effective January 1, 2014.

*2001 Amendment:* Chapter 574 in first sentence near beginning substituted "hail insurance fees" for "tax levies", after "each" substituted "person" for "taxpayer", and at end substituted "must be collected by the department of revenue" for "must be entered in the property tax record and collected by the officers charged with such duties in the manner and form as are other property taxes"; in second sentence near beginning substituted "fees" for "levies" and at end substituted "imposed" for "levied in the same manner as are other property taxes"; and made minor changes in style. Amendment effective July 1, 2001.

*1993 Special Session Amendment:* Chapter 27 in first sentence substituted "property tax record" for "tax roll"; deleted last two sentences that read: "The lien may in no way affect mortgages that are of record on March 14, 1917. The lien of any mortgage filed subsequent to March 14, 1917, shall be subsequent to any lien for hail insurance hereafter levied thereon"; and made minor changes in style. Amendment effective January 1, 1994.

*Applicability:* Section 171(2), Ch. 27, Sp. L. November 1993, provided that the amendments to this section apply to tax years after December 31, 1993.

*Section Not Codified:* Sections 16-2101 through 16-2104, R.C.M. 1947, pertaining to release of liens on county seed grain loans and cancellation of defaulted seed grain contracts, were not codified in the MCA. These sections have not been repealed and are still valid law. Citation may be made to sec. 1 through 3, Ch. 121, L. 1935, and sec. 1, Ch. 120, L. 1945.

**Attorney General's Opinions**

*Unpaid Hail Insurance Levy — Lien Against Land or Crops:* If a taxpayer insured under the provisions of Title 80, ch. 2, part 2, owns unencumbered lands, unpaid hail insurance levies become a lien upon his lands. If a taxpayer does not own unencumbered lands or does not pay cash, then unpaid hail insurance levies become a lien against his crops. 34 A.G. Op. 43 (1972).

### 80-2-227. Hail insurance secured by crop lien only.

**Compiler's Comments**

*2007 Amendment:* Chapter 275 at end substituted "insured crop" for "insured grain"; and made minor changes in style. Amendment effective April 26, 2007.

### 80-2-228. Reserve fund.

**Compiler's Comments**

*2001 Amendment:* Chapter 574 in (1) in two places substituted "fee" for "levy"; in (2) in second sentence substituted "may" for "shall"; and made minor changes in style. Amendment effective July 1, 2001.

*1993 Amendment:* Chapter 69 in (3) substituted reference to enterprise fund for reference to expendable trust fund; and made minor changes in style. Amendment effective February 22, 1993.

*1989 Amendment:* In (3), at end, deleted "and is statutorily appropriated as provided in 17-7-502 to the board for the purpose of paying costs of administration, interest, and losses of the program"; and made minor change in phraseology. Amendment effective July 1, 1989.

*1985 Amendment:* In (3) substituted present language providing for statutory appropriation under 17-7-502 for "The reserve hereby created shall be deposited in an expendable trust fund, and the board is hereby granted the power to draw from its moneys in the fund such amounts as it considers necessary for the purpose of paying costs of administration, interest, and losses".

*1983 Amendments:* Chapter 281, in (3), substituted "an expendable trust fund" for "the agency fund".

Chapter 691 made the following changes: deleted former (2), which read: "The reserve fund may not exceed $4 million prior to January 1, 1976. On January 1, 1976, and thereafter, the maximum permissible reserve fund shall be established as set forth in subsection (3) of this section."; and at beginning of (4) before "The board" deleted "Whenever there are no unpaid losses for prior years and whenever in any one year the cost of administration, interest, and losses for the current year is less than the sum of 60 cents per acre on nonirrigated grains and a proportionate amount on irrigated grains and other crops,"; and at end of (4) after "by the board" inserted "for the current year pursuant to 80-2-221".

**Attorney General's Opinions**

*Authority to Increase Maximum Coverage:* The Board of Hail Insurance has authority to increase the maximum coverage on each nonirrigated acre of grain for the 1978 hail season from $12 to $18 only if its reserve fund contains a minimum of $3 million after payment of administrative expenses, interest owed on registered warrants, and claims for losses sustained during the 1977 hail season. 37 A.G. Op. 51 (1977).

### 80-2-229. Withdrawal of crop in case of destruction through other means.

**Compiler's Comments**

*2001 Amendment:* Chapter 574 near end of first sentence after "regular" substituted "fee" for "levy"; and made minor changes in style. Amendment effective July 1, 2001.

**Administrative Rules**

ARM 4.4.309 Filing of application for reduction and schedule.

### 80-2-230. Collection of fees — release of lien — interest.

**Compiler's Comments**

*2013 Amendment:* Chapter 399 in (1) in two places and in (3) after "department" deleted "of revenue"; in (1) substituted "and transfer the money collected to the state treasurer for deposit pursuant to 80-2-232" for "The department of revenue shall deposit the money with the state treasurer" and substituted "collecting" for "making the collections of"; in (2) after "insurance fees" deleted "whether imposed against land or in the form of special assessments secured by crop liens" and after "in full" deleted "and not in semiannual payments"; in (3) after "secured by a" deleted "crop" and after "the lien" deleted "on file in the office of the county clerk and recorder"; in (4) in first sentence substituted "The department shall impose interest for late payments" for "The penalty and interest provisions of 15-1-216 apply to late payments" and at end inserted "at the rate of 2% a month or fraction of a month on the unpaid fees" and inserted last sentence concerning interest accrual; and made minor changes in style. Amendment effective January 1, 2014.

*2002 Amendment:* Chapter 13 inserted (4) relating to penalty and interest. Amendment effective August 16, 2002.

*2001 Amendments — Composite Section:* Chapter 257 in (1) at beginning of first sentence inserted "Subject to subsection (2)", in second sentence substituted "The county treasurer shall remit money in the fund to the department of revenue, as provided under 15-1-504" for "and remit the same to the state treasurer in the same manner as provided by law for the remittance of other moneys due to the state", and deleted former third sentence that read: "All county treasurers shall use due diligence in making the collections of the levies provided herein"; and made minor changes in style. Amendment effective July 1, 2001. The amendment by Ch. 574 rendered the amendment by Ch. 257 void. Because Ch. 574 transferred collection of fees from the county treasurer to the department of revenue, the code commissioner has not codified the language concerning remittance of fees to the department of revenue as provided under 15-1-504.

Chapter 574 substituted (1) concerning collection of fees by department of revenue for "The county treasurer in each county in the state shall collect all levies made under this part in the same manner as other property taxes are collected and shall keep all moneys collected by him or for him for hail insurance in a separate fund to be known as the hail insurance fund and remit the same to the state treasurer in the same manner as provided by law for the remittance of other moneys due to the state. All county treasurers shall use due diligence in making the collections of the levies provided herein. Also the board may furnish assistance needed at any time in making collections or may take over the collection of any levy at any time, depositing any collections therefrom with the treasurer of the county where the levy therefor was made"; in (2) near beginning substituted "fees, whether imposed" for "levies, whether levied" and at end substituted "the fees are imposed" for "such levies are made"; in (3) near beginning substituted "department of revenue" for "treasurer"; and made minor changes in style. Amendment effective July 1, 2001.

*Applicability:* Section 49, Ch. 257, L. 2001, provided: "[This act] applies to remittances of state money made to the department of revenue for fiscal years beginning after June 30, 2001."

**Attorney General's Opinions**

*Statute of Limitations for Collection of Past-Due Levy:* An 8-year statutory period of limitations applies to the collection of past-due levies. Any levies that have been delinquent more than 8 years should be canceled and written off pursuant to section 82-110, R.C.M. 1947 (now 17-4-107). 34 A.G. Op. 43 (1972).

*Unpaid Hail Insurance Levy — Lien Against Land or Crops:* If a taxpayer insured under the provisions of Title 80, ch. 2, part 2, owns unencumbered lands, unpaid hail insurance levies become a lien upon his lands. If a taxpayer does not own unencumbered lands or does not pay cash, then unpaid hail insurance levies become a lien against his crops. 34 A.G. Op. 43 (1972).

## 80-2-232. Department's duty — warrants — transfers to state general fund.

**Compiler's Comments**

*2013 Amendment — Coordination:* Chapter 399 in (1) substituted current language for "The department of revenue shall receive all money paid under this part and shall place the money in trust for the hail insurance program to the credit of the enterprise fund. All money collected by the board must be deposited in the enterprise fund, and all losses must be paid from that fund"; in (2)(a) substituted "All costs other than covered losses" for "All other costs" and before "enterprise fund" deleted "board's"; deleted former (2) that read: "(2) The department of revenue may retain 2% of the gross annual fees imposed and collected under this part for administrative costs associated with billing and collection of hail insurance premiums"; in (3) substituted "the department shall transfer from the enterprise fund to the state general fund 1.5% of the hail insurance premiums collected during the calendar year not to exceed $100,000" for "the state treasurer shall transfer out of the board's enterprise fund to the general fund of the state of Montana 1.5% of the gross annual fees imposed and collected in the state of Montana"; and made minor changes in style. Amendment effective January 1, 2014.

The amendment to this section made by sec. 2, Ch. 242, L. 2013, was rendered void by sec. 3, Ch. 242, L. 2013, a coordination section.

*2001 Amendment:* Chapter 574 in (1) at beginning substituted "department of revenue" for "state treasurer"; substituted (2) allowing department to retain 2% of fees for administrative costs for former text that read: "Upon warrants drawn by order of the board, the state treasurer shall pay out of the board's enterprise fund to the county treasurer of each county where state hail insurance coverage is in force 2% of the gross annual levies made and collected in that county under this part for the use of the county as the board of county commissioners may determine"; in (3) near end substituted "fees imposed" for "levies made"; and made minor changes in style. Amendment effective July 1, 2001.

*1993 Amendment:* Chapter 69 throughout section substituted reference to enterprise fund for reference to expendable trust fund; in (1), in first sentence, inserted clause requiring money to be held in trust for hail insurance programs; and made minor changes in style. Amendment effective February 22, 1993.

*1983 Amendments:* Chapter 281 made the following changes: in (1), at end of first sentence, substituted "expendable trust fund" for "agency fund" and deleted "and may from time to time transfer to the earmarked revenue fund such sums as the board of hail insurance may deem necessary and proper to pay the expenses of administration"; in second sentence substituted first "expendable trust fund" for "agency fund" and second "expendable trust fund" for "account in the earmarked revenue fund", and deleted last sentence, which read: "If at any time more funds are in the earmarked revenue fund than the board estimates are needed for administrative expenses, the state treasurer may on the order of the board transfer such funds back to the agency fund as the board may direct."; and in (2) and (3), substituted "expendable trust fund" for "account in the agency fund".

Chapter 691, near middle of (2), changed "1%" to "2%"; and near end of (3), changed "2%" to "1.5%".

## 80-2-241. Report of losses.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

*1983 Amendment:* Near beginning of section, substituted "14 days" for "3 days"; and inserted last sentence requiring that costs be charged to claimant for adjustment due to late reporting of loss.

**Administrative Rules**

ARM 4.4.316 Liability on all crops.

## 80-2-242. Adjusters — appointment — qualifications — duties.

**Compiler's Comments**

*2013 Amendment:* Chapter 399 in (1) after "department" deleted "of agriculture", after "shall" deleted "as soon as practicable each year", substituted "adjusters" for "appraisers", substituted "that are covered by hail insurance" for "incurred", and after "this part" deleted "in the various counties. The persons so appointed shall be actively engaged in farming or shall have had practical experience in farming"; in (2) in two places substituted "department" for "board", substituted "adjusters to appraise each loss" for "duly appointed appraisers for the adjustment of each and every loss", substituted "the adjusters" for "the said appraisers", and substituted "adopted" for "provided"; in (3) substituted current language for "No appraiser who shall be a relative, attorney, agent, employee, or creditor or in any manner interested by lien, mortgage, or otherwise in the crop injured or destroyed shall assist in adjusting any such loss"; deleted former (4) that read: "(4) The board may send any duly appointed appraiser or appraisers into any county as the occasion may require"; and made minor changes in style. Amendment effective January 1, 2014.

*1983 Amendment:* In (1), near beginning changed "board of hail insurance" to "department of agriculture", and at end deleted "and shall be selected from names submitted by regularly organized farmers societies in the various counties. If the recommendations are not made as provided above, then the board shall select the appraisers from men actively engaged in farming or men who have had practical experience in farming as heretofore provided."; in (4) after "the board may", deleted "in case of emergency appoint more than three appraisers in any county. Also it may"; and made minor changes in phraseology.

**Administrative Rules**

ARM 4.4.310 Special crops reduction.

## 80-2-243. Disputed appraisal.

**Compiler's Comments**

*2013 Amendment:* Chapter 399 throughout section substituted references to adjuster for references to appraiser; in (1) in first sentence substituted "appraisal" for "adjustment", after "make the appeal" deleted "by certified mail", at end of second sentence substituted "appraisal" for "adjustment offer of the board in writing", and substituted "The board of hail insurance shall arrange for a second appraisal by another adjuster" for "Also the board may require the posting of a cash bond of $25 with the request for reappraisal of the first adjustment. If the board requires the posting of the $25 bond, the board may retain it if an increase is not allowed. If an increase is obtained, the board shall return the bond to the claimant"; in (2) after "second appraisal" inserted "pursuant to the appeal", deleted former third through fifth sentences that read: "If a claimant demands arbitration, the claimant shall, if required by the board, furnish a cash bond to the board in the sum of $50, which must accompany the application. If there is not sufficient allowance made to any claimant after arbitration to cover the cost of arbitration without the use of the $50 bond, the board may use a part or all of the cash bond. If the claimant secures an increase, the bond must be promptly returned to the claimant", after third "disinterested person" inserted "as an adjuster", and after "proceed to" substituted "appraise" for "adjust"; in (3)(a) after "allowed by the" substituted "adjuster" for "official appraiser", substituted "appraisal" for "adjustment", and substituted "department" for "board"; in (3)(b) substituted "reappraisal" for "reappraisement" and substituted "department" for "board"; in (4) before "board" inserted "department or the" and substituted "appraisal" for "appraisement"; and made minor changes in style. Amendment effective January 1, 2014.

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

*1983 Amendment:* In third and fourth sentences of (1), increased bond from $10 to $25; and in third and fourth sentences of (2), increased bond from $25 to $50.

**Administrative Rules**

ARM 4.4.308 Reappraisal.
ARM 4.4.319 Disputed appraisal.

**Case Notes**

*Board of Arbitrators:* The members of a board of arbitrators must be disinterested parties and are more than mere appraisers (exercising a power judicial in nature, the basis of whose decision is not limited to information gained from inspection only, but they may hear evidence including that of the parties). Where arbitration was prevented by the naming of an improper person on the board, judgment was reversed, the cause dismissed, and the board ordered to name a proper person as arbitrator. Crosby v. St. Bd. of Hail Ins., 113 M 470, 129 P2d 99 (1942).

*Exclusive Remedy:* Under this section, providing the sole and exclusive statutory remedy available to an insured who is dissatisfied with the award of appraisers, an action against the Board of Hail Insurance is not available. Crosby v. St. Bd. of Hail Ins., 113 M 470, 129 P2d 99 (1942).

## 80-2-244. Payment of losses.

**Compiler's Comments**

*2013 Amendment:* Chapter 399 in (1) at beginning substituted "The department" for "The board of hail insurance"; in (1) and in (2) in three places substituted "department" for "board"; in (2) at end deleted "In any year, the board may by resolution authorize its presiding officer and secretary to borrow money that the board may consider necessary for the purpose of paying all warrants as issued"; and deleted former (3) that read: "(3) For any money borrowed under the provisions of this part, the board shall cause warrants to be drawn. The warrants must bear interest at a rate not to exceed 6% a year, and the warrants and the interest on the warrants must be paid out of funds from the state hail insurance program as they are collected. The board may not at any time borrow a total sum greater than the amount of the fees imposed for the current year, together with delinquent fees that remain unpaid." Amendment effective January 1, 2014.

*2007 Amendment:* Chapter 275 in (2) in first sentence after "payment" deleted "for the amount deducted", deleted former second sentence and beginning of third sentence that read: "The payment must be remitted to the county treasurer of the county in which the fee was imposed. The board shall then order payment", and in third sentence before "growers" deleted "grain"; in (3) at end of second sentence after "collected" deleted "from the various counties in the state" and at end of third sentence after "unpaid" deleted "on the books of the county treasurer"; and made minor changes in style. Amendment effective April 26, 2007.

*2003 Amendment:* Chapter 97 in (2) at end of third sentence substituted "the maximum amounts established in 80-2-208" for "$24 per acre for grain crops on nonirrigated lands or $48 per acre on irrigated lands". Amendment effective March 24, 2003.

*2001 Amendment:* Chapter 574 in (1) in second sentence in two places substituted "fee" for "tax"; in (2) at end of second sentence substituted "fee was imposed" for "tax was assessed", in fifth sentence after "current" substituted "fees" for "levy", and near end of last sentence after "borrow" deleted "as needed from any person, bank, or corporation such sum or sums of"; in (3) in last sentence near middle substituted "the fees imposed for the current year together with delinquent fees" for "levies as made for taxes for the current year together with such delinquent taxes"; and made minor changes in style. Amendment effective July 1, 2001.

*1983 Amendment:* At end of (1), deleted "and shall make settlement within 40 days from the time loss is sustained by paying, either by registered warrant or otherwise if funds are immediately available, 50% of the total loss as agreed upon, less the maximum rate of assessment. The balance shall be paid at the expiration of the hail season."; and at end of second sentence of (2) after "irrigated lands", deleted ", and $24 per acre on hay crops".

**Administrative Rules**

ARM 4.4.301 Adjustment of hail loss.
ARM 4.4.302 At least 5% loss needed.
ARM 4.4.305 Provisions of coverage.
ARM 4.4.312 Process of payment for losses.
ARM 4.4.313 Losses exceeding the premium for that year.
ARM 4.4.315 Liability to cease for Board.
ARM 4.4.318 Paying 100% when loss shows at least 90% or above actual loss.

## Part 3
## Plant Sampling

**80-2-301. Plant sampling provided — fees — rulemaking authority.**

**Compiler's Comments**

*Effective Date:* This section is effective October 1, 2015.

# CHAPTER 3
# PRODUCE

**Chapter Administrative Rules**

Title 4, chapter 12, subchapter 22, ARM Control of apples.
Title 4, chapter 12, subchapter 23, ARM Grading of cherries.
Title 4, chapter 12, subchapter 26, ARM Wholesalers and itinerant merchants.
Title 4, chapter 12, subchapter 35, ARM Grading of certified seed potatoes.

## Part 3
## Montana Produce Act

**Part Compiler's Comments**

*1993 Statement of Intent:* The statement of intent attached to Ch. 553, L. 1993, provided: "A statement of intent is required for this bill because the following sections extend additional rulemaking authority to the department of agriculture's present authority to regulate horticulture and farm produce:

(1) The definition of "produce" in [section 2] [80-3-302] is intended to allow the department to establish by rule what products constitute produce and are subject to the Montana Produce Act.

(2) [Section 6(3)] [80-3-306(3)] is intended to allow the department to establish a penalty matrix that sets out the kinds of administrative penalties applicable to violations of the Montana Produce Act and delineate the degrees of penalty that may be assessed for initial and subsequent administrative violations.

(3) [Section 10(1)] [80-3-314(1)] is intended to grant the department the discretion to set and adjust the produce assessment fee, within the statutory range, to cover the department's assessment costs."

*Severability:* Section 16, Ch. 553, L. 1993, was a severability clause.

*Transition:* Section 17, Ch. 553, L. 1993, provided: "In order to implement the provisions of the produce dealer license established in [section 12] [80-3-321] on a calendar year basis, the department shall issue a new 1993 produce dealer license to any licensee who has paid the license fee for 1993. The state treasurer shall transfer $50 of the 1993 fee to the produce account established in [section 4] [80-3-304]. All remaining license fees must be refunded to the licensee at the time the new license is issued."

*Effective Date — Retroactive Applicability:* Section 18, Ch. 553, L. 1993, provided: "[This act] [Title 80, ch. 3, part 3] is effective on passage and approval [approved April 28, 1993] and applies retroactively, within the meaning of 1-2-109, to produce dealer licenses issued and fees collected on and after January 1, 1993."

### 80-3-302. Definitions.

**Administrative Rules**

ARM 4.12.1429 Products designated as produce — produce unit quantified.

### 80-3-303. Powers and duties of department.

**Compiler's Comments**

*2017 Amendment:* Chapter 44 in (1)(a) at end inserted clause concerning compliance with FDA Food Safety Modernization Act; inserted (2)(b) concerning FDA Food Safety Modernization Act; and made minor changes in style. Amendment effective October 1, 2017.

*Saving Clause:* Section 2, Ch. 44, L. 2017, was a saving clause.

*Severability:* Section 3, Ch. 44, L. 2017, was a severability clause.

**Administrative Rules**

ARM 4.12.2206 Apples — Montana grades defined.
ARM 4.12.2310 Montana sweet cherry grade standards.
ARM 4.12.2311 Sweet cherries — Montana grades defined.
ARM 4.12.2615 Verification of "Montana-grown" produce or produce "grown" in Montana.

### 80-3-306. Penalties.

**Administrative Rules**

ARM 4.12.1425 Civil penalties — enforcement for produce.
ARM 4.12.1426 Civil penalties — matrix for produce.

### 80-3-314. Reporting requirements — assessment fees — exceptions.

**Compiler's Comments**

*2017 Amendment:* Chapter 339 in (3) in first sentence substituted "30 days after the last day of the reporting period" for "on or before the 30th day of the month following each calendar quarter" and inserted last sentence concerning end of reporting periods; and inserted (5) requiring that fees be paid only if they total more than $5 in a reporting period. Amendment effective May 7, 2017.

*Saving Clause:* Section 11, Ch. 339, L. 2017, was a saving clause.

*Severability:* Section 12, Ch. 339, L. 2017, was a severability clause.

*2009 Amendment:* Chapter 191 in (2) in first sentence and in (4)(a) increased annual gross sales amount from $15,000 to $25,000; and made minor changes in style. Amendment effective April 9, 2009.

**Administrative Rules**

ARM 4.12.1428 Assessment fees on all produce.

### 80-3-315. Shipping point inspection — fees.

**Administrative Rules**

ARM 4.12.1427 Inspection fees.

### 80-3-321. Produce dealer license — exception — renewal.

**Compiler's Comments**

*2009 Amendment:* Chapter 191 in (1)(c) and in (2)(a) increased annual gross sales amount from $15,000 to $25,000; and made minor changes in style. Amendment effective April 9, 2009.

## CHAPTER 4
## AGRICULTURAL COMMODITIES

**Chapter Administrative Rules**

Title 4, chapter 12, subchapter 10, ARM Grain rules.
Title 4, chapter 13, ARM Grain rules.

**Chapter Case Notes**

*Distribution of Bond Proceeds — Two Separate Grain Purchasing Businesses Conducted by Same Entity:* In 1980, a grain purchasing company was determined by the state to be conducting two separate and independent grain purchasing businesses in Montana. In 1981, the company was required to execute two bonds under the provisions of Title 80, ch. 4, part 2. One bond secured a group of farmers under a $195,000 grain dealer-public warehouse operator bond. The second bond secured a group of independent grain dealers under a $20,000 grain merchandiser-track buyer bond. Upon subsequent bankruptcy of the company, the District Court properly distributed the bond proceeds by determining the intention of the parties when the bonds were purchased. In affirming the lower court, the Supreme Court noted that the statutory provisions under which the bonds were issued were ambiguous, illogical, and antiquated, leading both to this case and to repeal of the statutes in 1983. St. v. A.B.N. Ranch, 230 M 449, 750 P2d 1079, 45 St. Rep. 343 (1988).

*Judicial Notice:* The law presumed that the Commissioner of Agriculture (now the Department of Agriculture) performed his official duty as required by 80-4-224 (prior to repeal in 1983) and that the form of warehouse receipt used and issued by plaintiff was in the form prescribed by law and the rules of the Commissioner of Agriculture of which law and official acts this court may take judicial notice. N. Mont. Mustard Growers' Co-op v. Britton, 128 M 553, 280 P2d 1078 (1955).

*Mustard Seed as Grain:* Mustard seed is a grain and was subject to the provisions of 80-4-229 and 80-4-230 (both repealed in 1983). N. Mont. Mustard Growers' Co-op v. Britton, 128 M 553, 280 P2d 1078 (1955).

*Waiver of Storage:* Plaintiff delivered a quantity of grain to an elevator. Three months later he sold it to the elevator company; at that time, while section 3-217, R.C.M. 1947 (80-4-223, MCA, repealed in 1983), required the warehouse operator to charge storage and 80-4-222 (repealed in 1983) prescribed the penalty for failure to do so, none was charged when the sale was made. In an action to recover the balance of the sale price due, the buyer contended that no storage having been charged, the contract of sale was invalid as against public policy. The court held that the contract of storage, one of bailment, and the contract of sale were separate and distinct contracts, and in the absence of proof that the waiver of storage was an inducement for the sale, the latter transaction was valid. Spurgeon v. Imperial Elevator Co., 99 M 432, 43 P2d 891 (1935).

*Bailment:* An operator of a grain elevator is a public warehouse operator; delivery of grain for storage constitutes a bailment, and as bailee the operator must, under the Montana law, at all times keep on hand in bonded warehouses sufficient grain to make redelivery on all storage receipts and may not sell or deliver it out of storage except as provided by law. The operator may not use it for purposes of speculation on the market. Whorley v. Patton-Kjose Co., Inc., 90 M 461, 5 P2d 210 (1931).

**Chapter Attorney General's Opinions**

*Exemption — Out-of-State "Annex":* A grain merchandising facility located 900 feet within the Montana border could not be classified as an "annex" of a North Dakota operation and exempted from licensing and grain storage obligations under 80-4-202 (repealed in 1983). 36 A.G. Op. 89 (1976).

*Bonding Requirement Exemption:* A warehouse operator licensed under the United States Warehouse Act could not be required to execute a warehouse operator's bond under 80-4-205 (repealed in 1983). 36 A.G. Op. 36 (1975).

*Federal Act Exempt From State Law:* The charges for grain storage that a warehouse operator, licensed under the United States Warehouse Act, may impose cannot be regulated by state law. However, state law remains effective as to persons licensed under the United States Warehouse Act in those areas that are not regulated by the act, i.e., those activities not confined to the storage of grain. 36 A.G. Op. 36 (1975).

*Lack of State Power to Initiate Suit on Behalf of a Citizen Absent Some Specially Conferred Standing:* Section 80-4-234 (repealed in 1983) requiring intervention by the Montana Department of Agriculture on behalf of grain producers was not applicable where the injury was caused by a person licensed under the United States Warehouse Act. 36 A.G. Op. 36 (1975).

## Part 4

## Agricultural Commodities Generally

**Part Administrative Rules**

Title 4, chapter 12, subchapter 10, ARM Grain rules.

Title 4, chapter 13, ARM Grain rules.

**Part Case Notes**

*Construction of Bond:* In construing a mustard seed contractor bond, it was necessary to consider 80-4-311 (repealed in 1983) as part of the bond itself. Kohles v. St. Paul Fire & Marine Ins. Co., 144 M 395, 396 P2d 724 (1964).

*Purpose:* The purpose of 80-4-311 (repealed in 1983) was to benefit those farmers who have sold their crops "in advance of harvest". Kohles v. St. Paul Fire & Marine Ins. Co., 144 M 395, 396 P2d 724 (1964).

*Recovery on Bond:* Plaintiff who, prior to the repeal of 80-4-311 in 1983, sold and delivered mustard seed to company which went bankrupt could not recover on a mustard seed contractor bond when he had the seed on hand and in storage when he contracted for sale. The seed was not planted or harvested in such year nor was it a growing crop during that year. Kohles v. St. Paul Fire & Marine Ins. Co., 144 M 395, 396 P2d 724 (1964).

### 80-4-402. Definitions.

**Compiler's Comments**

*2019 Amendment:* Chapter 302 in definition of commodity dealer in (a) near middle after "buying" inserted "brokering" and at end inserted "including online transactions of agricultural commodities grown in Montana"; and made minor changes in style. Amendment effective May 7, 2019.

*2011 Amendment:* Chapter 175 in definition of commodity dealer in (b)(vi) at end after "livestock" deleted "and not for resale"; inserted definitions of equity and working capital; and made minor changes in style. Amendment effective July 1, 2011.

*2001 Amendment:* Chapter 168 inserted definition of bailment; in definition of commodity dealer in (a) after "exchange" inserted "bailment"; and made minor changes in style. Amendment effective March 30, 2001.

*Saving Clause:* Section 4, Ch. 168, L. 2001, was a saving clause.

*1997 Amendment:* Chapter 76 in definition of agricultural commodity, after "grain", substituted "oil seed crops, seed, or other crops" for "beans, safflower, sunflower seeds, tame mustards, rapeseed, flaxseed, leguminous seed, or other small seed, and other agricultural commodities"; in definition of delayed payment contract, in first sentence, substituted "purchase price" for "sale price"; in definition of depositor, after "person who", inserted "delivers an agricultural commodity to a commodity dealer for sale"; inserted definition of FGIS; in definition of grain, after "Act", deleted "7 U.S.C. 71 through 87"; inserted definition of grain standards; substituted official agricultural commodity inspections for grain inspections as defined term and at end substituted "agricultural commodities" for "grain"; substituted official agricultural commodity samplers for official grain samplers as defined term; deleted definition of official grain standards that read: ""Official grain standards" means the standards of quality and condition of grain that establish the grades defined by the Grain Standards Act"; substituted official agricultural commodity weighers for official grain weighers as defined term and at end substituted "agricultural commodity" for "grain"; inserted definition of purchase price; and made minor changes in style. Amendment effective July 1, 1997.

*Severability:* Section 23, Ch. 76, L. 1997, was a severability clause.

*1995 Amendment:* Chapter 337 in definition of commodity dealer inserted (f) exempting person who buys agricultural commodities exclusively for feeding of livestock from licensure as commodity dealer; and made minor changes in style. Amendment effective April 7, 1995.

*1993 Amendment:* Chapter 452 in definition of delayed payment contract (formerly credit sale contract), near beginning of first sentence after "means a", inserted "written" and near end, before "or price-later contracts", inserted "no-price-established contracts" and inserted second sentence that read: "A delayed payment contract does not include those contracts in which the parties intend payment to be made immediately upon determination of weights and grades"; inserted definition of purchase contract; and made minor changes in style. Amendment effective July 1, 1993.

*1991 Amendment:* In definition of commodity dealer, at the end of (c), inserted language concerning exceeding $30,000 exemption; at the end of definition of Grain Standards Act deleted "as that act reads on July 1, 1983"; and made minor changes in style.

*Severability:* Section 11, Ch. 299, L. 1991, was a severability clause.

*1985 Amendments:* Chapter 55 in (4)(b) substituted "a person who buys agricultural commodities from a licensed commodity dealer or who does not purchase more than $30,000 worth of agricultural commodities from producers during a licensing year" for "a person who buys or handles less than $10,000 worth of agricultural commodities in a licensing year".

Chapter 578 inserted (3) defining bond.

## 80-4-403. Rules — adoption.

**Compiler's Comments**

*Statement of Intent:* The statement of intent attached to Ch. 539, L. 1983, provided: "A statement of intent is required for this bill because of the general rulemaking authorization in section 3 [codified as this section] and various other specific authorizations located throughout the remainder of the bill.

The Legislature intends that under the general authorization the Department of Agriculture have authority to adopt any rules it may from time to time consider necessary to properly implement the general provisions and the respective sections relating to public warehousing, commodity dealing, and grain standards.

The Legislature further intends in those sections containing specific rulemaking authorization that rules will be adopted implementing the language, requirements, and procedures stated therein."

**Administrative Rules**

ARM 4.12.1018 through 4.12.1022 and 4.12.1024 through 4.12.1029 Public warehouse license — reports — bond — license fees — receipts — contracts — warehouse shortage remedies.

ARM 4.13.1001B Grain fee schedule.

## 80-4-404. Terms of licenses — renewals.

**Administrative Rules**

ARM 4.12.1018 Term of licenses — expiration.

## 80-4-405. Maximum bond amount.

**Compiler's Comments**

*2019 Amendment:* Chapter 302 deleted former (2) that read: "(2) the maximum bond amount must be adjusted each year based upon the percentage increase or decrease in the annual average index of prices received by Montana farmers for food and feed grains as computed by the Montana crop and livestock reporting service"; and inserted (2) concerning modified license. Amendment effective May 7, 2019.

*2011 Amendment:* Chapter 175 in (1) near beginning substituted "equity or working capital deficiencies" for "net asset deficiencies" and near end substituted "bond amount" for "net asset deficiency amount"; and made minor changes in style. Amendment effective July 1, 2011.

*1997 Amendment:* Chapter 76 inserted last sentence in (1) requiring one asset deficiency amount when the public warehouse operator is a licensed commodity dealer; and made minor changes in style. Amendment effective July 1, 1997.

*Severability:* Section 23, Ch. 76, L. 1997, was a severability clause.

*Name Change — Code Commissioner Instruction:* Section 20, Ch. 452, L. 1993, provided: "Wherever the term "warehouseman" or its equivalent appears in Title 80, chapter 4, parts 4 through 7, or in legislation enacted by the 1993 legislature, the code commissioner shall substitute the term "warehouse operator" or its equivalent and make any necessary grammatical changes to reflect the name change." The term appeared in this section, and the Code Commissioner made the name change accordingly. Amendment effective July 1, 1993.

**Attorney General's Opinions**

*Bonding Requirement Exemption:* A warehouse operator licensed under the United States Warehouse Act could not be required to execute a warehouse operator's bond under 80-4-205 (repealed in 1983). 36 A.G. Op. 36 (1975).

## 80-4-406. Appointment by nonresident licensee of agent to receive process.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

## 80-4-407. Reports to the department.

**Administrative Rules**

ARM 4.12.1019 Reports to Department.

## 80-4-409. Confidentiality of records.

**Compiler's Comments**

*1997 Amendment:* Chapter 76 in (2) extended reference to include part 7; and made minor changes in style. Amendment effective July 1, 1997.

*Severability:* Section 23, Ch. 76, L. 1997, was a severability clause.

*Name Change — Code Commissioner Instruction:* Section 20, Ch. 452, L. 1993, provided: "Wherever the term "warehouseman" or its equivalent appears in Title 80, chapter 4, parts 4 through 7, or in legislation enacted by the 1993 legislature, the code commissioner shall substitute the term "warehouse operator" or its equivalent and make any necessary grammatical changes to reflect the name change." The term appeared in this section, and the Code Commissioner made the name change accordingly. Amendment effective July 1, 1993.

### 80-4-415. Creation of commodity dealer/public warehouse operators account — deposit of funds.

**Compiler's Comments**

*Effective Date:* Section 21, Ch. 452, L. 1993, provided: "[This act] is effective July 1, 1993."

### 80-4-416. Deposit of deficiency funds and liquidation funds.

**Compiler's Comments**

*Effective Date:* Section 21, Ch. 452, L. 1993, provided: "[This act] is effective July 1, 1993."

### 80-4-419. Bankruptcy as grounds for cancellation.

**Compiler's Comments**

*Effective Date:* This section is effective October 1, 2013.

### 80-4-420. Producer's lien.

**Compiler's Comments**

*2003 Amendment:* Chapter 177 near end of (1) and in second sentence of (3) after "tickets" inserted "bailment contracts"; and made minor changes in style. Amendment effective March 31, 2003.

*Effective Date:* Section 21, Ch. 452, L. 1993, provided: "[This act] is effective July 1, 1993."

### 80-4-421. License suspension and revocation — renewal.

**Compiler's Comments**

*2011 Amendment:* Chapter 175 in (1)(a) in two places and in (2)(b) substituted references to equity and working capital requirements for references to net asset requirements; and made minor changes in style. Amendment effective July 1, 2011.

*2005 Amendment:* Chapter 131 in (1) near beginning inserted "commodity warehouse operator's or commodity dealer's"; inserted (1)(m) regarding assessments; and made minor changes in style. Amendment effective March 30, 2005.

*1997 Amendment:* Chapter 76 throughout section, in three places, extended references to parts 4 and 7; in (1)(c) inserted "after considering Title 37, chapter 1, part 2"; inserted (1)(k) regarding failure to satisfy a judgment entered as a result of a violation of the chapter; in (1)(l), after "department", inserted "pursuant to parts 4 through 7"; and made minor changes in style. Amendment effective July 1, 1997.

*Severability:* Section 23, Ch. 76, L. 1997, was a severability clause.

*Name Change — Code Commissioner Instruction:* Section 20, Ch. 452, L. 1993, provided: "Wherever the term "warehouseman" or its equivalent appears in Title 80, chapter 4, parts 4 through 7, or in legislation enacted by the 1993 legislature, the code commissioner shall substitute the term "warehouse operator" or its equivalent and make any necessary grammatical changes to reflect the name change." The term appeared in this section, and the Code Commissioner made the name change accordingly. Amendment effective July 1, 1993.

**Administrative Rules**

ARM 4.12.1020 Financial statements — filing date.
ARM 4.12.1032 Conditioned, suspended, or revoked licenses for commodity dealers.

### 80-4-422. Delayed payment or purchase contracts.

**Compiler's Comments**

*1993 Amendment:* Chapter 452 near middle of (1) and (2), before "contract", substituted "purchase" for "credit sale"; in (2)(a), after "seller's", inserted "and purchaser's"; in (2)(f), before "contract", substituted "delayed payment" for "credit sale"; in first sentence of (3), before "contract", substituted "purchase" for "credit sale" and near middle substituted "agricultural commodities are delivered to and in physical control of the purchaser" for "contract is executed", in fourth sentence, near beginning, substituted "commodity dealer's or warehouse operator's" for "warehouseman's" and near middle, before "contracts", substituted "delayed payment" for "credit sale", and near middle of sixth sentence, before "contracts", substituted "purchase" for "credit sale"; inserted (4) clarifying that a contract that does not satisfy certain conditions is considered a sale; and made minor changes in style. Amendment effective July 1, 1993.

*1991 Amendment:* Inserted (2)(f) requiring contract for agricultural commodities sold by credit sale contract to contain notice of financial risk in form adopted by Department; and made minor changes in style. Amendment effective July 1, 1991.

*1991 Statement of Intent:* The statement of intent attached to Ch. 518, L. 1991, provided: "A statement of intent is required for this bill because 80-4-422(2)(f) requires the department of agriculture to adopt rules regarding the form of a notice of financial risk required to appear on credit sale contracts for the sale of agricultural commodities. It is intended that the warning appear on the face of the contract, in boldface type, and be in substantially the following form:

NOTICE TO SELLER OF FINANCIAL RISK

The seller recognizes that in the event of foreclosure or bankruptcy, this contract is equivalent to an unsecured loan to the purchaser. The seller and any of the seller's creditors should be advised of the financial risks involved in this contract."

*Applicability:* Section 2, Ch. 518, L. 1991, provided: "[This act] . . . applies to credit sale contracts for agricultural commodities entered into after July 1, 1991."

**Administrative Rules**

ARM 4.12.1029 Contract form required of seed dealers.
ARM 4.12.1030 Notice to sellers of financial risk.

### 80-4-424. Director's authority — investigative hearing.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 80-4-425. Action on bond by persons injured — liability of surety — statute of limitations.

**Compiler's Comments**

*1993 Amendment:* Chapter 452 inserted first sentence of (1) requiring that all claims be made through the Department, in second sentence, after "may", substituted "file a complaint with the department" for "take action against the bond in his own name to recover damages caused by the breach", and substituted remainder of subsection regarding Department investigation procedures for former language that read: "The director shall then make demand upon the warehouseman or the commodity dealer and his surety for payment of damages. If the damages are not promptly paid, the director shall commence an action on the bond to enforce payment of damages"; deleted former first sentence of (2) that read: "Liability of the surety upon the bond is limited to the amount of the bond"; inserted (3) regarding surety liability; and made minor changes in style. Amendment effective July 1, 1993.

**Administrative Rules**

ARM 4.12.1021 Bond conditions — cancellation.
ARM 4.12.1022 Certificates of deposit or other bond equivalents.
ARM 4.12.1026 Loss of receipts — conditions of reissue.
ARM 4.12.1028 Warehouse shortage — remedies.

### 80-4-426. Duty to prosecute.

**Compiler's Comments**

*2019 Amendment:* Chapter 79 inserted (2) allowing for a civil penalty; and made minor changes in style. Amendment effective July 1, 2019.

### 80-4-427. Injunction.

**Compiler's Comments**

*2019 Amendment:* Chapter 79 in last sentence substituted "criminal or civil penalties" for "criminal penalty". Amendment effective July 1, 2019.

*1993 Amendment:* Chapter 452 inserted fourth sentence allowing filing in First Judicial District Court; and made minor changes in style. Amendment effective July 1, 1993.

*1987 Amendment:* At end of section changed "80-4-429" to "80-4-428".

### 80-4-428. Penalty for operating without license — misrepresentation.

**Compiler's Comments**

*2019 Amendment:* Chapter 79 inserted (4) regarding civil penalties. Amendment effective July 1, 2019.

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

*Name Change — Code Commissioner Instruction:* Section 20, Ch. 452, L. 1993, provided: "Wherever the term "warehouseman" or its equivalent appears in Title 80, chapter 4, parts 4 through 7, or in legislation enacted by the 1993 legislature, the code commissioner shall substitute the term "warehouse operator" or its equivalent and make any necessary grammatical changes to reflect the name change." The term appeared in this section, and the Code Commissioner made the name change accordingly. Amendment effective July 1, 1993.

### 80-4-429. Penalty.

**Compiler's Comments**

*2019 Amendment:* Chapter 79 inserted (6) regarding civil penalties. Amendment effective July 1, 2019.

*2001 Amendment:* Chapter 168 in (4) substituted "80-4-402(5)(b)(vi)" for "80-4-402(4)(f)". Amendment effective March 30, 2001.

*Saving Clause:* Section 4, Ch. 168, L. 2001, was a saving clause.

*1997 Amendment:* Chapter 76 in (1), in three places, extended references to part 7 and at end, after "misdemeanor", deleted "and is punishable by imprisonment in a county jail not to exceed 6 months or by a fine of not more than $1,000, or both"; in (4) near middle, substituted "producer" for "commodity dealer"; inserted (5) providing that a person knowingly delivering an agricultural commodity containing a nitrogen fertilizer added to harvest grain, a substance not registered or approved by federal or state law, or a registered or approved substance not used or applied according to label directions is guilty of a felony; and made minor changes in style. Amendment effective July 1, 1997.

*Severability:* Section 23, Ch. 76, L. 1997, was a severability clause.

*1995 Amendment:* Chapter 337 inserted (4) setting penalty for failure to pay amounts due to commodity dealer by person exempt from licensure as commodity dealer. Amendment effective April 7, 1995.

*1993 Amendment:* Chapter 452 near middle of (2), before "contract", substituted "purchase" for "credit sale"; and made minor changes in style. Amendment effective July 1, 1993.

*1991 Amendment:* Inserted (3) designating as felonies certain acts of commodity dealer or warehouseman (now warehouse operator).

*Severability:* Section 11, Ch. 299, L. 1991, was a severability clause.

### 80-4-430. Director's enforcement action.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

## Part 5
## Agricultural Commodity Warehouse Operators

**Part Administrative Rules**

Title 4, chapter 12, subchapter 10, ARM Grain rules.
Title 4, chapter 13, ARM Grain rules.

### 80-4-501. License necessary to operate public warehouse.

**Compiler's Comments**

*1997 Amendment:* Chapter 76 in second sentence in (1), after "requirement", inserted "and other requirements in parts 4 through 6 that regulate the activities of a warehouse operator" and inserted third sentence providing that provisions of parts 4 through 7 apply to a federally licensed warehouse operator in business as a commodity; and made minor changes in style. Amendment effective July 1, 1997.

*Severability:* Section 23, Ch. 76, L. 1997, was a severability clause.

*Name Change — Code Commissioner Instruction:* Section 20, Ch. 452, L. 1993, provided: "Wherever the term "warehouseman" or its equivalent appears in Title 80, chapter 4, parts 4 through 7, or in legislation enacted by the 1993 legislature, the code commissioner shall substitute the term "warehouse operator" or its equivalent and make any necessary grammatical changes to reflect the name change." The term appeared in this section, and the Code Commissioner made the name change accordingly. Amendment effective July 1, 1993.

**Attorney General's Opinions**

*Exemption — Out-of-State "Annex":* A grain merchandising facility located 900 feet within the Montana border could not be classified as an "annex" of a North Dakota operation and exempted from licensing and grain storage obligations under 80-4-202 (repealed in 1983). 36 A.G. Op. 89 (1976).

### 80-4-502. Licenses to warehouse operator — issuance — renewal — conditions precedent.

**Compiler's Comments**

*2015 Amendment:* Chapter 169 in (1)(f)(i) substituted "certified public accountant" for "licensed accountant". Amendment effective October 1, 2015.

*2011 Amendment:* Chapter 175 in (1)(f)(i) at beginning inserted exception clause and at end after "applicant" substituted "has and maintains positive working capital" for "has and does maintain current assets equal to or greater than current liabilities"; in (1)(f)(ii) substituted "An applicant without positive working capital may" for "Applicants not having adequate current assets equal to or greater than current liabilities may" and in second sentence substituted "bond or equivalent required in this subsection (1)(f)(ii) is" for "bond or equivalent must be"; and made minor changes in style. Amendment effective July 1, 2011.

*Name Change — Code Commissioner Instruction:* Section 20, Ch. 452, L. 1993, provided: "Wherever the term "warehouseman" or its equivalent appears in Title 80, chapter 4, parts 4 through 7, or in legislation enacted by the 1993 legislature, the code commissioner shall substitute the term "warehouse operator" or its equivalent and make any necessary grammatical changes to reflect the name change." The term appeared in this section, and the Code Commissioner made the name change accordingly. Amendment effective July 1, 1993.

*1989 Amendment:* In (1)(f) inserted last two sentences relating to additional bonding if current assets are equal to or greater than liabilities. Amendment effective March 20, 1989.

**Administrative Rules**

ARM 4.12.1020 Financial statements — filing date.

### 80-4-503. Fees of department.

**Compiler's Comments**

*1993 Amendment:* Chapter 452 near beginning of (1), after "fee", substituted "of $232 for each warehouse owned or operated by the warehouse operator" for "based on the number of warehouses owned by the warehouseman, according to the following schedule" and deleted former schedule (see 1993 Session Law for text); deleted former (2) that read: "The department shall collect a fee of $50 for each initial licensing inspection of a warehouse or station"; substituted present (2) allowing a fee increase by rule for former (3) that read: "The department shall collect a fee of $25 for each amendment of a license"; substituted present (4) regarding deposit of fees for former (5) that read: "All fees must be deposited into the state treasury and credited to the general fund account"; and made minor changes in style. Amendment effective July 1, 1993.

*1993 Statement of Intent:* The statement of intent attached to Ch. 452, L. 1993, provided: "A statement of intent is required for this bill because 80-4-503 and 80-4-602 grant to the department of agriculture the authority to set license fees outside the statutory scale established in those sections. It is intended that the department, as part of the ongoing administration of the commodity dealer and public warehouse operator program, evaluate the amount of revenue generated by license fees and adjust the fees as necessary within the statutory maximum to ensure proper operation of the program."

*1987 Amendment:* In (1) increased license fees by $10 in each category.

**Administrative Rules**

ARM 4.12.1024 License fees for commodity dealers and public warehouses.

### 80-4-504. Bond of applicant for license — additional bond — additional obligations.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

*Name Change — Code Commissioner Instruction:* Section 20, Ch. 452, L. 1993, provided: "Wherever the term "warehouseman" or its equivalent appears in Title 80, chapter 4, parts 4 through 7, or in legislation enacted by the 1993 legislature, the code commissioner shall substitute the term "warehouse operator" or its equivalent and make any necessary grammatical changes to reflect the name change." The term appeared in this section, and the Code Commissioner made the name change accordingly. Amendment effective July 1, 1993.

*1985 Amendment:* In first sentence of (1) inserted "or its equivalent, as established by department rule".

**Administrative Rules**

ARM 4.12.1021 Bond conditions — cancellation.
ARM 4.12.1022 Certificates of deposit or other bond equivalents.

**Attorney General's Opinions**

*Bonding Requirement Exemption:* A warehouse operator licensed under the United States Warehouse Act could not be required to execute a warehouse operator's bond under 80-4-205 (repealed in 1983). 36 A.G. Op. 36 (1975).

## 80-4-505. Amount of bond — cancellation.

**Compiler's Comments**

*2011 Amendment:* Chapter 175 in (3) at beginning substituted "equity" for "net assets"; and made minor changes in style. Amendment effective July 1, 2011.

*1993 Amendment:* Chapter 452 in (4) deleted second sentence that read: "The aggregate liability of the surety may in no event exceed the sum of the bond"; and made minor changes in style. Amendment effective July 1, 1993.

*1985 Amendment:* In second sentence of (4), after "aggregate" deleted "annual", deleted third sentence of (4) that read: "A continuous bond shall obligate a new penal sum with the commencement of each licensing year"; in (5) increased the notice period from 30 to 60 days and after "canceled" inserted remainder of subsection explaining surety liability in the event of cancellation.

**Administrative Rules**

ARM 4.12.1021 Bond conditions — cancellation.
ARM 4.12.1022 Certificates of deposit or other bond equivalents.

## 80-4-506. Equity requirements.

**Compiler's Comments**

*2011 Amendment:* Chapter 175 in (1) near beginning substituted "total equity liable" for "total net assets liable"; in (2) at end substituted "maintains allowable positive equity" for "maintains allowable net assets of at least $10,000"; in (4) near beginning substituted "total equity" for "total net assets"; in (5) near end near end substituted "equity requirements" for "net asset requirements". Amendment effective July 1, 2011.

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

*Name Change — Code Commissioner Instruction:* Section 20, Ch. 452, L. 1993, provided: "Wherever the term "warehouseman" or its equivalent appears in Title 80, chapter 4, parts 4 through 7, or in legislation enacted by the 1993 legislature, the code commissioner shall substitute the term "warehouse operator" or its equivalent and make any necessary grammatical changes to reflect the name change." The term appeared in this section, and the Code Commissioner made the name change accordingly. Amendment effective July 1, 1993.

*1985 Amendment:* Inserted (3) explaining asset valuation and providing an exception.

## 80-4-521. Duties of warehouse operator — content of records.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

*Name Change — Code Commissioner Instruction:* Section 20, Ch. 452, L. 1993, provided: "Wherever the term "warehouseman" or its equivalent appears in Title 80, chapter 4, parts 4 through 7, or in legislation enacted by the 1993 legislature, the code commissioner shall substitute the term "warehouse operator" or its equivalent and make any necessary grammatical changes to reflect the name change." The term appeared in this section, and the Code Commissioner made the name change accordingly. Amendment effective July 1, 1993.

## 80-4-522. Schedule of charges — posting.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

*Name Change — Code Commissioner Instruction:* Section 20, Ch. 452, L. 1993, provided: "Wherever the term "warehouseman" or its equivalent appears in Title 80, chapter 4, parts 4 through 7, or in legislation enacted by the 1993 legislature, the code commissioner shall substitute the term "warehouse operator" or its equivalent and make any necessary grammatical changes to reflect the name change." The term appeared in this section, and the Code Commissioner made the name change accordingly. Amendment effective July 1, 1993.

**Case Notes**

*Waiver of Storage:* Plaintiff delivered a quantity of grain to an elevator. Three months later he sold it to the elevator company; at that time, while section 3-217, R.C.M. 1947 (80-4-223, MCA, repealed in 1983), required the warehouse operator to charge storage and 80-4-222, MCA (repealed in 1983), prescribed the penalty for failure to do so, none was charged when the sale was made. In an action to recover the balance of the sale price due, the buyer contended that no storage having been charged, the contract of sale was invalid as against public policy. The court held that the contract of storage, one of bailment, and the contract of sale were separate and distinct contracts, and in the absence of proof that the waiver of storage was an inducement for the sale, the latter transaction was valid. Spurgeon v. Imperial Elevator Co., 99 M 432, 43 P2d 891 (1935).

**Attorney General's Opinions**

*Federal Act Exempt From State Law:* The charges for grain storage that a warehouse operator, licensed under the United States Warehouse Act, may impose cannot be regulated by state law. However, state law remains effective as to persons licensed under the United States Warehouse Act in those areas that are not regulated by the act, i.e., those activities not confined to the storage of grain. 36 A.G. Op. 36 (1975).

## 80-4-523. Required receipt of agricultural commodities according to capacity.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

*Name Change — Code Commissioner Instruction:* Section 20, Ch. 452, L. 1993, provided: "Wherever the term "warehouseman" or its equivalent appears in Title 80, chapter 4, parts 4 through 7, or in legislation enacted by the 1993 legislature, the code commissioner shall substitute the term "warehouse operator" or its equivalent and make any necessary grammatical changes to reflect the name change." The term appeared in this section, and the Code Commissioner made the name change accordingly. Amendment effective July 1, 1993.

## 80-4-524. Discrimination in charge by warehouse operator prohibited.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

*Name Change — Code Commissioner Instruction:* Section 20, Ch. 452, L. 1993, provided: "Wherever the term "warehouseman" or its equivalent appears in Title 80, chapter 4, parts 4 through 7, or in legislation enacted by the 1993 legislature, the code commissioner shall substitute the term "warehouse operator" or its equivalent and make any necessary grammatical changes to reflect the name change." The term appeared in this section, and the Code Commissioner made the name change accordingly. Amendment effective July 1, 1993.

## 80-4-525. Scale weight tickets — form — issuance.

**Compiler's Comments**

*1993 Amendment:* Chapter 452 in (3), after first sentence, substituted remainder of present section regarding depositor's title for former second sentence that read: "The retention of scale weight tickets in lieu of warehouse receipts by the owner of the grain is at the owner's risk"; and made minor changes in style. Amendment effective July 1, 1993.

*1991 Amendment:* Deleted former (5) concerning required wording on combination scale weight ticket and warehouse receipt; and deleted (7) concerning surrender of scale weight ticket exchanged for warehouse receipts.

*Severability:* Section 11, Ch. 299, L. 1991, was a severability clause.

## 80-4-526. Warehouse receipts — written terms.

### Compiler's Comments

*2001 Amendment:* Chapter 168 in (3)(c) inserted "provided for in Title 30, chapter 7, part 2, that do not conflict with this part"; and made minor changes in style. Amendment effective March 30, 2001.

*Saving Clause:* Section 4, Ch. 168, L. 2001, was a saving clause.

*Name Change — Code Commissioner Instruction:* Section 20, Ch. 452, L. 1993, provided: "Wherever the term "warehouseman" or its equivalent appears in Title 80, chapter 4, parts 4 through 7, or in legislation enacted by the 1993 legislature, the code commissioner shall substitute the term "warehouse operator" or its equivalent and make any necessary grammatical changes to reflect the name change." The term appeared in this section, and the Code Commissioner made the name change accordingly. Amendment effective July 1, 1993.

## 80-4-527. Warehouse receipt — issuance — cancellation.

### Compiler's Comments

*1993 Amendment:* Chapter 452 near beginning of (7), after "grower", deleted "and conducts such an enterprise"; inserted (12) regarding cancellation of warehouse receipts; and made minor changes in style. Amendment effective July 1, 1993.

*1991 Amendment:* In (8), near middle of first sentence after "given", inserted "upon request"; and inserted (11) concerning issuance of warehouse receipts when storage is charged.

*Severability:* Section 11, Ch. 299, L. 1991, was a severability clause.

### Administrative Rules

ARM 4.12.1025 Agricultural seed warehouse receipts — written terms.

## 80-4-529. Partial withdrawal of agricultural commodities — adjustment or substitution of receipt — duties of warehouse operator.

### Compiler's Comments

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

*Name Change — Code Commissioner Instruction:* Section 20, Ch. 452, L. 1993, provided: "Wherever the term "warehouseman" or its equivalent appears in Title 80, chapter 4, parts 4 through 7, or in legislation enacted by the 1993 legislature, the code commissioner shall substitute the term "warehouse operator" or its equivalent and make any necessary grammatical changes to reflect the name change." The term appeared in this section, and the Code Commissioner made the name change accordingly. Amendment effective July 1, 1993.

## 80-4-530. Shipment of stored grain to terminal grain warehouse outside state.

### Compiler's Comments

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

*Name Change — Code Commissioner Instruction:* Section 20, Ch. 452, L. 1993, provided: "Wherever the term "warehouseman" or its equivalent appears in Title 80, chapter 4, parts 4 through 7, or in legislation enacted by the 1993 legislature, the code commissioner shall substitute the term "warehouse operator" or its equivalent and make any necessary grammatical changes to reflect the name change." The term appeared in this section, and the Code Commissioner made the name change accordingly. Amendment effective July 1, 1993.

## 80-4-531. Duty to deliver stored agricultural commodities — weights and inspections — modifying agreements — damages.

### Compiler's Comments

*Name Change — Code Commissioner Instruction:* Section 20, Ch. 452, L. 1993, provided: "Wherever the term "warehouseman" or its equivalent appears in Title 80, chapter 4, parts 4 through 7, or in legislation enacted by the 1993 legislature, the code commissioner shall substitute the term "warehouse operator" or its equivalent and make any necessary grammatical changes to reflect the name change." The term appeared in this section, and the Code Commissioner made the name change accordingly. Amendment effective July 1, 1993.

*1989 Amendment:* Inserted (2) relating to official inspection entitlement; inserted (3) establishing class X or Y weight entitlement or alternatives; and inserted (4) regarding binding storage agreements.

**Case Notes**

*Bailment:* An operator of a grain elevator is a public warehouse operator; delivery of grain for storage constitutes a bailment, and as bailee the operator must, under the Montana law, at all times keep on hand in bonded warehouses sufficient grain to make redelivery on all storage receipts and may not sell or deliver it out of storage except as provided by law. The operator may not use it for purposes of speculation on the market. Whorley v. Patton-Kjose Co., Inc., 90 M 461, 5 P2d 210 (1931).

### 80-4-532. Delivery of grain from different warehouse.

**Compiler's Comments**

*Name Change — Code Commissioner Instruction:* Section 20, Ch. 452, L. 1993, provided: "Wherever the term "warehouseman" or its equivalent appears in Title 80, chapter 4, parts 4 through 7, or in legislation enacted by the 1993 legislature, the code commissioner shall substitute the term "warehouse operator" or its equivalent and make any necessary grammatical changes to reflect the name change." The term appeared in this section, and the Code Commissioner made the name change accordingly. Amendment effective July 1, 1993.

### 80-4-533. Loss of receipts — conditions of reissue.

**Compiler's Comments**

*Name Change — Code Commissioner Instruction:* Section 20, Ch. 452, L. 1993, provided: "Wherever the term "warehouseman" or its equivalent appears in Title 80, chapter 4, parts 4 through 7, or in legislation enacted by the 1993 legislature, the code commissioner shall substitute the term "warehouse operator" or its equivalent and make any necessary grammatical changes to reflect the name change." The term appeared in this section, and the Code Commissioner made the name change accordingly. Amendment effective July 1, 1993.

**Administrative Rules**

ARM 4.12.1026 Loss of receipts — conditions of reissue.

### 80-4-534. Cancellation of insurance — suspension of license.

**Compiler's Comments**

*Name Change — Code Commissioner Instruction:* Section 20, Ch. 452, L. 1993, provided: "Wherever the term "warehouseman" or its equivalent appears in Title 80, chapter 4, parts 4 through 7, or in legislation enacted by the 1993 legislature, the code commissioner shall substitute the term "warehouse operator" or its equivalent and make any necessary grammatical changes to reflect the name change." The term appeared in this section, and the Code Commissioner made the name change accordingly. Amendment effective July 1, 1993.

### 80-4-536. Termination of storage contract — sale of agricultural commodities for charges — notice required.

**Compiler's Comments**

*1997 Amendment:* Chapter 76 in (2) inserted third sentence authorizing a warehouse operator to apply for an encumbrance if a warehouse receipt is not returned, in fourth sentence inserted "who are subject to the provisions of subsection (3)", and at end of last sentence substituted "license year" for "storage period"; inserted (3) regarding termination of storage contracts on agricultural commodities evidenced by a warehouse receipt within 3 license years; and made minor changes in style. Amendment effective July 1, 1997.

*Severability:* Section 23, Ch. 76, L. 1997, was a severability clause.

*Name Change — Code Commissioner Instruction:* Section 20, Ch. 452, L. 1993, provided: "Wherever the term "warehouseman" or its equivalent appears in Title 80, chapter 4, parts 4 through 7, or in legislation enacted by the 1993 legislature, the code commissioner shall substitute the term "warehouse operator" or its equivalent and make any necessary grammatical changes to reflect the name change." The term appeared in this section, and the Code Commissioner made the name change accordingly. Amendment effective July 1, 1993.

**Administrative Rules**

ARM 4.12.1027 Date of termination of storage contracts evidenced by warehouse receipts.

### 80-4-537. Examination of stored agricultural commodities.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

*Name Change — Code Commissioner Instruction:* Section 20, Ch. 452, L. 1993, provided: "Wherever the term "warehouseman" or its equivalent appears in Title 80, chapter 4, parts 4 through 7, or in legislation enacted by the 1993 legislature, the code commissioner shall substitute the term "warehouse operator" or its equivalent and make any necessary grammatical changes to reflect the name change." The term appeared in this section, and the Code Commissioner made the name change accordingly. Amendment effective July 1, 1993.

### 80-4-538. Warehouse shortage — remedies.

**Compiler's Comments**

*1993 Amendment:* Chapter 452 near middle of (7) substituted reference to First Judicial District Court for reference to District Court of the county in which the warehouse is located; in (8), after "recovered", inserted "at the discretion of the department from the assets of the licensee, from the agricultural commodities held by the licensee under warehouse receipt, or", before "district" inserted "the first judicial", and after "court" deleted "or recovered at the same time and as part of the seizure action filed under subsection (3)(a)"; at end of (9) substituted "part" for "section"; and made minor changes in style. Amendment effective July 1, 1993.

*1991 Amendment:* Inserted (1) concerning receipt holder's claim when warehouse operator stores agricultural commodities of different kinds; in (3) inserted clause allowing Department to petition for an order in District Court of the First Judicial District, Lewis and Clark County; and in (8) changed internal reference.

*Severability:* Section 11, Ch. 299, L. 1991, was a severability clause.

**Administrative Rules**

ARM 4.12.1022 Certificates of deposit or other bond equivalents.
ARM 4.12.1028 Warehouse shortage — remedies.

### 80-4-539. Inspection by department.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

*Name Change — Code Commissioner Instruction:* Section 20, Ch. 452, L. 1993, provided: "Wherever the term "warehouseman" or its equivalent appears in Title 80, chapter 4, parts 4 through 7, or in legislation enacted by the 1993 legislature, the code commissioner shall substitute the term "warehouse operator" or its equivalent and make any necessary grammatical changes to reflect the name change." The term appeared in this section, and the Code Commissioner made the name change accordingly. Amendment effective July 1, 1993.

## Part 6
## Agricultural Commodity Dealers

### 80-4-601. Commodity dealer license requirements — financial responsibility.

**Compiler's Comments**

*2019 Amendment:* Chapter 302 in (3)(a)(vi) near end inserted "cost of all commodities purchased in Montana"; inserted (6) concerning a company's ability to post a bond for a subsidiary; inserted (7) regarding circumstances when the department may waive the requirement to file a complete financial statement; inserted (8) regarding circumstances when the department may waive certain requirements to receive and retain a commodities license; inserted (9) allowing a company whose business structure includes one or more subsidiary locations to file the parent company's financial statement; and made minor changes in style. Amendment effective May 7, 2019.

*2015 Amendment:* Chapter 169 in (3)(a)(vi) substituted "certified public accountant" for "licensed accountant". Amendment effective October 1, 2015.

*2011 Amendment:* Chapter 175 in (3)(a)(v) after "80-4-604" inserted "plus the bond specified in subsection (5)(a)(i) or (5)(a)(ii) if applicable, or as specified in subsection (5)(a)(iii)"; deleted former (3)(f) that read: "(f) the number and description of trucks or tractor-trailer units owned or leased by the applicant that will be used in the transportation of agricultural commodities purchased pursuant to the provisions of this part"; in (3)(a)(vi) at end substituted "and equity" for "and net worth" and deleted former second, third, and fourth sentences that read: "The commodity dealer shall have and maintain current assets equal to or greater than current liabilities. Applicants not having adequate current assets equal to or greater than current liabilities may provide the department with additional bonding, or an equivalent in the form of a certificate of deposit or irrevocable letter of credit, in the amount of $2,000 for each $1,000 of deficit. The bond or equivalent must be in addition to the bond amount required in 80-4-604"; inserted (3)(b) establishing formula for determining value of assets for licensing purposes; in (4) at beginning inserted exception clause, after "shall have and maintain" deleted "net assets of at least $50,000 or maintain a bond in the amount of $2,000 for each $1,000 or fraction thereof of net assets deficiency. However, a minimum of $10,000 net assets is required by a commodity dealer to qualify for a license. Assets must be shown at original cost less depreciation, except that upon written request filed with the department, the director may allow asset valuations in accordance with a competent appraisal. In determining total net assets, credit may be given for insurable property, such as buildings, machinery, equipment, and merchandise inventory, only to the extent that such property is protected by insurance against loss or damage by fire. The insurance must be in the form of lawful policies issued by one or more insurance companies authorized to do business and subject to service of process in suits brought in this state. A bond submitted for purposes of this subsection is in addition to any bond otherwise required under this part", and inserted (4)(a) through (4)(c) relating to equity, capital, and bond requirements; inserted (5) relating to additional bonding requirements; and made minor changes in style. Amendment effective July 1, 2011.

*1989 Amendment:* In (3)(g) inserted last two sentences relating to additional bonding if current assets are equal to or greater than liabilities and deleted the following and inserted it at end of (4): "Assets must be shown at original cost less depreciation, except that upon written request filed with the department, the director may allow asset valuations in accordance with a competent appraisal. In determining total net assets, credit may be given for insurable property, such as buildings, machinery, equipment, and merchandise inventory, only to the extent that such property is protected by insurance against loss or damage by fire. The insurance must be in the form of lawful policies issued by one or more insurance companies authorized to do business and subject to service of process in suits brought in this state." Amendment effective March 20, 1989.

*1985 Amendment:* In (3)(g) combined third and former fourth sentences substituting "except that upon for "Upon", and inserted last two sentences allowing credit only for certain property insured by Montana-authorized companies.

**Administrative Rules**

ARM 4.12.1020 Financial statements — filing date.
ARM 4.12.1021 Bond conditions — cancellation.
ARM 4.12.1022 Certificates of deposit or other bond equivalents.
ARM 4.19.202 Hemp processing for a commodity dealer.

**Attorney General's Opinions**

*Exemption — Out-of-State "Annex":* A grain merchandising facility located 900 feet within the Montana border could not be classified as an "annex" of a North Dakota operation and exempted from licensing and grain storage obligations under 80-4-202 (repealed in 1983). 36 A.G. Op. 89 (1976).

### 80-4-602. License fees.

**Compiler's Comments**

*1997 Amendment:* Chapter 76 in (1), after "$232", inserted "per facility". Amendment effective July 1, 1997.

*Severability:* Section 23, Ch. 76, L. 1997, was a severability clause.

*1993 Amendment:* Chapter 452 at beginning of (1) inserted exception clause, after "fee" inserted "of $232", and after "license" deleted former fee schedule based on hundredweight (see 1991 MCA for schedule text); substituted (2) allowing an increase in fees by rule for former language that read: "Each applicant shall also pay a fee of $25 for each truck operated by it in the operation of its business as a commodity dealer"; inserted (3) establishing a fee for a commodity dealer who is licensed as a seed dealer; at end of (4) substituted "commodity dealer/public warehouse operators account" for "general fund"; and made minor changes in style. Amendment effective July 1, 1993.

*1993 Statement of Intent:* The statement of intent attached to Ch. 452, L. 1993, provided: "A statement of intent is required for this bill because 80-4-503 and 80-4-602 grant to the department of agriculture the authority to set license fees outside the statutory scale established in those sections. It is intended that the department, as part of the ongoing administration of the commodity dealer and public warehouse operator program, evaluate the amount of revenue generated by license fees and adjust the fees as necessary within the statutory maximum to ensure proper operation of the program."

*1987 Amendment:* In (1) increased license fees by $10 in each category.

**Administrative Rules**

ARM 4.12.1024 License fees for commodity dealers and public warehouses.

## 80-4-604. Bonding requirement amounts — cancellation.

**Compiler's Comments**

*2019 Amendment:* Chapter 302 in (2) at end of introductory clause inserted "and subsection (3) of this section"; inserted (3)(a) and (3)(b) concerning bond requirements for commodities dealers; and made minor changes in style. Amendment effective May 7, 2019.

*2011 Amendment:* Chapter 175 in (2) at beginning inserted exception clause; and made minor changes in style. Amendment effective July 1, 2011.

*1993 Amendment:* Chapter 452 deleted second sentence of (1) that read: "The aggregate liability of the surety may not exceed the sum of the bond"; deleted former second sentence of (3) that read: "The liability of the surety covers purchases made by the commodity dealer during the time the bond is in force"; and made minor changes in style. Amendment effective July 1, 1993.

*1991 Amendment:* In last sentence of (1), before "liability", deleted "annual"; in (2), at beginning, deleted "Unless set by department rule" and deleted former third sentence authorizing Department to establish by rule a greater percentage for bond.

*Severability:* Section 11, Ch. 299, L. 1991, was a severability clause.

*1985 Amendment:* In (1), in first sentence, after "bond", inserted "or its equivalent, as established by department rule" and deleted last sentence that read: "A continuous bond shall obligate a new penal sum with the commencement of each licensing year"; in first sentence of (2), after "producer", deleted "or warehouseman"; in (3) increased notice period from 30 to 60 days in two places and at end of last sentence after "notice", inserted remainder of subsection explaining surety liability in the event of cancellation.

**Administrative Rules**

ARM 4.12.1021 Bond conditions — cancellation.

ARM 4.12.1022 Certificates of deposit or other bond equivalents.

**Attorney General's Opinions**

*Bonding Requirement Exemption:* A warehouse operator licensed under the United States Warehouse Act could not be required to execute a warehouse operator's bond under 80-4-205 (repealed in 1983). 36 A.G. Op. 36 (1975).

## 80-4-605. Posting of license.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

## 80-4-606. Inspection of premises, books, and records.

**Compiler's Comments**

*2005 Amendment:* Chapter 131 in (1) at end of second sentence inserted "including those pertaining to the collecting, reporting, and paying of authorized assessments pursuant to Title 80, chapter 4 or 11"; inserted (2) regarding retention and maintenance of records; and made minor changes in style. Amendment effective March 30, 2005.

*Applicability:* Section 4, Ch. 131, L. 2005, provided: "[Section 2(2)] [80-4-606(2)] applies to transactions with a date after [the effective date of this act]." Effective March 30, 2005.

## 80-4-608. Payment of purchase price — definitions.

**Compiler's Comments**

*1993 Amendment:* Chapter 452 inserted second sentence of (1) that read: "Title to agricultural commodities sold to a commodity dealer under this section transfers to the commodity dealer upon physical delivery of the commodity"; and made minor changes in style. Amendment effective July 1, 1993.

## 80-4-612. Commodity dealer defaults — remedies.

**Compiler's Comments**

*1993 Amendment:* Chapter 452 inserted (3) and (4) regarding recovery of Department expenses. Amendment effective July 1, 1993.

*Severability:* Section 11, Ch. 299, L. 1991, was a severability clause.

### 80-4-613. Records.

**Compiler's Comments**

*Severability:* Section 11, Ch. 299, L. 1991, was a severability clause.

**Administrative Rules**

ARM 4.12.1034 Records retention.

### 80-4-614. Claims on bond by injured person.

**Compiler's Comments**

*Severability:* Section 11, Ch. 299, L. 1991, was a severability clause.

## Part 7

## Inspection and Grading

**Part Administrative Rules**

Title 4, chapter 12, subchapter 10, ARM Grain rules.
Title 4, chapter 13, ARM Grain rules.

### 80-4-701. Official agricultural commodity inspectors, samplers, and weighers — designation of seasonal inspection points — assignment of inspectors.

**Compiler's Comments**

*1997 Amendment:* Chapter 76 in two places substituted reference to agricultural commodity for "grain". Amendment effective July 1, 1997.

*Severability:* Section 23, Ch. 76, L. 1997, was a severability clause.

### 80-4-702. Qualifications of official agricultural commodity inspectors, samplers, and weighers.

**Compiler's Comments**

*1997 Amendment:* Chapter 76 in two places, after "Official", substituted "agricultural commodity"for "grain"; near end, after "selling of", inserted "agricultural commodities"; and made minor changes in style. Amendment effective July 1, 1997.

*Severability:* Section 23, Ch. 76, L. 1997, was a severability clause.

### 80-4-703. Penalty for misconduct.

**Compiler's Comments**

*1997 Amendment:* Chapter 76 in two places in (1) and in (2) substituted references to agricultural commodity for "grain"; in (3) substituted "official agricultural commodity inspector, sampler, or weigher" for "officer"; and made minor changes in style. Amendment effective July 1, 1997.

*Severability:* Section 23, Ch. 76, L. 1997, was a severability clause.

### 80-4-704. Establishment of standard agricultural commodity grades.

**Compiler's Comments**

*1997 Amendment:* Chapter 76 in (1), near beginning of first sentence, substituted "may" for "shall" and after "all" substituted "agricultural commodities for which a United States department of agriculture grade has not been established and that are bought by commodity dealers and stored" for "all grain", in second sentence, after "grade", inserted "and dockage" and substituted "agricultural commodities" for "grain", and inserted third sentence providing that any reference to a grade includes a reference to a protein analysis if analysis affects purchase price; in (2), in two places, substituted references to agricultural commodity for references to grain; and made minor changes in style. Amendment effective July 1, 1997.

*Severability:* Section 23, Ch. 76, L. 1997, was a severability clause.

**Administrative Rules**

ARM 4.13.1003 Standards for grading hulless barley.
ARM 4.13.1008 Standards for grading cultivated buckwheat.

### 80-4-705. Rules governing dockage — sample inspection.

**Compiler's Comments**

*1997 Amendment:* Chapter 76 in two places, in second sentence, substituted purchase price for references to price to be paid; in third sentence substituted "agricultural commodities" for "grain"; and made minor changes in style. Amendment effective July 1, 1997.

*Severability:* Section 23, Ch. 76, L. 1997, was a severability clause.

**Administrative Rules**

ARM 4.13.1003 Standards for grading hulless barley.
ARM 4.13.1008 Standards for grading cultivated buckwheat.

### 80-4-706. Special inspection of agricultural commodities.

**Compiler's Comments**

*1997 Amendment:* Chapter 76 throughout section substituted references to agricultural commodities for "grain"; and made minor changes in style. Amendment effective July 1, 1997.

*Severability:* Section 23, Ch. 76, L. 1997, was a severability clause.

### 80-4-708. Examination of agricultural commodity cars or trucks at destination.

**Compiler's Comments**

*1997 Amendment:* Chapter 76 in two places in (1), in (2), and in four places in (3) substituted references to agricultural commodity for "grain"; in two places in (1) and in (2), after "doors", inserted "or lids"; and in three places in (1) and two places in (3), after references to car, inserted references to truck. Amendment effective July 1, 1997.

*Severability:* Section 23, Ch. 76, L. 1997, was a severability clause.

### 80-4-709. Protein testing laboratory.

**Administrative Rules**

ARM 4.13.1005 Malting barley germination.
ARM 4.13.1006 Chit.
ARM 4.13.1007 Starch strength.

### 80-4-711. Agricultural commodity sampling — appeal procedure.

**Compiler's Comments**

*2009 Amendment:* Chapter 19 in (5) near end of first sentence after "section and" inserted "a partial list of". Amendment effective March 17, 2009.

*2003 Amendment:* Chapter 445 in (1) inserted second, third, and fourth sentences requiring that a written agreement be given to the depositor authorizing the depositor a preference with respect to grading facilities, providing that the options for grading facilities must include the state grain lab, and requiring the written agreement to specify a time period to which the agreement applies and in fifth sentence at beginning inserted "If the state grain lab is chosen as the grading facility" and near middle after "sample must" deleted "upon written request of the depositor"; inserted (2) requiring that fees and charges associated with grain sample analysis reflect the actual cost of the services; in (5) at end of first sentence after "section" inserted "and the fees established in 80-4-721" and inserted second sentence requiring the department to provide a placard for warehouse operators to list anticipated shipping and handling fees; and made minor changes in style. Amendment effective April 22, 2003.

*Severability:* Section 23, Ch. 76, L. 1997, was a severability clause.

*Effective Date:* Section 25, Ch. 76, L. 1997, provided that this section is effective July 1, 1997.

### 80-4-721. Fees for inspection, testing, and weighing agricultural commodities — disposition — investment.

**Compiler's Comments**

*2003 Amendment:* Chapter 445 inserted (5) providing for how fees collected must be expended; and made minor changes in style. Amendment effective April 22, 2003.

*1997 Amendment:* Chapter 76 in (1), (2), and (3) substituted "agricultural commodities" for "grain"; deleted former (2) that read: "Payment of the fees referred to in subsection (1) must be divided equally between the warehouse operator and the holder of the warehouse receipt"; deleted former (3) that read: "(3) Those fees or proceeds are a lien upon the grain until paid"; and made minor changes in style. Amendment effective July 1, 1997.

*Severability:* Section 23, Ch. 76, L. 1997, was a severability clause.

*Name Change — Code Commissioner Instruction:* Section 20, Ch. 452, L. 1993, provided: "Wherever the term "warehouseman" or its equivalent appears in Title 80, chapter 4, parts 4 through 7, or in legislation enacted by the 1993 legislature, the code commissioner shall substitute the term "warehouse operator" or its equivalent and make any necessary grammatical changes to reflect the name change." The term appeared in this section, and the Code Commissioner made the name change accordingly. Amendment effective July 1, 1993.

*1989 Amendment:* Inserted (2) providing for equal division of fees between the warehouse operator and holder of the warehouse receipt.

*1983 Amendment:* In (4) and (5), substituted "state special revenue fund" for "earmarked revenue fund" in four places.

**Administrative Rules**

ARM 4.13.1001B Grain fee schedule.

**80-4-722. Records of inspection.**

**Compiler's Comments**

*1997 Amendment:* Chapter 76 in three places in (1), in (1)(b), in (1)(c), in two places in (2), in two places in (3), and in (4) substituted references to agricultural commodity for "grain"; and made minor changes in style. Amendment effective July 1, 1997.

*Severability:* Section 23, Ch. 76, L. 1997, was a severability clause.

**80-4-724. Coloration of agricultural commodities treated with injurious or toxic substances — exception.**

**Compiler's Comments**

*1997 Amendment:* Chapter 76 in three places in first sentence in (1) substituted "agricultural commodity" for "grain" and inserted second sentence providing that the subsection does not apply to the application of pesticides to agricultural commodities; inserted (2) providing that a person who fails to comply with the section is subject to penalty; and made minor changes in style. Amendment effective July 1, 1997.

*Severability:* Section 23, Ch. 76, L. 1997, was a severability clause.

**80-4-725. Sale or offering for sale of treated product prohibited.**

**Compiler's Comments**

*1997 Amendment:* Chapter 76 in four places substituted "agricultural commodity" for "grain"; and made minor changes in style. Amendment effective July 1, 1997.

*Severability:* Section 23, Ch. 76, L. 1997, was a severability clause.

**80-4-726. Copies of grades and rules to be furnished and displayed by warehouse operators.**

**Compiler's Comments**

*Name Change — Code Commissioner Instruction:* Section 20, Ch. 452, L. 1993, provided: "Wherever the term "warehouseman" or its equivalent appears in Title 80, chapter 4, parts 4 through 7, or in legislation enacted by the 1993 legislature, the code commissioner shall substitute the term "warehouse operator" or its equivalent and make any necessary grammatical changes to reflect the name change." The term appeared in this section, and the Code Commissioner made the name change accordingly. Amendment effective July 1, 1993.

# CHAPTER 5
# AGRICULTURAL SEED AND PATENTED PLANT MATERIAL

## Part 1
## Seed Labeling — Licensing — Certification

**Part Compiler's Comments**

*Arbitration Study:* Section 15, Ch. 345, L. 1999, provided: "Arbitration study. During the 1999-2000 interim, the department of agriculture shall conduct a study of the concept of arbitration as it applies to the seed industry. With input from the industry, the department shall investigate the feasibility of a department-sponsored arbitration program to assist in settling damage claims between seed buyers and seed sellers and report to the legislature regarding the results of the study. If an arbitration program is determined to be feasible, the department shall make recommendations to the 57th legislature regarding any legislation necessary to implement the arbitration concept. The study report and legislative recommendations, if any, must be presented to the legislature by September 1, 2000."

**Part Administrative Rules**

Title 4, chapter 12, subchapter 30, ARM Seed warehouse rules.
Title 4, chapter 12, subchapter 31, ARM Seed labeling rules.

## 80-5-120. Definitions.

**Compiler's Comments**

*2019 Amendment:* Chapter 92 in definition of prohibited noxious weed seeds substituted "7-22-2101" for "7-22-2101(8)(a)(i)". Amendment effective October 1, 2019.

*2017 Amendment:* Chapter 420 in definition of agricultural seeds inserted (b) providing exception for certain seeds from plants of the genus Cannabis; and made minor changes in style. Amendment effective May 22, 2017.

*2001 Amendment:* Chapter 407 in definition of prohibited noxious weed seeds at end substituted "as defined in 7-22-2101(8)(a)(i)" for "under 7-22-2101(7)(a)(i)"; and made minor changes in style. Amendment effective July 1, 2001.

*1999 Amendment:* Chapter 345 inserted definitions of advertisement, bulk, conditioning, dormant, genuine grower declaration, germination, hard seeds, inert matter, kind, lot, mixture, pure live seed, pure seed, stop sale, treated, type, variety, and viable; deleted definition of bin-run seed sales that read: ""Bin-run seed sales" means seed sales from one farmer to another farmer with seeds sold "as is", without guaranty or analysis"; in definition of controlling the pollination deleted former second sentence that read: "Hybrid designations must be treated as variety names"; in definition of hybrid at end of first sentence in (c) inserted exception clause and inserted second and third sentences prohibiting hybrid destination of crosses of second generation of subsequent generations and requiring that hybrid designation be treated as variety names; substituted definition of labeling for former definition that read: ""Labeling" means to affix, before offering the seed for sale, on the exterior of the container in a conspicuous place a label written or printed in the English language that has not been altered, giving the information required under this chapter"; deleted former definition of name of the state in which the seed was grown that read: ""Name of the state in which the seed was grown" means any of the several states of the United States or a foreign country"; deleted former definition of percentage of germination that read: ""Percentage of germination" means the percentage of seeds that show normal sprouts as evidence of vitality when the seeds are subjected to the proper moisture and temperature conditions with proper aeration for the customary length of time for each specific kind of seed, as specified in the rules for seed testing adopted by the association of official seed analysts"; deleted former definition of percentage viability that read: ""Percentage viability" means the percentage of live seed capable of producing a normal seedling under optimum growing conditions, after all forms of dormancy have been overcome, if present"; in definition of prohibited noxious weed seeds after "seeds of" substituted "plant species designated as noxious weeds under 7-22-2101(7)(a)(i)" for former text that read: "perennial plants that not only reproduce by seed but also may spread by underground roots, stems, and other reproductive parts and that, when well established, are highly destructive and difficult to control in this state by ordinary good cultural practice. Prohibited noxious weed seeds include the seeds of:

(a) leafy spurge (Euphorbia esula);

(b) Russian knapweed (Centaurea repens); and

(c) plants that are designated by rule of the department as prohibited noxious weeds"; substituted "Restricted weed seeds" for "Restricted noxious weed seeds", after "seeds" deleted "and bulbets", after "plant" inserted "that may adversely affect agriculture or the environment and that are", and deleted former provisions that read: "The term includes the seeds of:

(a) spotted knapweed (Centaurea maculosa); and

(b) dyers woad (Isatis tinctoria)"; in definition of seed conditioning plant after "business" inserted "whether a permanent or portable facility" and substituted "that conditions seeds" for "that repackages, conditions, blends, treats, or otherwise manipulates agricultural seeds"; in definition of seed dealer substituted "a person who sells seeds" for "any person who offers for sale, sells, or barters agricultural seeds"; in definition of seed labeler after "labels to" deleted "agricultural" and substituted "required in 80-5-123" for "required in 80-5-102, when such seed is distributed in Montana"; in definition of vegetable seeds at end inserted "or herbs"; in definition of weed seeds after "seeds" deleted "or bulbets"; and made minor changes in style. Amendment effective July 1, 1999.

*1987 Statement of Intent:* The statement of intent attached to Ch. 373, L. 1987, provided: "This bill requires a statement of intent because section 1 [80-5-120] and 80-5-105 [renumbered 80-5-134], as amended, require the department of agriculture to adopt rules defining noxious weed seeds.

It is the intent of the legislature that the department establish rules for prohibited or restricted noxious weed seeds for the purpose of implementing Title 80, chapter 7, part 8, and Title 7, chapter 22, part 21. The legislature intends that noxious weed seeds be classified into two categories, prohibited noxious weed seeds and restricted noxious weed seeds. The characteristics of the two categories are as follows:

(1) "Prohibited noxious weed seeds" means seeds of perennial plants that not only reproduce by seed but also may spread by underground roots, stems, and other reproductive parts and which, when well established, are highly destructive and difficult to control in this state by ordinary good cultural practice.

(2) "Restricted noxious weed seeds" are seeds of weeds that are very objectionable in fields, lawns, and gardens of this state that can be controlled by good cultural practices.

The legislature intends that seeds designated as noxious weed seeds under current statutes need not be identical to seeds classified as noxious weed seeds under rules adopted by the department. However, the department shall include the seeds of leafy spurge and Russian knapweed in the prohibited noxious weed seeds category. In addition, the department shall designate the seeds of spotted knapweed and dyers woad as restricted noxious weed seeds. Thus, except as otherwise provided under this act, the Montana department of agriculture shall determine which noxious weed seeds must be prohibited and which noxious weed seeds should be restricted and at what levels."

### 80-5-123. Label requirements for agricultural, vegetable, flower, and indigenous seeds.

**Compiler's Comments**

*2001 Amendment:* Chapter 567 inserted (1)(e) requiring label notification of the requirement for alternative dispute resolution; and made minor changes in style. Amendment effective October 1, 2001.

*Saving Clause:* Section 14, Ch. 567, L. 2001, was a saving clause.

*Effective Date:* Section 18, Ch. 345, L. 1999, provided that this section is effective July 1, 1999.

**Administrative Rules**

ARM 4.12.3002 Seed handling procedures for seed conditioning plants.

### 80-5-124. Exemptions.

**Compiler's Comments**

*Effective Date:* Section 18, Ch. 345, L. 1999, provided that this section is effective July 1, 1999.

### 80-5-125. Exchange of seed between labelers.

**Compiler's Comments**

*1987 Amendment:* In second sentence of (1), after "container", inserted "of seed", after "carry" deleted "appropriate", and after "designation" deleted "and shall be accompanied by mechanical analysis for each lot so involved"; and inserted (2) requiring a lot number and a complete label.

### 80-5-126. Analysis by seed laboratory — reports.

**Compiler's Comments**

*2011 Amendment:* Chapter 300 at end of first sentence substituted "determines" for "and the department determine". Amendment effective April 29, 2011.

*1987 Amendment:* Near beginning changed name to "seed laboratory" from "grain and seed laboratory"; deleted requirement to "inspect" seeds; in third sentence made the annual report discretionary rather than mandatory; and deleted former last two sentences that read: "The laboratory and the department shall have free access at all reasonable hours to all premises or structures to make examination of any seeds or any other premises of a warehouse, elevator, or railway company. Upon tendering payment at the current value, the department may take any sample of seeds."

**Administrative Rules**

ARM 4.12.3402 Seed laboratory analysis fees.

### 80-5-127. Testing of submitted samples.

**Compiler's Comments**

*1987 Amendment:* At beginning of section, after "The", deleted "grain and"; after "analyze any" inserted "official"; and at end of section, after "department", inserted language relating to Federal Seed Act and procedural guidelines.

**80-5-128. Laboratory testing of samples — fees.**

**Compiler's Comments**

*2011 Amendment:* Chapter 300 in (1) before "test" substituted "or" for "and" and before "governing" substituted "procedures" for "rules"; in (2) substituted "the seed laboratory as provided in 20-25-229" for "rule of the department as recommended by the agricultural experiment station"; in (3) at end inserted "and the expenses incurred by the seed laboratory advisory board provided for in 2-15-1525"; and made minor changes in style. Amendment effective April 29, 2011.

*1999 Amendment:* Chapter 345 at end of third sentence after "under" substituted "this chapter" for "80-5-102 through 80-5-105 and 80-5-107 through 80-5-113"; and made minor changes in style. Amendment effective July 1, 1999.

*1987 Amendment:* In first sentence, after "request the", deleted "grain and"; in second sentence, after "rates", substituted "established by rule of the department as recommended by the agricultural experiment station" for "determined jointly by the department and the director of the grain and seed laboratory"; and in third sentence, after "collected by the", deleted "grain and" and at end, after "under", changed "80-5-101" to "80-5-102".

**Administrative Rules**

ARM 4.12.3402 Seed laboratory analysis fees.

**80-5-129. Certificate of test presumptive evidence.**

**Compiler's Comments**

*1987 Amendment:* Near beginning of section, before "seed laboratory", deleted "grain and".

**80-5-130. Licensing — application — fee.**

**Compiler's Comments**

*2021 Amendment:* Chapter 122 in (5) substituted current text for former (5) (see 2021 Session Law for former text). Amendment effective July 1, 2021.

*2003 Amendment:* Chapter 263 in (5)(a) substituted "Except as provided in this subsection (5), the fee is $55 a year for each type of license. The department may by rule adjust the license fee by type of license to maintain adequate funding for the administration of this part. The fee may not be less than $55 a year or more than $75 a year" for "Each type of license for an in-state person costs $50 a year"; in (5)(b) at beginning of first sentence inserted exception clause and at end increased license fee from $100 to $110, inserted second sentence allowing the department to adjust the fee by rule and inserted third sentence concerning minimum and maximum fee; deleted former (5)(c) and (5)(d) that read: "(c) The license fee for an out-of-state person who labels seed that is being sold in Montana is $50 a year.

(d) The license fee for a person who sells only lawn and turf grass seed is $50 a year"; in (5)(c) at beginning of first sentence inserted exception clause, near middle after "labels" inserted "or sells and labels", and at end increased license fee from $50 to $55, inserted second sentence allowing the department to adjust the fee by rule, and inserted third sentence concerning minimum and maximum fee; and made minor changes in style. Amendment effective April 9, 2003.

*1999 Amendment:* Chapter 345 at beginning of (1) substituted "facilities located in the state that condition agricultural seed" for "seed conditioning plants" and after "each" deleted "plant before doing business in this state"; at beginning of (3) substituted current language regarding name and address on seed label for "All seed labelers and growers who labor or affix written claims to their seed"; inserted (3)(c) excluding Montana grower labeling seeds of labeler's own production with gross annual sales value of $5,000 or less from licensing requirements; in (4)(b) substituted current language regarding gross sales value of $1,000 or less a year for "a Montana certified seed grower when selling certified seed from his own production"; in (4)(c) substituted "a person selling seed only to a Montana-licensed seed dealer, labeler, or conditioner" for "a grain producer when making bin-run seed sales"; inserted (4)(d) excluding Montana grower selling own production with gross annual sales value of $5,000 or less from licensing requirements; deleted former (5) that read: "(5) Each person selling seed from a location other than the licensed place must be listed on the application for license"; deleted former (6) that read: "(6) The department shall set by rule the period for which a license is issued under this section"; deleted former (7) that read: "(7) The department may establish by rule minimum standards for equipment and handling procedures for facilities to be licensed"; in former (8) deleted second and third sentences that read: "The fee must include the cost of application for a license and must be nonrefundable. The department may by rule establish license fees which bear a reasonable relationship to the cost of administering this part"; in (5)(a) after "Each" substituted "type of license for an in-state person" for "Each license"; inserted (5)(b) through (5)(e) outlining various licenses fees; in (6)(c) substituted "required by department rule" for "the application is for a seed dealer's license"; in (7) before "seed" inserted "agricultural"; in (7)(a)(i) and (7)(a)(ii) substituted "seed dealer" for "seller"; and made minor changes in style. Amendment effective July 1, 1999.

*Termination Provision Repealed:* Section 1, Ch. 149, L. 1991, repealed sec. 5, Ch. 446, L. 1989, which terminated the 1989 amendments to this section July 1, 1991. Effective March 25, 1991.

*1989 Amendment:* Inserted (10) relating to information required on bill of lading for seed shipments. Amendment effective April 5, 1989, and terminates July 1, 1991.

*Preamble:* The preamble to Ch. 446, L. 1989, provided: "WHEREAS, the growth and spread of noxious weeds in the State of Montana has become one of the single greatest natural threats to the state's agricultural industry and economy; and

WHEREAS, this threat frequently materializes when seeds shipped into this state contain unlawful noxious weed seeds which become planted with agricultural seed crops before the Department of Agriculture has the knowledge and opportunity to embargo the shipment; and

WHEREAS, the Legislature of the State of Montana finds it appropriate to use existing Department of Highways [now Department of Transportation] personnel and the facilities in the Gross Vehicle Weight Division to obtain bills of lading on all seed shipments into the state and forward the bills of lading to the Montana Department of Agriculture in order to enhance its enforcement capabilities."

*1987 Amendment:* Near beginning of (1), after "plants", deleted "and seed labelers", after "department" inserted "for each plant", after "however, a" deleted "Montana certified", after "conditioning" deleted "or labeling certified", and deleted former last sentence that read: "Bin run seed sales from one farmer to another are exempt from this part"; deleted former (2), (3), and (6) that read: "(2) All licenses are issued on a fiscal-year basis and expire on June 30 of each year.

(3) Application for license is made in a manner and on forms provided by the department. A nonresident shall file a written power of attorney designating the secretary of state as his agent, and the power of attorney shall be so prepared and in such form as to render effective the jurisdiction of the courts of the state of Montana over the nonresident applicant. A nonresident who has a duly appointed resident agent upon whom process may be served as provided by law is not required to designate the secretary of state as his agent. The department shall be furnished with a certified copy of the designation of the secretary of state or of a resident agent.

(6) Failure on the part of a licensee to comply with the rules issued under the authority of this section is sufficient cause for cancellation of a license by the department, provided the licensee is given a reasonable opportunity to correct inadvertent and nonrecurring deficiencies"; inserted (2) requiring posting of fees and license designation; inserted (3) requiring licensing of seed labelers and growers and providing certain licensing exceptions; inserted (4) requiring licenses for seed sellers and distributors and providing certain licensing exceptions; inserted (5) requiring listing of each person selling seed from a location other than the licensed place; inserted (6) allowing the Department to set the period of license issuance by rule; in (7), after "licensed", deleted "and may carry out inspections during normal business hours to determine that these standards are being adhered to"; in (8) inserted second sentence allowing the Department to set license fees commensurate with administrative costs; and inserted (9) setting out application requirements.

*1983 Amendments:* Chapter 464, twice in (1), changed "processing" to "conditioning"; and in first sentence of (1), changed "section" to "part".

Chapter 539 made the following changes: near beginning of (1), deleted "seed buyers, and public agricultural seed warehouses" before "shall obtain"; in (2) deleted "A license may cover any or as many as all four activities: processing plant, seed labeler, seed buyer, and public agricultural seed warehouse"; and deleted (7), which read: "The department may by rule establish bonding and insurance requirements for each class of license."

**Administrative Rules**

Title 4, chapter 12, subchapter 30, ARM Seed warehouse rules.
ARM 4.12.3005 Posting of license.
ARM 4.12.3008 License year.

## 80-5-131. Assessment on sales into Montana — reporting — rulemaking.

**Compiler's Comments**

*2017 Amendment:* Chapter 339 in (1) inserted last sentence requiring that fees be paid only if they total more than $5 in a reporting period; in (2)(a) after "form of reports" inserted "the reporting period"; in (2)(c) substituted "$25" for "$10"; and made minor changes in style. Amendment effective May 7, 2017.

*Saving Clause:* Section 11, Ch. 339, L. 2017, was a saving clause.

*Severability:* Section 12, Ch. 339, L. 2017, was a severability clause.

*2003 Amendment:* Chapter 263 in (1) at beginning of first sentence inserted exception clause and near middle increased fee from 15 cents to 20 cents per $100 and inserted second and third sentences allowing the department to adjust the fee by rule and setting minimum and maximum fee. Amendment effective April 9, 2003.

*Effective Date:* Section 18, Ch. 345, L. 1999, provided that this section is effective July 1, 1999.

### 80-5-132. Deposit of funds — seed account.

**Compiler's Comments**

*1999 Amendment:* Chapter 345 in second sentence in (1) after "license" inserted "assessment, filing" and inserted third sentence regarding deposit of gifts, grants, cost-share funds, and other funds consistent with chapter purpose. Amendment effective July 1, 1999.

*1993 Amendment:* Chapter 602 substituted present section creating seed account and providing for deposit of funds in the account for former section that read: "All money collected under the provisions of this part shall be deposited to the general fund." Amendment effective July 1, 1993.

### 80-5-133. Inspection.

**Compiler's Comments**

*1999 Amendment:* Chapter 345 at beginning substituted "Consistent with the responsibilities of this chapter, authorized representatives of the department, upon presentation of department-issued credentials" for "To enforce this chapter, the department" and after "times" inserted "or under emergency conditions"; in second sentence after "may" inserted "inspect or investigate", after "review" inserted "and copy", and after "seed" inserted "or licensing requirements"; at beginning of third sentence deleted "The department may take any sample of seeds as may be required"; and made minor changes in style. Amendment effective July 1, 1999.

### 80-5-134. Prohibitions.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 1, Ch. 630, L. 2023. Amendment effective October 1, 2023.

*1999 Amendment:* Chapter 345 at beginning of (1) after "person" deleted "firm, corporation, partnership, or association"; deleted former chart in (1)(b) regarding maximum number of seeds allowed per pound (see 1999 Session Law for former text); deleted former (1)(d) that read: "(d) the germination of vegetable seed at the time of packaging was equal to or above standards prescribed in the Federal Seed Act, 7 U.S.C. 1551 through 1610, amended October 15, 1967, with subsequent revisions"; in (1)(f) substituted language regarding certificate of plant variety protection for former (6) that read: "(6) is labeled with a variety name for which a U.S. certificate of plant variety protection has been issued or applied for under the provisions of the Plant Variety Protection Act (7 U.S.C. 2321, et seq.) without the authority of the owner of the variety or" and at end after "mixture" deleted "by or with approval of the owner of the variety"; inserted (1)(g) prohibiting sale or transport of seed with false or misleading labeling; inserted (1)(h) prohibiting sale or transport of seed that has been falsely or misleadingly advertised; inserted (2) outlining illegal activities; and made minor changes in style. Amendment effective July 1, 1999.

*1987 Amendment:* Near end of introduction, after "any", deleted "agricultural, vegetable, or flower"; in (2), after "excess of", inserted "either"; inserted (2)(a) providing for limiting numbers of noxious weed seeds by Department rule; in (2)(b), under "Common name", "Species", and "Number of seeds per pound", inserted "dyers woad (Isatis tinctoria) 0", under "Common name", "Species", and "Number of seeds per pound", deleted former classifications that read:

| | | |
|---|---|---|
| "dodder | (Cuscuta spp.) | 18 |
| blue lettuce | (Lactuca pulchella) | 27 |
| St.-Johnswort | (Hypericum perforatum) | 27 |
| oxeye daisy | (Chrysanthemum leucanthemum) | 90 |
| hoary alyssum | (Berteroa incana) | 9 |
| buckhorn plantain | (Plantago lanceolata) | 90 |
| chickweed | (Stellaria spp.) | 9 |
| curly dock | (Rumex crispus) | 45", |

and under "Number of seeds per pound", after "wild oats (Avena fatua) 45", inserted "(per pound of grass seed) 9 (per pound of cereal seed)"; and deleted former (5) that read: "(5) is represented in any manner to be for lawn seeding purposes, unless it contains at least 50% pure seed of fine-textured perennial species which shall be specified by rules under this part. However, grass mixtures which do not contain 50% pure seed of fine-textured perennial grasses may be sold. When these grass mixtures are contained in packages of 25 pounds or less, they shall carry the statements: "Not recommended for a fine-textured perennial turf. Satisfactory for a temporary ground cover or where coarse grass is not objectionable." A definition of fine-textured varieties to be adopted in the rules is as follows:

(a) bluegrasses—all varieties except Canada bluegrass (Poa compressa), annual bluegrass (Poa annua), and rough bluegrass (Poa trivialis);
(b) chewings red fescue and all improved varieties;
(c) creeping red fescue and all improved varieties;
(d) bentgrass—all varieties;
(e) fine-textured ryegrasses".

*1987 Statement of Intent:* The statement of intent attached to Ch. 373, L. 1987, provided: "This bill requires a statement of intent because section 1 [80-5-120] and 80-5-105 [renumbered 80-5-134], as amended, require the department of agriculture to adopt rules defining noxious weed seeds.

It is the intent of the legislature that the department establish rules for prohibited or restricted noxious weed seeds for the purpose of implementing Title 80, chapter 7, part 8, and Title 7, chapter 22, part 21. The legislature intends that noxious weed seeds be classified into two categories, prohibited noxious weed seeds and restricted noxious weed seeds. The characteristics of the two categories are as follows:

(1) "Prohibited noxious weed seeds" means seeds of perennial plants that not only reproduce by seed but also may spread by underground roots, stems, and other reproductive parts and which, when well established, are highly destructive and difficult to control in this state by ordinary good cultural practice.

(2) "Restricted noxious weed seeds" are seeds of weeds that are very objectionable in fields, lawns, and gardens of this state that can be controlled by good cultural practices.

The legislature intends that seeds designated as noxious weed seeds under current statutes need not be identical to seeds classified as noxious weed seeds under rules adopted by the department. However, the department shall include the seeds of leafy spurge and Russian knapweed in the prohibited noxious weed seeds category. In addition, the department shall designate the seeds of spotted knapweed and dyers woad as restricted noxious weed seeds. Thus, except as otherwise provided under this act, the Montana department of agriculture shall determine which noxious weed seeds must be prohibited and which noxious weed seeds should be restricted and at what levels."

**Administrative Rules**

ARM 4.12.3010 Prohibited noxious weed seeds.
ARM 4.12.3011 Restricted weed seeds.

## 80-5-135. Screenings — restrictions on movements.

**Compiler's Comments**

*1987 Amendment:* In (1) changed "80-5-101" to "80-5-120"; and in (2), after "department", substituted "may adopt" for "has authority to issue".

*1983 Amendment:* In lead-in, changed "processing" to "conditioning".

**Administrative Rules**

ARM 4.12.3004 Handling of screenings.

## 80-5-136. Administration — stop sale order — violation — cancellation of license — enforcement.

**Compiler's Comments**

*2017 Amendment:* Chapter 420 inserted (10) prohibiting political subdivision from adopting or continuing to enforce local legislation or regulation related to agricultural seeds and vegetable seeds and declaring any legislation in violation of this section to be void and unenforceable. Amendment effective May 22, 2017.

*1999 Amendment:* Chapter 345 inserted (1) requiring department to administer and enforce chapter and adopted rules; inserted (2) authorizing department to issue and enforce stop sale orders to seed owner or custodian and providing criteria pertaining to stop sale order; in two places in (4)(b) inserted "plus costs of prosecution"; and made minor changes in style. Amendment effective July 1, 1999.

*1993 Amendment:* Chapter 602 substituted (2) concerning violation or aiding in a violation for "Any person convicted of violating the provisions of this part or rules promulgated under the authority of this part is guilty of"; inserted (2)(a) regarding assessment of an administrative civil penalty; inserted (3) requiring establishment of a penalty matrix; and made minor changes in style. Amendment effective July 1, 1993.

*1993 Statement of Intent:* The statement of intent attached to Ch. 602, L. 1993, provided: "A statement of intent is required for this bill because rulemaking authority is granted in 80-5-207 [renumbered 80-5-136] to the department of agriculture to adopt rules regarding administrative civil penalties for violations of the agricultural seed laws. It is intended that the department establish a penalty matrix that sets out the kinds of administrative penalties applicable to violations of the agricultural seed laws and delineate the degrees of penalty that may be assessed for initial and subsequent administrative violations."

*1987 Amendment:* Substituted (1) (see 1987 Session Law for text) for former language that read: "The department may cancel any license issued by it when the provisions of this part have been violated by the holder of the license."

**Administrative Rules**

ARM 4.12.3012 Civil penalties — enforcement.
ARM 4.12.3013 Civil penalties — matrix.

### 80-5-137. Cooperation and agreements.

**Compiler's Comments**

*Effective Date:* Section 18, Ch. 345, L. 1999, provided that this section is effective July 1, 1999.

### 80-5-139. Rules — promulgated by department.

**Compiler's Comments**

*2011 Amendment:* Chapter 300 deleted former (3) that read: "(3) The department may promulgate rules related to the operation of the state seed laboratory. The rules may include but are not limited to procedures for submitting seed samples and rates charged for seed analysis"; and made minor changes in style. Amendment effective April 29, 2011.

*1999 Amendment:* Chapter 345 inserted (2) outlining subjects for rulemaking; inserted (3) authorizing department to adopt rules related to operation of state seed laboratory, procedures for submitting seed samples, and rates charged for analysis; and made minor changes in style. Amendment effective July 1, 1999.

**Administrative Rules**

ARM 4.12.3002 Seed handling procedures for seed conditioning plants.
ARM 4.12.3008 License year.

### 80-5-140. Application of sections.

**Compiler's Comments**

*1999 Amendment:* Chapter 345 near end after "Montana certified" inserted "or "one year off certified""; and made minor changes in style. Amendment effective July 1, 1999.

### 80-5-141. Rules by Montana state university-Bozeman — certification agencies.

**Compiler's Comments**

*Name Change — Directions to Code Commissioner:* Pursuant to sec. 36, Ch. 308, L. 1995, in this section the Code Commissioner changed "Montana state university" to "Montana state university-Bozeman".

### 80-5-144. Unlawful use of certification — penalty.

**Compiler's Comments**

*1999 Amendment:* Chapter 345 in middle after "Montana certified" inserted "or "one year off certified""; and made minor changes in style. Amendment effective July 1, 1999.

## Part 4
## Seed Potato Disease Control Act

**Part Compiler's Comments**

*1989 Statement of Intent:* The statement of intent attached to Ch. 610, L. 1989, provided: "A statement of intent is required for this bill because it grants rulemaking authority to the department of agriculture. It is the intent of the legislature that the department adopt rules to implement the quarantine provision contained in [section 3] [80-5-403] and the publication provision contained in [section 4] [80-5-404]. These rules should include but are not limited to procedures for:

(1) notification to growers of the provisions of [this act];
(2) inspection of imported seed potatoes, including the setting of inspection fees, if necessary;
(3) the quarantine of noncertified seed potatoes brought into the state;
(4) restrictions on the use of quarantined seed potatoes;
(5) disposition of the quarantined seed potatoes; and
(6) publication in counties where seed potatoes are grown of the prohibition on the planting of noncertified seed potatoes."

### 80-5-402. Definitions.

**Compiler's Comments**

*1997 Amendment:* Chapter 59 inserted definition of commercial purpose; and made minor changes in style.

### 80-5-403. Imported seed potatoes — restrictions — exceptions.

**Compiler's Comments**

*1997 Amendment:* Chapter 59 in (1), in introductory clause after "commercial", deleted "or agricultural"; in (1)(b), at beginning, substituted "subject to inspection" for "inspected"; deleted former (1)(b) that read: "(b) seed or commercial potatoes, equipment, machinery, bags, or containers known to be diseased or contaminated with bacterial ring rot, nematode, or tuber moth may not be brought into this state"; in (2) substituted "subsection (1)" for "this section"; in (3) substituted language concerning diseased or contaminated material not being brought into state for "The department shall quarantine seed potatoes imported into the state in violation of this section. The department shall adopt rules governing quarantines and regulating the use or disposition of quarantined seed potatoes"; and made minor changes in style.

### 80-5-404. Planting noncertified seed potatoes prohibited — exceptions.

**Compiler's Comments**

*1997 Amendment:* Chapter 59 in (1), near middle after "unlawful", deleted "after January 1, 1990"; in (1)(b), at beginning, substituted "subject to inspection" for "inspected"; deleted former (2) that read: "The provisions of this section apply only to counties where Montana certified seed potatoes are produced and certified by Montana state university-Bozeman during the preceding crop year as provided for in 80-5-301 through 80-5-305. On or before November 15 of each year, the department shall compile from official certification records at Montana state university-Bozeman a list of counties affected by this section and shall publish the provisions of this section throughout those counties"; and made minor changes in style.

*Name Change — Directions to Code Commissioner:* Pursuant to sec. 36, Ch. 308, L. 1995, in this section the Code Commissioner changed "Montana state university" to "Montana state university-Bozeman".

### 80-5-405. Enforcement — penalty.

**Compiler's Comments**

*1997 Amendment:* Chapter 59 inserted (2) allowing the Department to issue orders for potatoes in violation of part; inserted (3) allowing the Department to adopt rules governing the quarantine of potatoes; and made minor changes in style.

## Part 5
## Agricultural Seed Contract Alternative Dispute Resolution

**Part Compiler's Comments**

*Saving Clause:* Section 14, Ch. 567, L. 2001, was a saving clause.

*Effective Date:* This part is effective October 1, 2001.

**Part Administrative Rules**

Title 4, chapter 12, subchapter 32, ARM Alternative dispute resolution rules.

### 80-5-510. Administration of fees.

**Compiler's Comments**

*2009 Amendment:* Chapter 426 in second sentence near middle following "section are" deleted "statutorily appropriated, as provided in 17-7-502". Amendment effective July 1, 2009.

## Part 6
## Patented Plant Material

**Part Compiler's Comments**

*Severability:* Section 8, Ch. 260, L. 2011, was a severability clause.

*Effective Date:* Section 9, Ch. 260, L. 2011, provided: "[This act] is effective on passage and approval." Approved April 21, 2011.

# CHAPTER 6
# APICULTURE

**Chapter Administrative Rules**

Title 4, chapter 12, subchapter 1, ARM Apiculture rules.

Title 4, chapter 12, subchapter 18, ARM Commodity grade and charges.

## Part 1
## Registration — Apis Bees

### 80-6-101. Definitions.

**Compiler's Comments**

*2009 Amendment:* Chapter 468 throughout section after "apiary" inserted "site"; in definition of bees substituted "Apis mellifera and all European subspecies" for "of the bees in the genus Apis"; in definition of colony inserted "bees and the"; in definition of hobbyist apiary site and in definition of landowner apiary site substituted "registered" for "owned"; in definition of landowner in (a) before "apiary" deleted "landowner"; in definition of pest inserted "and Apis mellifera capensis"; in definition of pollination apiary site substituted "registered" for "operated"; and made minor changes in style. Amendment effective October 1, 2009.

*2003 Amendment:* Chapter 11 in definition of apiary substituted "location" for "place"; in definition of pest near middle after "African honeybee" inserted "and any other parasite or predator that attacks the egg, larval, pupal, or adult stages of the honeybee that are subject to regulation under parts 1 through 3 of this chapter"; and made minor changes in style. Amendment effective February 11, 2003.

*2001 Amendment:* Chapter 7 deleted former definition of queen apiary that read: ""Queen apiary" means an apiary or premises in which queen bees are reared or kept for sale or gift." Amendment effective October 1, 2001.

*1993 Amendment:* Chapter 491 in definition of bee diseases, after "means", deleted "American or European foulbrood, sacbrood, bee paralysis, bee parasites, or other" and inserted second sentence requiring Department to designate by rule specific bee diseases subject to regulation under parts 1 through 3 of this chapter. Amendment effective July 1, 1993.

*1993 Statement of Intent:* The statement of intent attached to Ch. 491, L. 1993, provided: "A statement of intent is required for this bill because additional rulemaking authority is extended to the department of agriculture's present authority to regulate apiculture in the following sections:

(1) The definition of "bee diseases" in 80-6-101(2) is intended to allow the department to establish by rule what specific diseases of bees are subject to regulation.

(2) Section 80-6-303(2) is intended to grant the department the authority to establish a penalty matrix that sets out the kinds of administrative penalties that are applicable to violations of Montana apiculture law and to delineate the degrees of penalty that may be assessed for initial and subsequent administrative violations."

*1991 Amendment:* Added bee parasites to definition of bee diseases; in definition of landowner, in first sentence before "use", deleted "actual"; and made minor changes in style. Amendment effective February 1, 1991.

*Severability:* Section 4, Ch. 9, L. 1991, was a severability clause.

*1987 Amendment:* Inserted definition of pest.

*1981 Amendment:* Inserted definitions of department, family unit, general apiary, hobbyist apiary, hobbyist beekeeper, landowner, landowner apiary, and pollination apiary.

**Administrative Rules**

ARM 4.12.108 Hourly inspection fee.

ARM 4.12.111 Regulated bee diseases.

ARM 4.12.112 Apiculture rules — definitions.

**80-6-102. Registration classes — reregistration — fees.**

**Compiler's Comments**

*2019 Amendment:* Chapter 379 in (1) at beginning of first sentence deleted "Except as provided in 80-6-114"; in (2)(a) inserted second sentence regarding an annual hobbyist apiary site registration or reregistration fee limit of $19; and made minor changes in style. Amendment effective July 1, 2019.

*2009 Amendments — Composite Section:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Chapter 468 in (1) in first sentence at beginning inserted exception clause, near end substituted "reregister" for "register", and inserted second sentence regarding civil penalty; inserted (2) and (3) regarding fees and time limits; in (4), (5)(c), (5)(d), (5)(e), (6), (7), and (8) substituted references to apiary site for references to apiary; in (4) in second sentence at end substituted "80-6-114" for "80-6-115"; deleted former (2) that read: "(2) Applications shall be made to the department for registration application blanks"; in (5)(a) substituted "the applicant's name, telephone number, and mailing address" for "the name and place of residence"; deleted former (3)(b) that read: "(b) the number of colonies of bees, hives, and equipment in the apiary"; substituted (5)(b) regarding location for "the location of the apiary, setting forth specifically the location by sectional division to the nearest quarter section, and the township and range and, if within the corporate limits of a town or city, the number of the lot and block in the town or city"; in (5)(c) substituted "current owner" for "owner"; in (5)(d) substituted "consented in writing" for "consented"; deleted former (3)(e) that read: "(e) the date when the apiary was first established"; in (6) before "and the class" deleted "the number of colonies of bees or size of the apiary authorized under the registration"; deleted former (6) and (7) that read: "(6) Certificates of registration may not be issued for new apiaries which are within such close proximity to established registered apiaries that there is or may be danger of spread of disease or pests or that the proximity will or may interfere with the proper feeding and honey flow of established apiaries.

(7) Before registering new apiaries, the department shall give at least 10 days' notice by certified mail to all registered apiarists likely to be affected by the proposed new apiary so that any party affected may file written protests with the department against registering the new apiary. If a written protest is filed, the department may require a hearing. Notice of the time and place of the hearing shall be given all parties interested by certified mail at least 10 days before the date set for the hearing"; in (8) in first and second sentences after "evidence of registration" deleted "furnished by the department" and inserted third sentence providing for quarantine and handling by department of unidentifiable hives; deleted former (9), (10), and (11) that read: "(9) A registration not applied for by April 1 of each year is a late registration and incurs an added penalty of 10% of the regular registration fee or $10, whichever is greater. Registrants who fail to apply for reregistration by April 1 of each year shall be notified of their delinquency by the department. The notification shall be by certified mail and is sufficient if deposited in a United States post office or mail box and addressed to the registrant at his last address appearing in the apiary registration files of the department at least 10 days before May 1. The registration of an apiary for which application for reregistration is not made by May 1 of each year is forfeited and all rights under the registration terminate.

(10) Any person who owns or possesses any bees, hives, colonies, or beekeeping equipment in this state or who owns or possesses an apiary in this state and who fails or refuses to register the same as provided in this part is guilty of a misdemeanor and upon conviction thereof is subject to the penalties set forth in 80-6-303.

(11) Nothing contained in this section or in 80-6-111 through 80-6-115 shall be construed as invalidating, canceling, amending, terminating, or extending any certificate of registration issued by the department prior to October 1, 1981. All such previously issued certificates of registration remain in effect for the period for which they were issued; subject, however, to forfeiture, lapse, abandonment, and termination in the manner provided by law"; inserted (9) providing that reregistration may not be granted if civil penalty is unpaid; and made minor changes in style. Amendment effective October 1, 2009.

*1987 Amendment:* In (6) inserted "or pests"; and in (9) inserted reference to $10 fee.

*1987 Statement of Intent:* The statement of intent attached to Ch. 198, L. 1987, provided: "A statement of intent is required for this bill because it provides the department of agriculture authority to adopt rules for administration of this act.

It is the intent of the legislature that the department establish rules for the detection of pest honeybees by using the most efficient, scientifically acceptable method of identifying pests.

It is further the intent of the legislature that the department establish by rule a fee structure for laboratory services. The department should set fees to correspond with the costs of providing services. These costs include both direct and indirect costs, plus expenses associated with operation of the laboratory authorized under section 9 [80-6-311].

In setting fees, the department may take into consideration the economic difficulties of the apiary industry and may reduce fees as may be necessary to promote increased use of services. The department may provide services at less than cost if alternative funding is available or if the economic conditions of the industry require the reduction of charges.

In addition, it is the intent of the legislature that the department establish by rule an effective method for conducting quarantines to prevent the entry and spread of harmful honeybee pests and diseases, such as Africanized honeybees and honeybee mites. It is contemplated that the department quarantine any apiary where pest honeybees or any contagious or infectious diseases are present and, during the quarantine, prevent the removal from the apiary of any bees or equipment."

*1981 Amendment:* Added the last two sentences of (1) on class registration of apiaries; added material in (3)(d) after "which the apiary is located" relating to initial applications; inserted (3)(f) requiring information as to which class of apiary registration is being applied for; made change in grammar in (3)(g); added "and the class of apiary authorized by the registration" at the end of (4); inserted (10) providing for a penalty for failure to register an apiary; and inserted (11) explaining the effect of this section on registration issued prior to October 1, 1981.

**Administrative Rules**

ARM 4.12.102 Apiary — located by permission.
ARM 4.12.105 Delineating honey-producing seasons and registration periods.
ARM 4.12.113 Registration and certification fees — apiary fees.

**Attorney General's Opinions**

*Administrative Standards:* The Department of Agriculture may refuse to grant a permit for an apiary when there would be a danger of the spread of disease or when it would interfere with the proper feeding and honey flow of established registered apiaries. 36 A.G. Op. 84 (1976).

### 80-6-103. Changing locations — transfer of apiary sites.

**Compiler's Comments**

*2009 Amendments — Composite Section:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Chapter 468 throughout section substituted "apiary site" for "apiary"; in (1) in first sentence at beginning before "registered" deleted "established" and in second sentence at end inserted "if the apiary site is outside the currently registered quarter section"; in (2) deleted second sentence that read: "Registrations for new apiaries may not be issued for greater areas than the applicant can show are reasonably necessary for his needs consistent with good beekeeping practice"; in (3) in first sentence substituted "may be transferred" for "may be sold or transferred to a purchaser" and at end substituted "transferee" for "purchaser"; deleted former (3) and (4) that read: "(3) No person may increase the number of hives on an apiary to exceed the number of hives authorized by his certificate of registration for that apiary, except that a person may increase the number of hives on a general apiary beyond the number authorized by the certificate of registration in order to protect his bees during adverse weather or crop conditions or to protect his bees and hives from bears or other predators. A person may also enlarge a general apiary during the spring buildup and in the fall after the end of the honey season in order to gather his bees for shipment out of the state or to winter his bees on that apiary.

(4) A person enlarging an apiary so as to exceed the number of hives herein allowed is guilty of a misdemeanor and is subject to the penalties set forth in 80-6-303"; and made minor changes in style. Amendment effective October 1, 2009.

*1981 Amendment:* Inserted (3) providing exceptions to enlargement of apiaries beyond the number of hives authorized by registration; substituted "herein allowed is guilty of a misdemeanor and" for "authorized under a certificate of registration" in (4); inserted "set forth" after "penalties" in (4).

**Administrative Rules**

ARM 4.12.102 Apiary — located by permission.
ARM 4.12.103 New locations of apiaries.

## 80-6-104. Apiaries — termination of rights — abandonment.

**Compiler's Comments**

*2009 Amendments — Composite Section:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Chapter 468 in (1) substituted first sentence providing that apiary site not stocked for 10 consecutive days is considered forfeited for former first sentence that read: "The registration of an apiary which is not stocked with bees during at least part of the normal build-up or honey-producing season is forfeited and all rights under the certificate of registration terminate" and inserted second and third sentences pertaining to forfeiture exceptions due to natural disasters or other circumstances and requiring hives to be moved to other registered apiary sites; in (2) in two places substituted "apiary site" for "apiary" and near end before "may be seized" inserted "the bees and equipment at the site"; in (4) in first sentence inserted "Abandoned equipment and bees", after "sold" inserted "by the department", in second sentence substituted "may be returned" for "shall be returned", and at end inserted "if the owner is known, or placed in the apiary account in 80-6-315 if the owner cannot be determined"; in (5) in first and third sentences inserted "of the apiary site", at end of second sentence substituted "apiary site" for "property", and inserted fourth sentence requiring publication of notice; inserted (6) requiring notice to owner of land before burning equipment; and made minor changes in style. Amendment effective October 1, 2009.

*1987 Amendment:* In (2), near beginning, inserted "or pest"; near end of first sentence inserted "or any apiary not registered in accordance with 80-6-102"; and near beginning of second sentence inserted "pest-infected or".

**Administrative Rules**

ARM 4.12.104 Limitations of colonies.

ARM 4.12.105 Delineating honey-producing seasons and registration periods.

## 80-6-106. Application fee.

**Compiler's Comments**

*2019 Amendment:* Chapter 379 in (1) at beginning of second sentence and in (3) at beginning inserted exception clauses; inserted (2) regarding a hobbyist apiary site application fee limit of $19; and made minor changes in style. Amendment effective July 1, 2019.

*Effective Date:* This section is effective October 1, 2009.

**Administrative Rules**

ARM 4.12.113 Registration and certification fees — apiary fees.

## 80-6-111. General apiary site registrations.

**Compiler's Comments**

*2009 Amendments — Composite Section:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Chapter 468 in (1) in first sentence near middle after "honey flow" inserted "as it relates to bee health", substituted "general apiary sites" for "general apiaries registered to different persons on October 1, 1981", and in second sentence substituted "any apiary site" for "any general apiary that is located less than 3 miles from a general apiary registered to another person"; throughout (2), (3), and (4) substituted references to apiary sites for references to apiaries; in (4)(a) before "may register" deleted "registered to another person"; deleted former (4)(a) that read: "(a) his apiary was established and registered with the department as a general apiary under the department's rules in effect prior to July 1, 1981"; in (4)(a)(ii) substituted "80-6-102(3)" for "80-6-102(9)"; inserted (4)(b) providing for moving of general apiary sites upon department approval; inserted (5) providing that registration certificates may not be issued if proximity to other apiaries may cause certain problems; inserted (6) providing notice, protest, and hearing opportunity to owners of apiaries potentially affected by new apiary site; and made minor changes in style. Amendment effective October 1, 2009.

*1987 Amendment:* Near beginning of (1) inserted "pests".

## 80-6-112. Pollination apiary site registrations.

**Compiler's Comments**

*2009 Amendment:* Chapter 468 throughout section substituted references to apiary sites for references to apiaries; inserted (4) requiring department to attempt to notify general apiarists of proposed pollination apiary site; and made minor changes in style. Amendment effective October 1, 2009.

## 80-6-113. Landowner apiary site registrations.

**Compiler's Comments**

*2009 Amendment:* Chapter 468 in (1) in three places and in (2) in two places substituted "apiary site" for "apiary"; inserted (3) requiring department attempt to notify general apiarists of proposed landowner apiary site; inserted (4) providing that registration of landowner apiary business changed to general apiary business remains in effect if not forfeited or abandoned; and made minor changes in style. Amendment effective October 1, 2009.

## 80-6-114. Hobbyist apiary site — registrations.

**Compiler's Comments**

*2019 Amendment:* Chapter 379 deleted former (1) that read: "(1) A hobbyist apiary site is exempt from the registration provisions of this part, but a hobbyist beekeeper may voluntarily register with the department under this section. A hobbyist beekeeper voluntarily registering a site shall pay any required registration fee but is not required to reregister pursuant to 80-6-102"; and made minor changes in style. Amendment effective July 1, 2019.

*2009 Amendment:* Chapter 468 inserted (1) exempting hobbyist apiary site from registration and providing that volunteer registrant pay fee; in (2), (2)(a), and (3) in two places substituted "hobbyist apiary site" for "hobbyist apiary"; in (2)(c) after "hobbyist" inserted "apiary site"; deleted former (2)(d) that read: "(d) If the department determines that too many hobbyist apiaries are being registered within too close proximity of each other or of other established apiaries so that there is or may be danger of the spread of bee diseases, pests, or other contagious or infectious diseases among bees or apiaries or that there will be interference with the proper feeding and honey flow of established apiaries, the department may refuse to grant any further hobbyist registrations in the locality and area of the danger, in accordance with 80-6-102(6)"; and made minor changes in style. Amendment effective October 1, 2009.

*1987 Amendment:* Near middle of (1)(d) inserted reference to "pests".

## Part 2
## Inspection and Certification — Apis Bees

## 80-6-201. Apiaries — powers and duties of department.

**Compiler's Comments**

*2019 Amendment:* Chapter 379 in (1)(c) near middle of second sentence after "the apiary site is registered" deleted "or the owner of an unregistered hobbyist apiary site". Amendment effective July 1, 2019.

*2009 Amendment:* Chapter 468 inserted (1)(a) authorizing department to enter private land to determine health or ownership of bees; in (1)(c) in second sentence substituted "person to whom the apiary site is registered or the owner of an unregistered hobbyist apiary site" for "owner or person in charge", in third sentence after "service" deleted "upon the owner or person in charge of the property", inserted fourth sentence requiring notice before burning equipment; in (1)(d) in five places substituted "apiary site" for "apiary"; in (1)(d)(iii) near end of first sentence inserted "at the owner's last-known address"; inserted (1)(d)(iv) authorizing owner to enter quarantined apiary site; inserted (1)(g) authorizing department to inspect apiary site at request and expense of interested party; and made minor changes in style. Amendment effective October 1, 2009.

*1991 Amendment:* Inserted (4) allowing Department to enter into agreements in carrying out Montana bee policy; and made minor changes in style. Amendment effective February 1, 1991.

*Severability:* Section 4, Ch. 9, L. 1991, was a severability clause.

*1987 Amendment:* In introductory clause of (1) inserted "pests and"; in (1)(b), after "contaminated", inserted "with disease or pests"; in (1)(c), near beginning, inserted reference to "pests"; inserted (1)(d) allowing the Department to establish by rule interior and exterior quarantines; at end of (1)(e) inserted "or pests"; and inserted (3) allowing departmental provision of disease and pest inspection, sampling, and laboratory analysis services and allowing fees therefor.

*1987 Statement of Intent:* The statement of intent attached to Ch. 198, L. 1987, provided: "A statement of intent is required for this bill because it provides the department of agriculture authority to adopt rules for administration of this act.

It is the intent of the legislature that the department establish rules for the detection of pest honeybees by using the most efficient, scientifically acceptable method of identifying pests.

It is further the intent of the legislature that the department establish by rule a fee structure for laboratory services. The department should set fees to correspond with the costs of providing services. These costs include both direct and indirect costs, plus expenses associated with operation of the laboratory authorized under section 9 [80-6-311].

In setting fees, the department may take into consideration the economic difficulties of the apiary industry and may reduce fees as may be necessary to promote increased use of services. The department may provide services at less than cost if alternative funding is available or if the economic conditions of the industry require the reduction of charges.

In addition, it is the intent of the legislature that the department establish by rule an effective method for conducting quarantines to prevent the entry and spread of harmful honeybee pests and diseases, such as Africanized honeybees and honeybee mites. It is contemplated that the department quarantine any apiary where pest honeybees or any contagious or infectious diseases are present and, during the quarantine, prevent the removal from the apiary of any bees or equipment."

**Administrative Rules**

Title 4, chapter 12, subchapter 1, ARM Apiculture rules.

**80-6-202. Inspection of bees or used beekeeping equipment transported interstate.**

**Compiler's Comments**

*2009 Amendment:* Chapter 468 substituted (1) regarding certification as pest-free and disease-free for former first sentence that read: "A person may not transport or bring into the state bees or used beekeeping equipment or containers, including honey to be extracted, unless under a compliance agreement or certified and marked as being apparently pest- and disease-free by an official responsible for apiary regulations of the state from which they are being moved"; in (2) in second sentence substituted "80-6-201(1)(d)" for "80-6-201(1)(c)" and after "90 days" deleted "and at least until the following July 1"; in (4)(a) substituted "subsections (1) through (3)" for "subsection (1)", after "paid" deleted "in advance", and after "equipment" inserted "following the inspection"; in (4)(b) substituted "inspection" for "compliance agreement"; deleted first sentence of former (2)(b)(iv) that read: "(iv) except as provided in this subsection (2)(b)(iv), a fee of $75 for the issuance of a certificate of health"; in (4)(b)(iii), in (4)(c)(iii), and in (4)(d)(iv) increased maximum fee from $100 to $150; in (4)(c) in introductory clause substituted "certificate of health" for "compliance agreement"; in (4)(c)(iii) at beginning substituted "a fee" for "except as provided in this subsection (2)(c)(iii), a fee of $75"; in (4)(d)(iv) at beginning substituted "a fee" for "except as provided in this subsection (2)(d)(iv), a fee of $75"; and made minor changes in style. Amendment effective October 1, 2009.

*2003 Amendment:* Chapter 11 in (2)(b)(iv) at beginning inserted exception clause, increased fee from $50 to $75, and inserted second and third sentences authorizing adjustment of fee by rule and setting minimum and maximum fees; in (2)(c)(iii) at beginning inserted exception clause, increased fee from $50 to $75, and inserted second and third sentences authorizing adjustment of fee by rule and setting minimum and maximum fees; in (2)(d)(iv) at beginning inserted exception clause, increased fee from $50 to $75, and inserted second and third sentences authorizing adjustment of fee by rule and setting minimum and maximum fees; and made minor changes in style. Amendment effective February 11, 2003.

*1991 Amendment:* In six places throughout section inserted reference to bees with regard to materials and equipment; in first sentence of (1), before "certified", inserted "under a compliance agreement or"; at beginning of (2)(b) inserted "Inspection fees for persons without a valid Montana compliance agreement"; inserted (2)(b)(iii) requiring inclusion of inspection fees at an hourly rate for persons without a compliance agreement; inserted (2)(c) establishing inspection fees for persons who have a compliance agreement; inserted (2)(d)(iii) requiring payment of an hourly rate for inspection of bees and materials from other states; and made minor changes in style. Amendment effective February 1, 1991.

*Severability:* Section 4, Ch. 9, L. 1991, was a severability clause.

*1987 Amendment:* In first and last sentence of (1) inserted "being apparently pest- and" before "disease-free" and in third sentence inserted "inspected and found to be apparently free of pests and diseases or until it has been"; and in (2) increased fee to $50 from $20 in two places and inserted reference to "pests" before "contagious or infectious disease".

**Administrative Rules**

ARM 4.12.106 Inspection of apiary equipment.
ARM 4.12.107 Inspection of pesticides damages.
ARM 4.12.108 Hourly inspection fee.

**80-6-203. Importation of bees in packages or queen cages.**

**Compiler's Comments**

*2009 Amendment:* Chapter 468 near middle substituted "packages or queen cages" for "combless packages"; and made minor changes in style. Amendment effective October 1, 2009.

## Part 3
## General Provisions — Apis Bees

**80-6-301. Orders effective until reversed or modified by court.**

**Administrative Rules**

Title 4, chapter 12, subchapter 1, ARM Apiculture rules.

**80-6-303. Penalty.**

**Compiler's Comments**

*2009 Amendment:* Chapter 468 in (1)(a) in first sentence at beginning inserted exception clause, after "is subject to" deleted "one or both of the following penalties", and in second sentence substituted "subsection (1)" for "subsection (1)(a)"; deleted former (1)(b) that read: "(b) if the offense is a misdemeanor, a fine of not less than $25 or more than $500 or imprisonment in the county jail not exceeding 1 year, or both"; inserted (1)(b) providing that a person assessed a penalty is subject to payment of department costs; inserted (2) providing administrative penalty; in (3) in first sentence at end substituted "subsection (1)" for "subsection (1)(a)"; and made minor changes in style. Amendment effective October 1, 2009.

*2003 Amendment:* Chapter 11 at end of (1)(a) substituted "state special revenue account provided for in 80-6-315" for "general fund"; and made minor changes in style. Amendment effective February 11, 2003.

*1993 Amendment:* Chapter 491 substituted (1)(a) and (1)(b) providing that a person violating or aiding in the violation of parts 1 through 3 or rules adopted under parts 1 through 3 is subject to either or both an administrative civil penalty not exceeding $1,000 to be deposited in the general fund or if the offense is a misdemeanor, a fine of not less than $25 or more than $500 or imprisonment in the county jail not exceeding 1 year, or both, for former language that read: "A person violating parts 1 through 3 is guilty of a misdemeanor and shall be fined not less than $25 or more than $500 or imprisoned in the county jail not exceeding 1 year or both fined and imprisoned"; inserted (2) requiring Department to establish by rule a penalty matrix scheduling types of penalties, amounts of penalties for first and subsequent violations, and any other matters necessary for administration of civil penalties and subjecting issuance of civil penalty to contested case procedures of Title 2, chapter 4, part 6; and inserted (3) providing that this part may not be construed as requiring the Department or its representatives to report violations of this part if public interest is best served by suitable notice or warning. Amendment effective July 1, 1993.

*1993 Statement of Intent:* The statement of intent attached to Ch. 491, L. 1993, provided: "A statement of intent is required for this bill because additional rulemaking authority is extended to the department of agriculture's present authority to regulate apiculture in the following sections:

(1) The definition of "bee diseases" in 80-6-101(2) is intended to allow the department to establish by rule what specific diseases of bees are subject to regulation.

(2) Section 80-6-303(2) is intended to grant the department the authority to establish a penalty matrix that sets out the kinds of administrative penalties that are applicable to violations of Montana apiculture law and to delineate the degrees of penalty that may be assessed for initial and subsequent administrative violations."

**Administrative Rules**

ARM 4.12.109 Civil penalties — enforcement.

ARM 4.12.110 Civil penalties — matrix.

**80-6-311. Bee laboratory authorized.**

**Compiler's Comments**

*1987 Statement of Intent:* The statement of intent attached to Ch. 198, L. 1987, provided: "A statement of intent is required for this bill because it provides the department of agriculture authority to adopt rules for administration of this act.

It is the intent of the legislature that the department establish rules for the detection of pest honeybees by using the most efficient, scientifically acceptable method of identifying pests.

It is further the intent of the legislature that the department establish by rule a fee structure for laboratory services. The department should set fees to correspond with the costs of providing services. These costs include both direct and indirect costs, plus expenses associated with operation of the laboratory authorized under section 9 [80-6-311].

In setting fees, the department may take into consideration the economic difficulties of the apiary industry and may reduce fees as may be necessary to promote increased use of services. The department may provide services at less than cost if alternative funding is available or if the economic conditions of the industry require the reduction of charges.

In addition, it is the intent of the legislature that the department establish by rule an effective method for conducting quarantines to prevent the entry and spread of harmful honeybee pests and diseases, such as Africanized honeybees and honeybee mites. It is contemplated that the department quarantine any apiary where pest honeybees or any contagious or infectious diseases are present and, during the quarantine, prevent the removal from the apiary of any bees or equipment."

**80-6-315. State special revenue account — source of funds.**

**Compiler's Comments**

*Effective Date:* Section 8, Ch. 11, L. 2003, provided: "[This act] is effective on passage and approval." Approved February 11, 2003.

## Part 11
## Alfalfa Leaf-Cutting Bees

**Part Compiler's Comments**

*1987 Statement of Intent:* The statement of intent attached to Ch. 310, L. 1987, provided: "It is the specific intent of the legislature that the department of agriculture shall establish standards for tolerances of pathogens and parasites and may establish standards for predators and nest destroyers that threaten alfalfa leaf-cutting bees. These standards should specify the parameters for the certification, importing, and quarantining of bees. The standards should be based upon scientific and economic considerations. The department also should establish the necessary procedures for registration, certification, quarantining, sampling, importing, and other functions designated in the act. These procedures should be reasonable and be based upon scientifically sound practices or logical administrative management. It is further the intent of the legislature that the department establish fees for services on a cost basis. The department shall consider both direct and indirect cost in determining the proper fee structure."

**Part Administrative Rules**

Title 4, chapter 12, subchapter 12, ARM Alfalfa leaf-cutting bee rules.

**80-6-1101. Short title.**

**Compiler's Comments**

*1987 Amendment:* Before "Act" inserted "Management".

**80-6-1102. Definitions.**

**Compiler's Comments**

*1997 Amendment:* Chapter 4 in definition of committee substituted reference to Montana Alfalfa Seed Committee established in 2-15-3004 for reference to Alfalfa Leaf-Cutting Bee Committee established in 2-15-3005. Amendment effective July 1, 1997.

*Preamble:* The preamble attached to Ch. 4, L. 1997, provided: "WHEREAS, the Legislature finds that the alfalfa seed industry and the alfalfa leaf-cutting bee industry are closely related; and

WHEREAS, the Legislature also finds that it is in the best interest of the people of the State of Montana to promote economy in government regulation of industry; and

WHEREAS, it is the intent of the Legislature to combine with the Montana Alfalfa Seed Committee the duties, responsibilities, and representation of the Alfalfa Leaf-Cutting Bee Committee and to grant the Montana Alfalfa Seed Committee the authority to administer the Alfalfa Leaf-Cutting Bee Management Act and the Alfalfa Seed Industry Act."

*Transition:* Section 4, Ch. 4, L. 1997, provided:"(This act] merges the alfalfa leaf-cutting bee committee into the Montana alfalfa seed committee and revises the membership of the Montana alfalfa seed committee to accommodate the merger. Because there are now incumbents holding positions on both committees, the legislature intends for the governor to make membership adjustments when necessary on and after [the effective date of this act] [effective July 1, 1997], in accordance with 2-15-3004 as amended by [this act]."

*1995 Amendment:* Chapter 57 deleted definition of custom pollinator that read: ""Custom pollinator" means a registered bee grower who for the purpose of pollination moves bees onto property not owned or leased by him"; deleted definition of emergency situation that read: ""Emergency situation" means a situation that requires the untimely movement of bees to a new food source. A situation may include drought, flood, hail damage, and other similar situations as defined by committee rule"; deleted definition of unrestricted area that read: ""Unrestricted area" means an area where a person may use new or used drilled boards, imported used laminates, or any similar material in the rearing of bees"; and made minor changes in style. Amendment effective February 10, 1995.

*1989 Amendment:* In definition of certification substituted "committee" for "department"; inserted definition of chalkbrood; in definition of committee, after "bee", deleted "advisory"; inserted definitions of custom pollinator and emergency situation; in definition of equipment, after "means", deleted "grooved boards" and after "apparatus" inserted "except nesting materials"; in definition of nesting materials, after "means", deleted "equipment" and after "laminates" inserted "drilled boards"; in definition of predator, after "organism", inserted "or insect" and after "bees" inserted "or nests"; inserted definition of unrestricted area; in definition of wild trap, after "means to", inserted "intentionally"; and made minor changes in form. Amendment effective March 20, 1989.

*1987 Amendment:* Deleted former (4) defining custom pollinator; inserted definitions of nest destroyer and predator; in (9), after "organism", deleted "parasitic or otherwise"; and in (12), after "owned", inserted "or leased".

*1983 Amendment:* Inserted (4) defining department.

## 80-6-1103. Committee responsibilities — adoption of rules.

**Compiler's Comments**

*1989 Amendment:* Throughout section changed "department" to "committee"; in (6)(b), after "equipment", inserted "and nesting material"; in (6)(c), after "equipment", inserted "or nesting material"; in (6)(d), after "equipment", inserted "or nesting material"; inserted (7) relating to abandoned nesting material or bees; and made minor changes in phraseology and punctuation. Amendment effective March 20, 1989.

*1987 Amendment:* In (3) inserted language concerning adoption of rules establishing standards for the presence of predators and nest destroyers and after "imported" inserted "quarantined"; inserted (4) allowing the Department to provide information and services relating to alfalfa leaf-cutting bees and alfalfa seed production; in (6)(a), after "inspect", inserted "equipment" and after "bees" deleted "or equipment that may be diseased or contaminated by parasites"; inserted (6)(b) allowing the Department to establish quarantines to regulate entry of bees and equipment; in (6)(c), after "contaminated", substituted "levels exceeding importation or quarantine" for "with pathogens at a level exceeding certification"; in (6)(d), after "destruction", inserted "or removal" and after "equipment that" substituted "does not meet importation or quarantine standards" for "is infected or contaminated with parasites or pathogens and that does not meet certification standards"; in (7)(a) substituted "bees" for "diseased or parasitic bee or equipment or otherwise possesses any bee" and after "quarantine" deleted "for not more than 30 days"; in (7)(b), after "quarantine", deleted "or order to hold bees upon the failure to detect disease in any official sample of bees, as provided by department rule, or on equipment and" and after "equipment are" deleted "possessed"; and made minor changes in phraseology.

*1983 Amendment:* In (5)(b), after "order to hold bees" inserted "upon the failure to detect disease in any official sample of bees, as provided by department rule, or on equipment and"; and after "bees and equipment" deleted "are disease-free and".

**Administrative Rules**

ARM 4.12.1220 Purpose of rules.
ARM 4.12.1221 Registration procedures and fees.
ARM 4.12.1224 Official certification procedures and fees.

## 80-6-1104. Advisory duty of committee.

**Compiler's Comments**

*1989 Amendment:* At end substituted "under this part" for "by the department". Amendment effective March 20, 1989.

*1987 Amendment:* Substituted periodic meetings for requirement of meeting at least once a year.

### 80-6-1105. Alfalfa leaf-cutting bees — certification.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

*1989 Amendment:* Throughout section changed "department" to "committee"; near middle of introductory clause in (2) substituted "a fee set by rule" for "the certification fee set by department rule"; in (2)(a) substituted "certified" for "registered"; at end of second sentence of (3) deleted "and sex ratio"; in (5), before "fee", substituted "an appropriate" for "a certification"; near beginning of (6) inserted "by rule" and deleted last sentence that read: "Applications for certification received after the date specified shall be assessed a penalty equal to 10% of the applicable certification fee but not exceeding $50"; and made minor change in phraseology. Amendment effective March 20, 1989.

*1987 Amendment:* After (1) substituted existing language (see 1987 Session Law for text) for "No person may import, possess, or control alfalfa leaf-cutting bees in the state of Montana unless the bees are certified annually, as provided in this section"; in (2) inserted "rule"; in (3), in second sentence, substituted "analyzed" for "inspected", after "parasites" inserted "predators, nest destroyers, live larvae count, and sex ratio", in third sentence, after "If", deleted "no pathogens or parasites in excess of", and after "certified" deleted "as to the appropriate class"; inserted (4) allowing bees to be certified to be stored in containers which can be officially sealed; and made minor changes in phraseology.

*1983 Amendment:* At end of (3), substituted "certified as to the appropriate class" for "reported disease-free"; in (4), substituted "meets certification standards" for "is disease-free"; in (5), substituted "certification" for "recertification"; and at end of (5), inserted "but not exceeding $50".

**Administrative Rules**

ARM 4.12.1224 Official certification procedures and fees.

ARM 4.12.1225 Bee sampling procedure for the certification of bees.

### 80-6-1106. Bee laboratory authorized.

**Compiler's Comments**

*1989 Amendment:* In two places substituted "committee" for "department". Amendment effective March 20, 1989.

*1987 Amendment:* In middle of first sentence, after "providing", deleted "disease and parasite".

*1985 Amendment:* In first sentence after "maintain a laboratory", deleted "at Montana state university".

### 80-6-1107. Restrictions on importing bees.

**Compiler's Comments**

*1995 Amendment:* Chapter 57 deleted (1) that read: "(1) All bees to be imported shall meet importation, quarantine, and certification requirements established under 80-6-1103 and must be registered in accordance with 80-6-1111"; deleted (2) that read: "(2) Prior to the importation of any bee, the importer shall file a completed application form as required in 80-6-1105(2) and arrange an approximate date and time for official sampling"; deleted (4) that read: "(4) A representative sample of the population of bees imported shall be the basis for certification"; and deleted (5) that read: "(5) A bee may not be certified unless all other requirements for certification provided in 80-6-1105 are met." Amendment effective February 10, 1995.

*1989 Amendment:* Deleted former (3) that read: "(3) Every imported bee must be shipped to a storage facility designated by the department for sampling purposes. Prior to certification, each bee, container, and piece of associated equipment must be quarantined at the designated storage facility"; deleted former (6) that read: "(6) No person may import used equipment or nesting materials"; and made minor changes in phraseology. Amendment effective March 20, 1989.

*1987 Amendment:* Substituted (1) (see 1987 Session Law for text) for former (1) that read: "No bee may be imported into the state of Montana except under the provisions of this section"; at end of (2) substituted "official sampling" for "inspection"; in (3), after "department", deleted "rule"; in (4), after "adequate", substituted "sampling" for "inspection"; in (5), after "shall be", deleted "inspected as"; and made minor changes in phraseology.

*1983 Amendment:* In first sentence of (3), substituted all language after "shipped" for "directly to the certification laboratory to be examined for infestation by parasites or pathogens"; in last sentence of (3), substituted all language after "each bee" for "and associated transport equipment shall be quarantined at the laboratory".

## 80-6-1108. Restrictions on rearing, moving, and trapping of bees and movement of equipment.

**Compiler's Comments**

*1995 Amendment:* Chapter 57 in (1), at end, substituted "wild trap within 1 mile of registered bees without the written permission of the registrant" for "rear any bee in a drilled board or a nesting material from which samples of loose larval cells cannot readily be obtained, except in an unrestricted area"; deleted (4) that read: "(4) A person may not sell bees for use in Montana unless the bees are officially certified in accordance with 80-6-1103 and 80-6-1105"; deleted (5) that read: "(5) Any purchase of used nesting material in the state must be reported to the committee"; and made minor changes in style. Amendment effective February 10, 1995.

*1989 Amendment:* At end of (1) inserted "except in an unrestricted area"; in (2) and (3), in two places, substituted "committee" for "department"; in (4), after "sell", deleted "or distribute" and before "in Montana" inserted "for use"; inserted (5) that read: "(5) Any purchase of used nesting material in the state must be reported to the committee"; and made minor changes in phraseology. Amendment effective March 20, 1989.

*1987 Amendment:* In (3) inserted second sentence requiring the Department to establish, by rule, a permit fee; and inserted (4) prohibiting sale or distribution of noncertified bees.

*1983 Amendment:* In (1), before "a nesting material" inserted "a drilled board or".

**Administrative Rules**

ARM 4.12.1230 Disease control — wild trapping permit — fee.

## 80-6-1109. Fees to be set by rule — account established.

**Compiler's Comments**

*2015 Amendment:* Chapter 102 in (1) in middle of second sentence inserted "when combined with other revenue sources available to the committee" and deleted former last sentence that read: "It is the intent of the legislature that committee activities under this part be self-supporting"; in (2) at beginning of second sentence inserted reference to account makeup; in (2)(a) at end deleted "must be paid into the leaf-cutting bee account"; inserted (2)(b) and (2)(c) concerning alfalfa seed assessment money and grants, donations, or gifts; and made minor changes in style. Amendment effective July 1, 2015.

*2009 Amendment:* Chapter 486 in (2) near beginning of first sentence substituted "account in the state special revenue fund" for "enterprise fund"; in (2) in two places and in (3) in two places substituted "account" for "fund"; and made minor changes in style. Amendment effective July 1, 2009.

*1989 Amendment:* Throughout section changed "department" to "committee"; and made minor changes in phraseology. Amendment effective March 20, 1989.

*1987 Amendment:* Inserted (3) allowing investment of fund money pursuant to the unified investment program and providing for crediting of income to the fund.

*1983 Amendment:* In (2), changed "earmarked revenue account" to "enterprise fund" and changed "account" to "fund" in two places.

**Administrative Rules**

ARM 4.12.1221 Registration procedures and fees.
ARM 4.12.1224 Official certification procedures and fees.
ARM 4.12.1229 Fees established for service samples.

## 80-6-1110. Violation — penalty.

**Compiler's Comments**

*1989 Amendment:* Near middle substituted "committee" for "department". Amendment effective March 20, 1989.

## 80-6-1111. Alfalfa leaf-cutting bees — registration.

**Compiler's Comments**

*1995 Amendment:* Chapter 57 in (1), after "registered", deleted "annually"; substituted (3) regarding continuous registration for former language that read: "The committee shall by rule specify the date by which any applicant must apply for reregistration each year. Applications for reregistration received after the date specified must be assessed a penalty equal to 50% of the applicable registration fee"; and made minor changes in style. Amendment effective February 10, 1995.

*1989 Amendment:* In (2)(c) substituted "committee" for "department"; deleted former (3) that read: "(3) One sample of the bees to be registered must be sent to the department by the beekeeper or his agent. This sample must be analyzed for pathogens and parasites at no cost to the beekeeper. Additional samples may be sent to the department for analysis on a fee-for-service basis as established by rule"; at beginning of (3) substituted "committee" for "department" and after "shall" inserted "by rule"; and made minor changes in phraseology. Amendment effective March 20, 1989.

**Administrative Rules**

ARM 4.12.1221 Registration procedures and fees.

### 80-6-1112. Funding limitation.

**Compiler's Comments**

*2015 Amendment:* Chapter 102 in (1) in first sentence substituted "deposited in the special revenue account provided for in 80-6-1109" for "which are raised by fees under this part". Amendment effective July 1, 2015.

*1989 Amendment:* In (1), in two places, changed "department" to "committee"; inserted (2) regarding contracting of lab services; and inserted (3) through (6) relating to certification fees. Amendment effective March 20, 1989.

# CHAPTER 7

# DISEASE, PEST, AND WEED CONTROL

**Chapter Administrative Rules**

Title 4, chapter 5, ARM Noxious weed management.

Title 4, chapter 12, subchapter 14, ARM Distribution and inspection of orchards and nurseries.

## Part 1

## Control of Diseases and Insects in Nurseries

**Part Administrative Rules**

Title 4, chapter 12, subchapter 14, ARM Distribution and inspection of orchards and nurseries.

**Part Attorney General's Opinions**

*Availability of Viral Indexing Services:* Nurserymen in Montana seeking to export nursery stock to Canada must have the stock virally indexed, i.e., certified by a state agency to be free of significant viral infection. Neither the Department of Agriculture nor Montana State University (now Montana State University-Bozeman) is required to conduct viral indexing of nursery stock. However, the Department of Agriculture is authorized to provide viral indexing services to nurserymen under 80-7-112 (now repealed) and 80-7-132. 39 A.G. Op. 26 (1981).

### 80-7-105. Definitions.

**Compiler's Comments**

*2019 Amendment:* Chapter 92 in definition of plant pest substituted "7-22-2101" for "7-22-2101(8)(a)(i)"; and made minor changes in style. Amendment effective October 1, 2019.

*2017 Amendment:* Chapter 389 in definition of nursery substituted "offered for sale, or distributed" for "or offered for sale or resale or as part of a landscape service"; in definition of nursery stock after "aquatic plants" deleted "cut trees and their products", at beginning of second sentence substituted "Certain plants and plant materials intended for human or animal consumption and not intended for planting" for "The following plants and plant materials", in second sentence after "may not be considered nursery stock" inserted "including the following", and in (a) substituted current text for "field crop plants and seeds"; deleted definition that read: ""Nursery stock certification" means the process by which the nursery stock or other plants have been inspected and found to meet certification standards established by department rule"; deleted definition that read: ""Small plant vendor" means a Montana firm that is engaged in the business of selling or distributing nursery stock, including coniferous Christmas decorations, and that:

(a) grows in Montana the nursery stock offered for sale or distribution; and

(b) has gross annual sales of less than $1,000 in a calendar year"; and made minor changes in style. Amendment effective May 19, 2017.

*Saving Clause:* Section 11, Ch. 389, L. 2017, was a saving clause.

*Severability:* Section 12, Ch. 389, L. 2017, was a severability clause.

*2009 Amendment — Coordination:* Section 2, Ch. 393, L. 2009, a coordination section, inserted (9) defining small plant vendor. Amendment effective April 28, 2009.

The amendment to this section made by sec. 1, Ch. 384, L. 2009, was rendered void by sec 2, Ch. 393, L. 2009, a coordination section.

*2007 Amendment:* Chapter 384 inserted definitions of landscape service and plant dealer; in definition of nursery stock near middle after "parts of plants" inserted "including but not limited to tropical potted plants, aquatic plants, cut trees and their products, and turf or sod grass", deleted former (a) that read: "(a) aquatic plants used for aquarium purposes", deleted former (e) that read: "(e) corms, tubers, and bulbs", and in (e) after "products" substituted "that are going to be processed to a point that they no longer represent a pest risk" for "for processing"; in definition of plant pest near beginning of first sentence after "insect" inserted "weed"; and made minor changes in style. Amendment effective October 1, 2007.

*2001 Amendment:* Chapter 407 in definition of plant pest in second sentence after "as defined in" substituted "7-22-2101(8)(a)(i)" for "7-22-2101(7)(a)(i)"; and made minor changes in style. Amendment effective July 1, 2001.

*Effective Date:* Section 14, Ch. 551, L. 1993, provided: "[This act] is effective January 1, 1994."

**80-7-106. License required — application and payment of license fee — exemption.**

**Compiler's Comments**

*2017 Amendment:* Chapter 389 throughout section substituted "landscape service" for "small plant vendor"; in (1)(a) at end inserted "for each location" and deleted former last sentence that read: "If the firm, nursery, plant dealer, or small plant vendor is required to be licensed and sells or distributes nursery stock, the firm, nursery, plant dealer, or small plant vendor shall obtain a license for each taxpayer identification number the firm, nursery, plant dealer, or small plant vendor uses when selling or distributing nursery stock"; deleted former (1)(b)(ii) that read: "(ii) operates only in Montana and has less than $1,000 in gross annual sales of nursery stock"; substituted (3) concerning license fees for former (3) and (4) that read: "(3) (a) A firm, nursery, plant dealer, or small plant vendor that earns at least $1,000 but less than $5,000 in gross annual sales of nursery stock shall pay a license fee of $25.

(b) A firm, nursery, plant dealer, or small plant vendor that earns $5,000 or more in gross annual sales of nursery stock shall pay a license fee of $100.

(4) The department may seek verification from the department of revenue as to whether a firm, nursery, plant dealer, or small plant vendor has met the income thresholds established in this section"; in (4) after "failing to renew a license" inserted "for any location"; and at end substituted "the license for the location" for "each license"; in (5) at end deleted "and may be discounted for payment processing charges paid by the department to a third party"; and made minor changes in style. Amendment effective May 19, 2017.

*Saving Clause:* Section 11, Ch. 389, L. 2017, was a saving clause.

*Severability:* Section 12, Ch. 389, L. 2017, was a severability clause.

*2011 Amendment:* Chapter 341 in (1) substituted current language for "A firm, nursery, or plant dealer engaging in the business of selling or distributing nursery stock in this state shall obtain a license from the department. If the firm, nursery, or plant dealer sells or distributes nursery stock at more than one location, the firm, nursery, or plant dealer shall obtain:

(a) one license if its combined annual gross sales are less than $10,000; and

(b) a license for each location if its gross annual sales are $10,000 or more"; in (2), (3)(b), and (5) inserted "or small plant vendor"; deleted former (3) that read: "(3) A small plant vendor must be licensed but is exempt from the license fee requirements of this section"; in (3)(a) substituted current language for former (4)(a) and (4)(b) that read: "(a) A firm, nursery, or plant dealer that earns less than $1,000 in gross annual sales of nursery stock must be licensed but is exempt from licensing fees.

(b) A firm, nursery, or plant dealer that earns $1,000 but less than $3,000 in gross annual sales of nursery stock shall pay a license fee of $50"; in (3)(b) substituted "$5,000 or more" for "$3,000 but less than $10,000" and decreased license fee to $100 from $125; deleted former (3)(d) that read: "(d) A firm, nursery, or plant dealer that earns $10,000 or more in gross annual sales of nursery stock shall pay a license fee of $160"; in (4) inserted "a firm, nursery, plant dealer, or small plant vendor has met" and at end deleted "have been met"; and made minor changes in style. Amendment effective May 6, 2011.

*2009 Amendments — Composite Section:* Chapter 384 inserted (3) relating to a small plant vendor. Amendment effective April 28, 2009.

Chapter 393 in (1) near end of first sentence after "license" deleted "for each location", inserted second sentence and (1)(a) and (1)(b) regarding licensure if nursery stock is sold or distributed at more than one location; deleted former (3) that read: "The department shall establish license fees by rule. License fees may be no less than $95 or more than $125. If the department determines that the revenue from the license fee is inadequate to accomplish the purposes of this chapter, the department may by rule increase the fee within the statutory limit"; inserted (4) and (5) establishing license fees and allowing verification of income thresholds; deleted former (5) that read: "(5) An out-of-state firm that imports nursery stock into Montana for resale by a licensed Montana nursery or plant dealer is not required to obtain a license if the firm is licensed in the state of origin of the nursery stock and if that state extends a similar exemption to Montana firms"; and made minor changes in style. Amendment effective April 28, 2009.

*2007 Amendment:* Chapter 384 in (1) near beginning, in (2) near beginning of first sentence, and in (4) near beginning after "firm" inserted "nursery, or plant dealer"; in (1) near end after "each" substituted "location" for "nursery"; deleted former (3) that read: "(3) (a) A nursery that earns less than $1,000 in gross annual sales of nursery stock and that submits an affidavit to that effect to the department is exempt from licensing.

(b) A nursery that earns $1,000 but less than $3,000 in gross annual sales of nursery stock and that submits an affidavit to that effect to the department shall pay a license fee of $30.

(c) A nursery that earns $3,000 or more in gross annual sales of nursery stock shall pay a license fee of $95"; inserted (3) allowing the setting of fees by rule and setting a fee range; in (4) near end after "nonrefundable" substituted "late" for "application"; in (5) after "nursery" inserted "or plant dealer"; deleted former (6) that read: "(6) If the department determines that the revenue from the license fee is inadequate to accomplish the purposes of this chapter, the department may by rule increase the fee"; and made minor changes in style. Amendment effective October 1, 2007.

*1999 Amendment:* Chapter 54 in (3)(a) and (3)(b) substituted "an affidavit" for "a notarized affidavit". Amendment effective March 15, 1999.

*1997 Amendment:* Chapter 366 in (2), at end of first sentence, substituted "the anniversary date established by the board of review established in 30-16-302" for "December 31 following the date of issue" and at end of second sentence inserted "and in the form determined by rule by the board of review established in 30-16-302"; in (4), after "license", substituted "on or before the annual anniversary date provided for in subsection (2)" for "by January 1 of each year"; inserted (7) regarding payment of fees by credit card and discounting of fees; and made minor changes in style.

*1997 Statement of Intent:* The statement of intent attached to Ch. 366, L. 1997, provided:"A statement of intent is required for this bill because [section 1] [30-16-104] grants rulemaking authority to the board of review established in 30-16-302 for the purpose of implementing a one-stop business licensing pilot project required by the 54th Legislature."

*1995 Amendment:* Chapter 147 deleted former (3) that read: "(3) The license fee is $95 per nursery"; inserted (3)(b) setting license fee for nurseries earning $1,000 to $3,000; inserted (3)(c) setting license fee for nurseries earning $3,000 or more; and made minor changes in style. Amendment effective January 1, 1996.

*Effective Date:* Section 14, Ch. 551, L. 1993, provided: "[This act] is effective January 1, 1994."

**Administrative Rules**

ARM 4.12.1445 Nursery fees.

## 80-7-107. Grounds for refusal or revocation of license.

**Compiler's Comments**

*1993 Amendment:* Chapter 551 in introductory clause, after "department", inserted "in accordance with Title 2, chapter 4"; at beginning of (1) substituted "firm" for "person"; and at end of (2) deleted "or the horticulture laws". Amendment effective January 1, 1994.

## 80-7-108. Nursery stock inspections.

**Compiler's Comments**

*2017 Amendment:* Chapter 389 in (1) substituted "landscape service" for "small plant vendor"; deleted former (2) and (3) that read: "(2) A firm, nursery, plant dealer, or small plant vendor may request the inspection of nursery stock, plants, or other materials by giving the department 5 days' notice prior to the time when the nursery stock, plants, or other materials are ready for inspection. The firm, nursery, plant dealer, or small plant vendor shall pay a fee to the department for an inspection conducted pursuant to this section. The fee must cover the actual costs of inspection, surveys, and other services performed by the department and may not be less than $42 per hour or more than $50 per hour as established by department rule.

(3) The department may issue a plant inspection certificate based on the results of a nursery stock or other plant inspection or inspection survey"; and made minor changes in style. Amendment effective May 19, 2017.

*Saving Clause:* Section 11, Ch. 389, L. 2017, was a saving clause.

*Severability:* Section 12, Ch. 389, L. 2017, was a severability clause.

*2011 Amendment:* Chapter 341 in (1)(a) at end deleted "An inspection fee may not be assessed if the department requests the inspection"; inserted (1)(b) relating to scheduling inspections; in (2) at end of second sentence substituted "shall pay a fee to the department for an inspection conducted pursuant to this section" for "requesting an inspection shall pay a fee as established by department rule" and at end of last sentence substituted "performed by the department and may not be less than $42 per hour or more than $50 per hour as established by department rule" for "required to issue the plant inspection certificate"; and made minor changes in style. Amendment effective May 6, 2011.

*2009 Amendment:* Chapter 384 in (1) and in (2) in two places after "dealer" inserted reference to small plant vendor; in (1) before "firm" inserted "licensed"; and made minor changes in style. Amendment effective April 28, 2009.

*2007 Amendment:* Chapter 384 in (1) near beginning of first sentence and in (2) near beginning of first and second sentences after "nursery" inserted "or plant dealer"; and made minor changes in style. Amendment effective October 1, 2007.

*Effective Date:* Section 14, Ch. 551, L. 1993, provided: "[This act] is effective January 1, 1994."

**Administrative Rules**

ARM 4.12.1405 Other nursery fees.
ARM 4.12.1427 Inspection fees.
ARM 4.12.1445 Nursery fees.

## 80-7-109. Duty to notify department of infestation.

**Compiler's Comments**

*2017 Amendment:* Chapter 389 in two places substituted "landscape service" for "small plant vendor". Amendment effective May 19, 2017.

*Saving Clause:* Section 11, Ch. 389, L. 2017, was a saving clause.

*Severability:* Section 12, Ch. 389, L. 2017, was a severability clause.

*2009 Amendment:* Chapter 384 in first and second sentences after "dealer" inserted "or small plant vendor"; and made minor changes in style. Amendment effective April 28, 2009.

*2007 Amendment:* Chapter 384 near beginning of first sentence after "nursery" inserted "or plant dealer" and after "materials that are" inserted "infected or" and in second sentence near beginning after "nursery" inserted "or plant dealer"; and made minor changes in style. Amendment effective October 1, 2007.

*Effective Date:* Section 14, Ch. 551, L. 1993, provided: "[This act] is effective January 1, 1994."

## 80-7-110. Removal of nursery stock — assessment of costs.

**Compiler's Comments**

*2017 Amendment:* Chapter 389 near beginning of first sentence substituted "landscape service" for "small plant vendor"; deleted former (2) that read: "(2) If an owner fails to pay the actual cost of the removal, treatment, or destruction within 30 days after notice has been mailed to the owner at the owner's last-known post-office address and to any purchaser of the property under contract for deed at the purchaser's last-known post-office address, the cost becomes a lien on the land of the owner and must be added by the county treasurer to the taxes upon the property and collected as other taxes"; and made minor changes in style. Amendment effective May 19, 2017.

*Saving Clause:* Section 11, Ch. 389, L. 2017, was a saving clause.

*Severability:* Section 12, Ch. 389, L. 2017, was a severability clause.

*2009 Amendment:* Chapter 384 in (1) near beginning after "dealer" inserted "or small plant vendor"; and made minor changes in style. Amendment effective April 28, 2009.

*2007 Amendment:* Chapter 384 in (1) near beginning after "firm" substituted "nursery, or plant dealer that owns" for "owning" and at end after "remedy" inserted "at the expense of the owner"; and made minor changes in style. Amendment effective October 1, 2007.

*1993 Amendment:* Chapter 551 near beginning of (1) substituted "firm" for "person", after "owning" deleted "any orchard or", after "stock" inserted "or other materials", after "injurious" substituted "plant pest" for "insect pest or disease and which becomes a menace to the agricultural or fruit industry or a menace to ornamental trees, shrubs, plants, or vines", near middle, after "injurious", substituted "plant pest" for "insect pest or disease", after "infected" deleted "orchard or", after "stock" inserted "or other material", near end, after "destroy the", deleted "orchard or", and after "stock or" inserted "other material or"; and made minor changes in style. Amendment effective January 1, 1994.

*1983 Amendment:* In (2), after "address" inserted "and to any purchaser of the property under contract for deed at his last-known post-office address".

**Administrative Rules**

ARM 4.12.1405 Other nursery fees.

ARM 4.12.1407 Right to hold nursery stock for inspection — condemnation of products.

### 80-7-123. Nursery account — investment of funds.

**Compiler's Comments**

*2017 Amendment:* Chapter 389 in (1) near beginning of second sentence before "fee revenue" deleted "inspection and license"; in (1) and in (2) in two places deleted "80-7-108" and "80-7-122" in list of statutory references; and made minor changes in style. Amendment effective May 19, 2017.

*Saving Clause:* Section 11, Ch. 389, L. 2017, was a saving clause.

*Severability:* Section 12, Ch. 389, L. 2017, was a severability clause.

*2007 Amendment:* Chapter 384 in (1) in second sentence after "revenue" inserted "and reimbursements for costs" and after "80-7-108" inserted "80-7-110" and inserted third sentence requiring that account revenue be used for the purposes of this part; in (2) near beginning of first sentence after "80-7-108" inserted "80-7-110", after "purpose of" deleted "80-7-105", and after "80-7-108" substituted "80-7-110" for "80-7-109"; and made minor changes in style. Amendment effective October 1, 2007.

*1997 Amendments:* Chapter 7 in (1) and in (2), in two places, deleted reference to 80-7-121.

Chapter 42 in (1) and (2) deleted references to 80-7-105, 80-7-109, and 80-7-121. Amendment effective March 12, 1997.

*1997 Statement of Intent:* The statement of intent attached to Ch. 7, L. 1997, provided: "A statement of intent is required for this bill because [section 2] [80-7-402] allows the department of agriculture to adopt all rules necessary to impose and administer quarantines. It is intended that the rules address:

(1) quarantines applicable to both intrastate and interstate plant and plant pest movement;

(2) procedures necessary to prevent the introduction and spread of pests that are considered plant pests and of plants capable of spreading plant pests, noxious weeds, and certain exotic plants that are considered pests;

(3) establishment of plant pest standards and procedures for surveying and controlling plant pests in this state;

(4) procedures that will allow the introduction of certain plant pests and biological control agents into Montana when necessary to control plant diseases or other plant pests; and

(5) procedures that will allow the department to recover costs incurred in implementing quarantines and plant pest management standards and to impose civil fines for violations of these rules, which may include a penalty schedule for initial and subsequent violations."

*Effective Date:* Section 14, Ch. 551, L. 1993, provided: "[This act] is effective January 1, 1994."

### 80-7-132. Cooperation — agreements with other governmental agencies.

**Attorney General's Opinions**

*Availability of Viral Indexing Services:* Nurserymen in Montana seeking to export nursery stock to Canada must have the stock virally indexed, i.e., certified by a state agency to be free of significant viral infection. Neither the Department of Agriculture nor Montana State University (now Montana State University-Bozeman) is required to conduct viral indexing of nursery stock. However, the Department of Agriculture is authorized to provide viral indexing services to nurserymen under 80-7-112 (now repealed) and 80-7-132. 39 A.G. Op. 26 (1981).

### 80-7-133. Acts made unlawful — penalty.

**Compiler's Comments**

*2017 Amendment:* Chapter 389 in (1) near beginning and in (2) substituted "landscape service" for "small plant vendor"; and in (1)(e) before "horticultural interests" inserted "agricultural or". Amendment effective May 19, 2017.

*Saving Clause:* Section 11, Ch. 389, L. 2017, was a saving clause.

*Severability:* Section 12, Ch. 389, L. 2017, was a severability clause.

*2009 Amendment:* Chapter 384 in (1) and (2) after "dealer" inserted "or small plant vendor"; and made minor changes in style. Amendment effective April 28, 2009.

*2007 Amendment:* Chapter 384 in (1) in introductory clause after "firm" inserted "nursery, or plant dealer"; in (1)(a) at end of first sentence after "sale" deleted "at retail" and in second sentence after "limited to the" inserted "scientific name" and at end after "variety" inserted "except with regard to mixed annual plantings"; in (1)(c) near beginning after "grown in" deleted "or came from", after "certain" substituted "location" for "nursery or locality", near end after "grown in" deleted "or came from", and after "location" deleted "or nursery"; in (1)(e) at beginning deleted "willfully or intentionally" and at end after "state or" inserted "that violates any federal or state quarantine"; in (1)(f) after "decorative" inserted "plants", substituted "aquatic" for "aquarium", and at end substituted "7-22-2101" for "7-22-2101(8)(a)(i)"; in (2) near middle after "firm" inserted "nursery, or plant dealer"; and made minor changes in style. Amendment effective October 1, 2007.

*2001 Amendment:* Chapter 407 in (1)(f) at end substituted "as defined in 7-22-2101(8)(a)(i)" for "under 7-22-2101(7)(a)(i)"; and made minor changes in style. Amendment effective July 1, 2001.

*1993 Amendment:* Chapter 551 throughout section substituted reference to firm for reference to person; inserted (1)(a) regarding penalty for failure to properly identify nursery stock; in (1)(e), before "dangerous", substituted "a plant pest" for "any disease or insect"; inserted (1)(f) regarding penalty for selling certain noxious weeds; in (2), after "substitution", inserted "or sale and distribution of noxious weeds", after "provided" substituted "in 80-7-135" for "by 80-7-134", and after "liable to" substituted "a party" for "the person, firm, or corporation"; and made minor changes in style. Amendment effective January 1, 1994.

## 80-7-135. Penalty for violation.

### Compiler's Comments

*2017 Amendment:* Chapter 389 in (1) substituted "landscape service" for "small plant vendor"; in (2) in second sentence inserted "response activities of the department,"; in (4) deleted "80-7-122" from list of statutory references; and made minor changes in style. Amendment effective May 19, 2017.

*Saving Clause:* Section 11, Ch. 389, L. 2017, was a saving clause.

*Severability:* Section 12, Ch. 389, L. 2017, was a severability clause.

*2009 Amendment:* Chapter 384 in (1) near beginning after "dealer" inserted "or small plant vendor"; and made minor changes in style. Amendment effective April 28, 2009.

*2007 Amendment:* Chapter 384 in (1) near beginning after "nursery" inserted "or plant dealer", before "violates" deleted "purposely, knowingly, or negligently", near middle after "provision of this" substituted "part" for "chapter", and near end before "commits" substituted "part" for "chapter"; in (2) at end of second sentence substituted "nursery account established in 80-7-123 for education, training, research, and development for the nursery industry pursuant to rules established by the department" for "general fund"; in (4) near middle after "violations of this" substituted "part" for "chapter"; and made minor changes in style. Amendment effective October 1, 2007.

*1997 Amendment:* Chapter 7 in (4) deleted reference to 80-7-121.

*1997 Statement of Intent:* The statement of intent attached to Ch. 7, L. 1997, provided: "A statement of intent is required for this bill because [section 2] [80-7-402] allows the department of agriculture to adopt all rules necessary to impose and administer quarantines. It is intended that the rules address:

(1) quarantines applicable to both intrastate and interstate plant and plant pest movement;

(2) procedures necessary to prevent the introduction and spread of pests that are considered plant pests and of plants capable of spreading plant pests, noxious weeds, and certain exotic plants that are considered pests;

(3) establishment of plant pest standards and procedures for surveying and controlling plant pests in this state;

(4) procedures that will allow the introduction of certain plant pests and biological control agents into Montana when necessary to control plant diseases or other plant pests; and

(5) procedures that will allow the department to recover costs incurred in implementing quarantines and plant pest management standards and to impose civil fines for violations of these rules, which may include a penalty schedule for initial and subsequent violations."

*Effective Date:* Section 14, Ch. 551, L. 1993, provided: "[This act] is effective January 1, 1994."

**Administrative Rules**

ARM 4.12.1430 Civil penalties — enforcement for nursery.

ARM 4.12.1431 Civil penalties — matrix for nursery.

## Part 4
## Quarantine and Pest Management

**Part Compiler's Comments**

*1997 Statement of Intent:* The statement of intent attached to Ch. 7, L. 1997, provided: "A statement of intent is required for this bill because [section 2] [80-7-402] allows the department of agriculture to adopt all rules necessary to impose and administer quarantines. It is intended that the rules address:

(1) quarantines applicable to both intrastate and interstate plant and plant pest movement;

(2) procedures necessary to prevent the introduction and spread of pests that are considered plant pests and of plants capable of spreading plant pests, noxious weeds, and certain exotic plants that are considered pests;

(3) establishment of plant pest standards and procedures for surveying and controlling plant pests in this state;

(4) procedures that will allow the introduction of certain plant pests and biological control agents into Montana when necessary to control plant diseases or other plant pests; and

(5) procedures that will allow the department to recover costs incurred in implementing quarantines and plant pest management standards and to impose civil fines for violations of these rules, which may include a penalty schedule for initial and subsequent violations."

**Part Administrative Rules**

Title 4, chapter 12, subchapter 13, ARM Quarantines and pest management standards.

**80-7-404. Penalty.**

**Compiler's Comments**

*2011 Amendment:* Chapter 303 in (1) and (3)(a) increased the maximum penalty from $1,000 to $5,000. Amendment effective April 29, 2011.

## Part 5
## Crop Insect Detection and Management

**Part Attorney General's Opinions**

*Emergency Exception Inapplicable to Foreseeable Situations — Environmental Policy Act Applicable:* The Department of Agriculture did not follow the directive of ARM 4.2.308 (now repealed) in dealing with an emergency infestation of grasshoppers when it failed to file a report with the Governor and the Environmental Quality Council. While an emergency situation is a legitimate exception to the requirements of the Montana Environmental Policy Act (MEPA), the Department should comply with MEPA before participating in a grasshopper spraying program if the need for such a program is reasonably foreseeable. 42 A.G. Op. 62 (1988).

*State Participation in Spraying Program — Environmental Policy Act Triggered:* State participation in a grasshopper spraying program in which the state paid up to one-third of the costs and provided financial management and technical expertise was a major state action in which compliance with the Montana Environmental Policy Act was required. 42 A.G. Op. 62 (1988).

**80-7-503. Duties of department.**

**Compiler's Comments**

*1989 Amendment:* In introductory clause substituted "may" for "shall". Amendment effective March 7, 1989.

**80-7-505. Computation and collection of assessments on landowners.**

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

**80-7-508. Duties of cooperative extension service.**

**Compiler's Comments**

*2005 Amendment:* Chapter 472 in (1) in first sentence near beginning after "extension service" deleted "within the department of education"; in (2) at end deleted reference to subsection (4) of 80-7-814; and made minor changes in style. Amendment effective April 28, 2005.

*1991 Amendment:* Inserted (2) concerning cooperation between cooperative extension service and agricultural experiment station in providing annual reports. Amendment effective July 1, 1991.

## Part 7
## Weed Control

### 80-7-701. Regulation of importation or sale of noxious weeds.

**Compiler's Comments**

*2003 Amendment:* Chapter 98 in definition of native plant after "plant" substituted "indigenous" for "endemic". Amendment effective October 1, 2003.

*1991 Amendment:* Inserted (1) defining native plant and native plant community; and at beginning of (2) substituted "The department may regulate or prohibit the importation or sale" for "If the department believes that movements", near beginning, after "nursery stock", deleted "hay, straw", and at end substituted "harmful to Montana's horticultural, agricultural, forestry, livestock, wildlife, or native plant communities" for "dangerous or inimical to the horticultural or agricultural industries are about to be introduced into the state, it may advise the governor. The governor shall, by proclamation, declare an embargo against the importation or shipment of the grain, plants, tubers, nursery stock, seed, hay, straw, fruit, or other materials into the state, except under restrictions established in this part and provided in the rules adopted by the department".

### 80-7-702. Rulemaking authority.

**Compiler's Comments**

*1991 Amendment:* In first sentence, after "rules", substituted "for the regulation of the importation or sale of materials" for "in the enforcement of an embargo proclaimed" and in second sentence, after "packaging", inserted "the regulation of nursery stock commerce".

### 80-7-704. Disposition of fines and inspection fees.

**Compiler's Comments**

*2001 Amendment:* Chapter 257 substituted reference to department of revenue for reference to state treasurer; and made minor changes in style. Amendment effective July 1, 2001.

*Applicability:* Section 49, Ch. 257, L. 2001, provided: "[This act] applies to remittances of state money made to the department of revenue for fiscal years beginning after June 30, 2001."

*1987 Amendment:* Near beginning, after "80-7-703", inserted "except fines paid to a justice's court".

*1983 Amendment:* Substituted reference to state special revenue fund for reference to earmarked revenue fund.

### 80-7-705. Weed management district program enhancement.

**Compiler's Comments**

*Effective Date:* Section 28, Ch. 407, L. 2001, provided that this section is effective July 1, 2001.

### 80-7-711. Technical assistance.

**Compiler's Comments**

*Severability Clause:* Section 5, Ch. 466, L. 1977, was a severability clause.

### 80-7-712. Funding of noxious plant management programs.

**Compiler's Comments**

*Severability Clause:* Section 5, Ch. 466, L. 1977, was a severability clause.

### 80-7-713. Reports.

**Compiler's Comments**

*1991 Amendment:* In second sentence inserted reference to 5-11-210; and made minor changes in style. Amendment effective March 20, 1991.

*Severability Clause:* Section 5, Ch. 466, L. 1977, was a severability clause.

### 80-7-714. Rules.

**Compiler's Comments**

*Severability Clause:* Section 5, Ch. 466, L. 1977, was a severability clause.

## Part 8
## Noxious Weed Management Funding

**Part Compiler's Comments**

*Preamble:* The preamble to Ch. 639, L. 1987, provided: "WHEREAS, noxious weeds infest 6.5 million acres of rangeland and are costing the State of Montana an estimated $47 million annually; and

WHEREAS, vehicles have been shown to be one of the major contributors to the spread of noxious weeds in Montana, and county and state funds are inadequate for stopping the spread of these weeds from roadsides and trails into adjacent rangeland; and

WHEREAS, the amount of $125,000 in annual revenue generated by the herbicide surcharge to fund weed control projects through the noxious weed management trust fund is inadequate to address the current weed problem; and interest income from the permanent account of the noxious weed management trust fund cannot be used to fund weed management projects in Montana until the fund reaches $2.5 million; and

WHEREAS, during this period, the spread of noxious weeds will continue at the rate of about 27% annually; and

WHEREAS, current weed management projects prove the success of well-planned, organized, and cooperative programs."

*Statement of Intent:* The statement of intent attached to Ch. 577, L. 1985, provided: "A statement of intent is required by this bill because rulemaking authority is granted to the Montana department of agriculture in section 8 [80-7-802].

It is the intent of the legislature that the department of agriculture adopt rules for the orderly administration of the noxious weed management trust fund and collection and administration of revenue as provided in the bill. The department, through reports required of herbicide registrants, shall establish a collection system for the surcharge imposed in section 3 [80-7-812, now repealed], giving notice to the registrant and providing a procedure for the payment of the surcharge.

It is the intent of the legislature that the department adopt rules relating to the disbursement of funds generated by this act. Specifically, the department shall use the criteria stated in sections 5 and 6 [80-7-814 and 80-7-815] as the basis for the distribution of the funds. The legislature intends that the money given in the form of grants and contracts be primarily on a cost-share basis. The department shall determine the ratio of cost sharing by considering the entity being given the money, its ability to find other sources of funding, the need for the project for which it receives the money, and the amount of benefit it bestows on the area involved. The legislature intends that projects involving greater community action and benefit receive increased priority.

It is the intent of the legislature that if the trust fund should be terminated by the legislature, the funds to be distributed to the counties must be distributed in an equitable manner, taking into consideration the population of the counties, the participation in the program, and the needs of the counties with respect to noxious weed management.

The legislature intends that the department adopt rules identifying any weed which constitutes a new and potentially harmful noxious weed. The department shall take into consideration the possible harm the newly introduced weed will have on the Montana economy, the damage the weed will cause to the existing foliage and environment, and the likelihood that the noxious weed will spread throughout the state. The department shall also establish rules for verifying the existence of the weed. These rules shall take into consideration the scientific methods for verification and proper sampling techniques for determining the extent of the weed outbreak.

It is the intent of the legislature that the decision for the disbursement of the funds for the projects be made by the director of the department of agriculture upon the advice of the noxious weed management advisory council. The directives of the director must be implemented by a noxious weed management coordinator, who shall serve the director. The noxious weed management coordinator shall maintain records on the disbursement of the funds and the progress of the funded projects. He shall make determinations as to the effectiveness of the previously funded projects and provide the director and the advisory council all relevant information necessary to make decisions for future disbursements of funds. He shall also work with and assist county weed districts."

*Severability Clause:* Section 10, Ch. 577, L. 1985, was a severability clause.

**Part Administrative Rules**

Title 4, chapter 5, subchapter 1, ARM Noxious weed trust fund.

## 80-7-801. Definitions.

**Compiler's Comments**

*2019 Amendment:* Chapter 92 in definition of noxious weed substituted "7-22-2101(9)(a)" for "7-22-2101(8)(a)". Amendment effective October 1, 2019.

*2005 Amendment:* Chapter 472 in definition of crop weed substituted "(5)(g)" for "(3)(g)" in reference to 80-7-814. Amendment effective April 28, 2005.

*2001 Amendment:* Chapter 407 in definition of noxious weed at end substituted "7-22-2101(8)(a)" for "7-22-2101(7)(a)". Amendment effective July 1, 2001.

*1995 Amendment:* Chapter 220 inserted definition of crop weed; deleted definition of herbicide that read: ""Herbicide" means a substance or mixture of substances for preventing, destroying, repelling, or mitigating any weed, as defined in 80-8-102. The term does not include herbicides labeled only for home, yard, or garden use and sold in containers of less than 10 pounds or 1 gallon"; in definition of noxious weed substituted "defined in 7-22-2101(7)(a)" for "defined and designated as a noxious weed by rule of the department"; deleted definition of retail value that read: ""Retail value" means the suggested or retail price to the consumer of a given herbicide as established by the registrant, or as determined by a survey of dealers conducted by the department"; and deleted definition of sale that read: ""Sale" includes only the sale of a herbicide to an applicator or consumer. Sales between or to distributors, dealers, or retailers are not included." Amendment effective March 24, 1995.

*1987 Amendment:* In (2), at end of first sentence, substituted "weed, as defined in 80-8-102" for "noxious weed".

**Administrative Rules**

ARM 4.5.101 Definitions.

## 80-7-802. Rules.

**Administrative Rules**

Title 4, chapter 5, subchapter 1, ARM Noxious weed trust fund.

Title 4, chapter 5, subchapter 2, ARM Designation of noxious weeds.

## 80-7-805. Noxious weed management advisory council.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 1, Ch. 65, L. 2023. Amendment effective March 16, 2023.

*1999 Amendment:* Chapter 493 in (2) increased council membership from 9 to 11; inserted (2)(i) including county representatives on council; and made minor changes in style. Amendment effective July 1, 1999.

**Administrative Rules**

ARM 4.5.112 Noxious Weed Management Council.

## 80-7-811. Noxious weed management trust fund.

**Compiler's Comments**

*2005 Amendment:* Chapter 472 in (1) at beginning inserted "As required by Article IX, section 6, of the Montana constitution"; inserted (2) providing what deposits to the trust fund may include; and made minor changes in style. Amendment effective April 28, 2005.

*1999 Amendment:* Chapter 493 increased fund from $2.5 million to $10 million. Amendment effective July 1, 1999.

*1995 Amendment:* Chapter 220 at end of first sentence substituted "trust fund of $2.5 million" for "trust fund, which must be funded from revenue collected under 80-7-812 and 80-7-813". Amendment effective March 24, 1995.

**Administrative Rules**

ARM 4.5.101 Definitions.

## 80-7-813. Acceptance and expenditure of gifts and other funds.

**Compiler's Comments**

*1995 Amendment:* Chapter 220 substituted second sentence concerning deposit of fund in trust fund or account for expenditure to support a project for former sentence that read: "Such funds may be expended to support any weed management project or may be deposited in the noxious weed management trust fund." Amendment effective March 24, 1995.

**80-7-814. Administration and expenditure of funds.**

**Compiler's Comments**

*2015 Amendment:* Chapter 32 in (5)(d)(ii) at end of first sentence substituted "amount of grants and contracts awarded from the noxious weed management special revenue fund under subsection (4) in the previous fiscal year" for "amount expended through grants and contracts made under subsection (4)". Amendment effective February 18, 2015.

*2013 Amendment:* Chapter 326 in (2)(d) substituted second sentence concerning reverted funds for "The department shall deposit any reverted funds into the noxious weed management trust fund as principal"; inserted (2)(e) prohibiting the department from applying for or receiving grant awards from the noxious weed management special revenue fund; and substituted current language in (5)(d) for former (5)(d) that read: "(d) administrative expenses of the department for managing the noxious weed management program and other provisions of this part. The cost of administering the program may not exceed 12% of the total program expenses". Amendment effective April 26, 2013.

*2011 Amendment — Coordination:* Chapter 244 in (4) at end substituted "using one of the following methods, whichever is less" for "with"; in (4)(a) at beginning substituted "levying" for "a levy in"; in (4)(b) at beginning substituted "appropriating" for "by" and after "$100,000" substituted "from any source" for "for first-class counties, as defined in 7-1-2111"; and made minor changes in style. Amendment effective April 21, 2011.

The amendments made to this section by sec. 31, Ch. 128, L. 2011, and sec. 11, Ch. 244, L. 2011, were rendered void by sec. 12, Ch. 244, L. 2011, a coordination section.

*2005 Amendment:* Chapter 472 inserted (1) providing that the section constitutes the noxious weed management program; in (2) substituted language providing that except as provided in subsection (2)(b), money in the trust fund may not be committed or spent until the principal reaches $10 million and providing that in case of a noxious weed emergency, three-fourths of the members of each house may vote to appropriate the principal from the trust fund for "(a) Except as provided in subsection (1)(b), money deposited in the noxious weed management trust fund may not be committed or expended until the principal reaches $2.5 million, except in case of a noxious weed emergency as provided in 80-7-815. Once this amount is accumulated, interest or revenue generated by the trust fund and by other funding measures provided by this part, excluding unrealized gains and losses, must be deposited in the special revenue fund and may be expended for noxious weed management projects in accordance with this section, as long as the principal of the trust fund remains at least $2.5 million.

(b) Money deposited as principal in the trust fund from [former 80-7-822] may not be expended until the principal of the trust fund reaches $10 million"; in (2)(c) near middle inserted "noxious weed management" and at end substituted "before the principal of the noxious weed management trust reaches $10 million with a majority vote of each house of the legislature" for "in accordance with this section"; inserted (2)(d) providing that grant funds not spent upon termination of the contract or its extension not to exceed 1 year revert to the department, which must deposit the funds in the noxious weed management trust fund as principal; inserted (3) providing that the trust fund principal over $10 million may be appropriated by a majority vote of each house and that appropriations of the principal over that amount may be used only to fund the noxious weed management program; in (8) near middle after "terminated by" substituted "constitutional amendment" for "law"; and made minor changes in style. Amendment effective April 28, 2005, except that amendment inserting subsection (2)(d) is effective July 1, 2005.

*2003 Amendments — Composite Section:* Chapter 106 in (1)(a) near middle of second sentence after "this part" inserted "excluding unrealized gains and losses"; and in (1)(b) near middle of second sentence after "trust fund" inserted "excluding unrealized gains and losses". Amendment effective March 24, 2003.

Chapter 114 in (2) in first sentence, (3)(b), (3)(c), and (5) substituted "weed management districts" for "weed control districts". Amendment effective October 1, 2003.

*2001 Amendment:* Chapter 574 in (1)(b) near middle of first sentence after "80-7-822" deleted "pursuant to 80-7-810(2)"; and made minor changes in style. Amendment effective July 1, 2001.

*1999 Amendment:* Chapter 493 at beginning of (1)(a) inserted exception clause; inserted (1)(b) restricting use of principal in trust fund until fund reaches $10 million and allowing use of interest or revenue generated by fund; and made minor changes in style. Amendment effective July 1, 1999.

*1995 Amendment:* Chapter 220 substituted (3)(d) concerning administrative expenses for former (3)(d) that read: "(d) costs of collecting the surcharge imposed by 80-7-812, not to exceed

3% of the total surcharge proceeds"; and made minor changes in style. Amendment effective March 24, 1995.

*1991 Amendment:* Inserted (3)(g) concerning grants for crop weed management research, evaluation, and education; inserted (4) requiring agricultural experiment station and cooperative extension service to submit annual reports; in (5), after "expenditures", inserted reference to subsections (2) and (3); and made minor changes in style. Amendment effective July 1, 1991.

*1989 Amendment:* In (3)(f) substituted "advisory council" for "advisory committee".

*1987 Amendment:* At end of (2) inserted "or by an amount of not less than $100,000 for first class counties, as defined in 7-1-2111"; and inserted (3)(f) allowing the Department to conditionally expend funds for any recommended project.

**Administrative Rules**

ARM 4.5.102 through 4.5.109 Weed control projects — application — feasibility — ranking — legal requirements — monitoring.

### 80-7-815. Noxious weed emergency.

**Compiler's Comments**

*2005 Amendment:* Chapter 472 in (2) near beginning after "other sources" deleted "this declaration authorizes the department to allocate up to $150,000 of" and near middle inserted "may be appropriated as provided in 80-7-814"; and deleted former (3) that read: "(3) If the expenditure causes the principal of the trust fund to fall below $2.5 million, it must be replenished by the interest or revenue generated by the trust fund or by the other revenue provided by this part, as determined by the department." Amendment effective April 28, 2005.

*2001 Amendments — Composite Section:* Chapter 407 inserted (1)(b) regarding potential influx of noxious weeds; in (2) at end inserted "or to protect the state from an influx of noxious weeds due to a natural disaster"; and made minor changes in style. Amendment effective July 1, 2001.

Chapter 574 near end of (3) after "part" deleted "or by revenue obtained from the fee imposed by 61-3-510"; and made minor changes in style. Amendment effective July 1, 2001.

*1995 Amendment:* Chapter 220 near middle of (2), after "replenished", deleted "by proceeds of the surcharge imposed in 80-7-812 or, if the surcharge has been terminated as provided in 80-7-812(5)"; and made minor changes in style. Amendment effective March 24, 1995.

*1991 Amendment:* In (1), near middle of second sentence before "trust", inserted "management"; and in (2), after "80-7-812", inserted language concerning replenishing the trust upon termination of surcharge fund by interest or revenue generated by trust fund or from other revenue as determined by Department. Amendment effective July 1, 1991.

*Severability:* Section 9, Ch. 588, L. 1991, was a severability clause.

**Administrative Rules**

ARM 4.5.111 Noxious weed identification and verification.

### 80-7-816. Account — deposit — investment.

**Compiler's Comments**

*2003 Amendment:* Chapter 106 in (1) near middle of second sentence after "80-7-823" inserted "excluding unrealized gains and losses". Amendment effective March 24, 2003.

*2001 Amendments — Composite Section:* Chapter 7 in (1) in second sentence substituted "noxious weed management trust fund" for "noxious weed trust fund". Amendment effective October 1, 2001.

Chapter 407 in (1) in first sentence near beginning substituted "a noxious weed account" for "an account" and in second sentence near middle inserted "and the funds directed to be deposited as provided in 80-7-823" and at end inserted reference to 80-7-705; and made minor changes in style. Amendment effective July 1, 2001.

Chapter 574 in (1) in second sentence after "fund" deleted "and the fee imposed in 61-3-510". Amendment effective July 1, 2001.

*Effective Date:* Section 11, Ch. 220, L. 1995, provided that this section is effective on passage and approval. Approved March 24, 1995.

### 80-7-823. Transfer of funds.

**Compiler's Comments**

*2007 Amendment:* Chapter 432 deleted former (2) that read: "(2) There is a one-time transfer in fiscal year 2003 of up to $300,000 from the resource indemnity trust fund, as provided in 15-38-202, from the first money paid into the resource indemnity trust fund that exceeds $100 million for the purposes provided in 80-7-705"; and made minor changes in style. Amendment effective July 1, 2007.

*2002 Amendment:* Chapter 20 in (2) reduced amount from $500,000 to $300,000. Amendment effective August 21, 2002.

*Effective Date:* Section 28, Ch. 407, L. 2001, provided that this section is effective July 1, 2001.

## Part 9
## Noxious Weed Seed Free Forage Act

**Part Compiler's Comments**

*Severability:* Section 19, Ch. 521, L. 1995, was a severability clause.

**Part Administrative Rules**

Title 4, chapter 5, subchapter 3, ARM Noxious weed seed free forage.

### 80-7-901. Short title.

**Compiler's Comments**

*Effective Date:* Section 20(1), Ch. 521, L. 1995, provided that this section is effective April 25, 1995.

### 80-7-902. Findings — purpose.

**Compiler's Comments**

*2021 Amendment:* Chapter 90 inserted (1)(g) concerning standards and good practices for other materials; in (2) near end substituted "forage and other materials free of noxious weeds and their seeds" for "forage free of noxious weed seeds"; and made minor changes in style. Amendment effective March 26, 2021.

*Effective Date:* Section 20(1), Ch. 521, L. 1995, provided that this section is effective April 25, 1995.

**Administrative Rules**

ARM 4.5.301 Purpose and scope.

### 80-7-903. Definitions.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 2, Ch. 65, L. 2023. Amendment effective March 16, 2023.

*2019 Amendment:* Chapter 92 in (2) substituted "7-22-2101" for "7-22-2101(8)(a)(i)". Amendment effective October 1, 2019.

*2001 Amendment:* Chapter 407 in definition of certification substituted "7-22-2101(8)(a)(i)" for "7-22-2101(7)(a)(i)". Amendment effective July 1, 2001.

*Effective Date:* Section 20(1), Ch. 521, L. 1995, provided that this section is effective April 25, 1995.

**Administrative Rules**

ARM 4.5.302 Definition of terms.
ARM 4.5.303 Noxious weeds.

### 80-7-905. Powers and duties of department.

**Compiler's Comments**

*1995 Statement of Intent:* The statement of intent attached to Ch. 521, L. 1995, provided: "A statement of intent is required for this bill because rulemaking authority is granted to the department of agriculture [in 80-7-905 and 80-7-909] to develop rules regarding implementation of the noxious weed seed free forage program. It is intended that the department, when adopting rules for the program and certification standards, processes, operations, agreements, and contracts; fees and the collection of fees; and inspections and investigation standards, ensure that the program and rules will be effective in preventing new introductions of noxious weed seed from forage in the state. The department shall base any related fees on the cost of managing and conducting the program. It is further intended that the program be conducted in a cooperative manner with federal, state, and local agencies, the regulated industry, and the public and that the department be allowed to enter into reciprocal agreements with other states or Canadian provinces as necessary for the proper administration of the program."

*Effective Date:* Section 20(1), Ch. 521, L. 1995, provided that this section is effective April 25, 1995.

**Administrative Rules**

Title 4, chapter 5, subchapter 3, ARM Noxious weed seed free forage.
Title 4, chapter 5, subchapter 4, ARM Noxious weed free materials.

### 80-7-906. Certification.

**Compiler's Comments**

*Effective Date:* Section 20(2), Ch. 521, L. 1995, provided that this section is effective January 1, 1996.

**Administrative Rules**

ARM 4.5.306 Procedures for Montana certification of forage products.
ARM 4.5.307 Forage inspection procedures.
ARM 4.5.308 Forage identification and transportation.

### 80-7-907. Fees.

**Compiler's Comments**

*Effective Date:* Section 20(2), Ch. 521, L. 1995, provided that this section is effective January 1, 1996.

### 80-7-908. Deposit and disbursement of funds — records — investment.

**Compiler's Comments**

*2009 Amendment:* Chapter 10 in (4) near beginning after "part are" substituted "available for appropriation" for "appropriated". Amendment effective October 1, 2009.

*Effective Date:* Section 20(2), Ch. 521, L. 1995, provided that this section is effective January 1, 1996.

**Administrative Rules**

ARM 4.5.312 Collection of fees.
ARM 4.5.313 Fees.

### 80-7-909. Rules.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 3, Ch. 65, L. 2023. Amendment effective March 16, 2023.

*1995 Statement of Intent:* The statement of intent attached to Ch. 521, L. 1995, provided: "A statement of intent is required for this bill because rulemaking authority is granted to the department of agriculture [in 80-7-905 and 80-7-909] to develop rules regarding implementation of the noxious weed seed free forage program. It is intended that the department, when adopting rules for the program and certification standards, processes, operations, agreements, and contracts; fees and the collection of fees; and inspections and investigation standards, ensure that the program and rules will be effective in preventing new introductions of noxious weed seed from forage in the state. The department shall base any related fees on the cost of managing and conducting the program. It is further intended that the program be conducted in a cooperative manner with federal, state, and local agencies, the regulated industry, and the public and that the department be allowed to enter into reciprocal agreements with other states or Canadian provinces as necessary for the proper administration of the program."

*Effective Date:* Section 20(1), Ch. 521, L. 1995, provided that this section is effective April 25, 1995.

**Administrative Rules**

Title 4, chapter 5, subchapter 3, ARM Noxious weed seed free forage.
Title 4, chapter 5, subchapter 4, ARM Noxious weed free materials.

### 80-7-910. Investigation and enforcement authority.

**Compiler's Comments**

*Effective Date:* Section 20(2), Ch. 521, L. 1995, provided that this section is effective January 1, 1996.

### 80-7-911. Stop sale, use, or removal order.

**Compiler's Comments**

*Effective Date:* Section 20(2), Ch. 521, L. 1995, provided that this section is effective January 1, 1996.

**Administrative Rules**

ARM 4.5.310 Stop sale, use, or removal order.

## 80-7-912. Prohibited acts.

**Compiler's Comments**

*Effective Date:* Section 20(2), Ch. 521, L. 1995, provided that this section is effective January 1, 1996.

## 80-7-913. Creation of certification programs — other materials.

**Compiler's Comments**

*Effective Date:* Section 4, Ch. 90, L. 2021, provided: "[This act] is effective on passage and approval." Approved March 26, 2021.

## 80-7-921. Penalty for nonpayment of fees.

**Compiler's Comments**

*Effective Date:* Section 20(2), Ch. 521, L. 1995, provided that this section is effective January 1, 1996.

## 80-7-922. Penalties.

**Compiler's Comments**

*Effective Date:* Section 20(2), Ch. 521, L. 1995, provided that this section is effective January 1, 1996.

**Administrative Rules**

ARM 4.5.316 Civil penalties.

## 80-7-923. Injunction authorized.

**Compiler's Comments**

*Effective Date:* Section 20(2), Ch. 521, L. 1995, provided that this section is effective January 1, 1996.

## 80-7-924. Embargo.

**Compiler's Comments**

*Effective Date:* Section 20(2), Ch. 521, L. 1995, provided that this section is effective January 1, 1996.

## Part 10

## Aquatic Invasive Species

**Part Compiler's Comments**

*Preamble:* The preamble attached to Ch. 429, L. 2009, provided: "WHEREAS, invasive species can wreak damage on the economy, environment, recreational opportunities, and human health; and

WHEREAS, aquatic invasive species, including Eurasian watermilfoil, the quagga mussel, and the zebra mussel, pose new and imminent threats, which if left unchecked could cost millions of dollars not only in damage to Montana waterways, rivers, and lakes, to water storage, delivery, and irrigation systems, to hydroelectric power structures and systems, and to aquatic ecosystems, but also to the entire state economy; and

WHEREAS, the enormous impact caused by the zebra mussel is clearly demonstrated in the eastern United States where the species was first observed in Lake Ontario in 1988 and spread to Lake Michigan and the Finger Lakes Region in New York State by the following year; and

WHEREAS, the United States Geological Survey estimates that $5 billion has been spent thus far in the Great Lakes Basin alone for damages caused by and control efforts for the zebra mussel; and

WHEREAS, the zebra mussel was first discovered in Lake Mead in January 2007 and has now spread to Lakes Mojave and Havasu and the Colorado River, impacting the states of Arizona, Nevada, and California, as well as to Pueblo Reservoir in Colorado, San Justo Reservoir in California, and Electric Lake in Utah; and

WHEREAS, Eurasian watermilfoil, the zebra mussel, and the quagga mussel are easily carried on vessels used in infested water and then transported to another body of water if the vessel has not been properly cleaned; and

WHEREAS, Eurasian watermilfoil is already present in Montana and unless Montana takes action now to prevent the infestation of its waters with the zebra mussel and quagga mussel it is only a matter of time before their introduction in this state occurs; and

WHEREAS, the most cost-effective way of dealing with an aquatic invasive species is preventing an infestation from occurring."

*Severability:* Section 19, Ch. 429, L. 2009, was a severability clause.

*Effective Date:* Section 20, Ch. 429, L. 2009, provided: "[This act] is effective July 1, 2009."

### 80-7-1002. Legislative findings and purpose.

**Compiler's Comments**

*2013 Amendment:* Chapter 354 in (1)(e) substituted "equipment" for "trailers transporting vessels"; and in (2) before "movement" deleted "intrastate". Amendment effective April 30, 2013.

*2011 Amendment:* Chapter 378 in (1)(b) near middle after "invasive species" deleted "not yet present"; and in (1)(e) substituted "vessels and trailers transporting vessels" for "the exterior of vessels". Amendment effective July 1, 2011.

### 80-7-1003. Definitions.

**Compiler's Comments**

*2021 Amendment:* Chapter 192 inserted definition of drain plug; and made minor changes in style. Amendment effective October 1, 2021.

*Applicability:* Section 5, Ch. 192, L. 2021, provided: "[This act] applies to violations charged on or after [the effective date of this act]." Effective October 1, 2021.

*2017 Amendment:* Chapter 348 inserted definition of tributaries to the Columbia River; and made minor changes in style. Amendment effective May 7, 2017.

*2013 Amendment:* Chapter 354 in definition of departments inserted "and the department of transportation"; inserted definition of equipment; in definition of invasive species management area inserted "under 80-7-1008"; and made minor changes in style. Amendment effective April 30, 2013.

*2011 Amendment:* Chapter 378 in definition of departments added reference to the department of natural resources and conservation; in definition of invasive species after "departments" deleted "of agriculture and fish, wildlife, and parks"; in definition of invasive species management area after "bodies or water" deleted "or for the entire state"; and made minor changes in style. Amendment effective July 1, 2011.

### 80-7-1004. Invasive species account.

**Compiler's Comments**

*2019 Amendment — Coordination:* Chapter 356 in (2) deleted reference to 87-2-130 and inserted references to 15-65-121 and 23-2-541; and made minor changes in style. Amendment effective May 7, 2019, and terminates December 31, 2019.

In (2) deleted references to 87-2-130 and 15-72-602 and inserted references to 15-65-121 and 23-2-541; and made minor changes in style. Amendment effective January 1, 2020, and terminates June 30, 2023.

In (2) deleted references to 87-2-130 and 15-72-602 and inserted references to 15-65-121 and 23-2-541; in (6) substituted "may recover not more than 5% in indirect costs" for "may not recover indirect costs"; and made minor changes in style. Amendment effective July 1, 2023.

Sections 6 and 7, Ch. 356, L. 2019, amended this section to include references to 61-3-321. However, the coordination clause in sec. 3, Ch. 486, L. 2019, voided these references.

*Termination Provision Removed:* Section 14, Ch. 356, L. 2019, amended sec. 21, Ch. 387, L. 2017, to remove the termination of the amendments made to this section by sec. 6, Ch. 387, L. 2017. Effective May 7, 2019.

Section 15, Ch. 356, L. 2019, repealed sec. 7, Ch. 387, L. 2017, which was a version of this section that had not yet gone into effect. Effective July 1, 2019.

*2017 Amendment:* Chapter 387 in (2) at beginning substituted "Money transferred from any lawful source" for "Money transferred from the general fund or received from any other lawful source" and in temporary version inserted "fees collected pursuant to 15-72-601, 15-72-602, and 87-2-130"; deleted former (5) that read: "(5) Any interest and earnings on the account must be retained in the account"; inserted (5) concerning unreserved funds being transferred to invasive species trust fund; inserted (6) concerning prohibition of recovery of indirect costs from invasive species account; and made minor changes in style. Amendment effective May 15, 2017, and terminates February 29, 2020. References in (2) in temporary version to 15-72-601 and 15-72-602 terminate June 20, 2019. Reference in (2) in temporary version to 87-2-130 terminates February 29, 2020. Subsection (6) terminates June 30, 2027.

*Code Commissioner Note:* Chapter 387, L. 2017, was not signed and approved until May 18, 2017.

*2013 Amendment:* Chapter 354 in (1) substituted "department of fish, wildlife, and parks" for "department of agriculture"; and in (3) substituted "for projects that prevent or control any nonnative, aquatic invasive species pursuant to this part" for "to accomplish the purposes of this part". Amendment effective April 30, 2013.

## 80-7-1005. Cooperative agreement for invasive species detection and control.

**Compiler's Comments**

*2011 Amendment:* Chapter 378 deleted former (4) that read: "(4) The overall coordinating authority is the department of agriculture." Amendment effective July 1, 2011.

## 80-7-1006. Departmental responsibilities — reporting.

**Compiler's Comments**

*2021 Amendment:* See 2021 Session Law for amendment made by sec. 109, Ch. 261, L. 2021. Amendment effective April 20, 2021.

*2019 Amendment:* Chapter 472 in (4) after "mandatory inspection" inserted "or decontamination". Amendment effective May 10, 2019.

*2017 Amendment:* Chapter 387 inserted (8) concerning reporting. Amendment effective May 15, 2017.

*Code Commissioner Note:* Chapter 387, L. 2017, was not signed and approved until May 18, 2017.

*2015 Amendment:* Chapter 290 inserted (6) concerning authorization to operate a check station; and made minor changes in style. Amendment effective October 1, 2015.

*2013 Amendment:* Chapter 354 in (3)(b) inserted "and the statewide invasive species management area established in 80-7-1015"; in (4) substituted "shall enforce" for "may enforce", in middle inserted "under 80-7-1008 or in the statewide invasive species management area under 80-7-1015", and after "vessel" inserted "or equipment"; inserted (5) regarding designation of employees; and made minor changes in style. Amendment effective April 30, 2013.

*2011 Amendment:* Chapter 378 inserted (4) relating to enforcement of quarantine regulations and measures; and made minor changes in style. Amendment effective July 1, 2011.

## 80-7-1007. Rulemaking authority.

**Compiler's Comments**

*2017 Amendments — Composite Section:* Chapter 275 in (2) substituted "statewide invasive species" for "statewide species". Amendment effective October 1, 2017.

Chapter 348 inserted (1)(e) concerning prohibition on felt-soled waders; and made minor changes in style. Amendment effective May 7, 2017.

*2013 Amendment:* Chapter 354 in (1)(c) inserted "under 80-7-1008"; in (1)(c)(ii), (1)(c)(iii), and (1)(d) after "vessels" inserted "and equipment"; inserted (2) regarding adoption of rules by departments; and made minor changes in style. Amendment effective April 30, 2013.

*2011 Amendment:* Chapter 378 in (1) at end inserted "adopted pursuant to 80-7-1006"; inserted (3)(a) relating to use of quarantine regulations and measures; in (3)(c) after "cleaning of" deleted "the exterior of"; and made minor changes in style. Amendment effective July 1, 2011.

**Administrative Rules**

Title 4, chapter 12, subchapter 39, ARM Eurasian watermilfoil management area.

## 80-7-1008. Invasive species management area — authorization.

**Compiler's Comments**

*2017 Amendment:* Chapter 348 in (3)(b)(iii) before "Mandatory inspections" deleted "A department may conduct" and near middle substituted "that may contain water may occur only if the use of mandatory inspections is included" for "that may contain water only if the department has included the use of mandatory inspections". Amendment effective May 7, 2017.

*2013 Amendment:* Chapter 354 in (1) at beginning inserted exception clause; in (3)(b)(ii) and (3)(b)(iii) after "vessels" inserted "and equipment"; and in (3)(b)(iii) after "vessel" inserted "or equipment". Amendment effective April 30, 2013.

*2011 Amendment:* Chapter 378 in (1) after "bodies of water" deleted "or for the entire state"; in (3)(b) at beginning deleted "subject to subsection (3)(b)(ii)"; inserted (3)(b)(i) relating to use of quarantine measures; in (3)(b)(iii) after "inspect and clean" deleted "the exterior of" and inserted last sentence relating to mandatory inspections; deleted former (3)(b)(ii) that read: "(ii) If the invasive species management area encompasses the entire state, departmental authority to prescribe requirements for cleaning and inspecting the exterior of vessels traveling within the state is limited to those vessels required to stop at a check station pursuant to 80-7-1011(3)(b)"; and made minor changes in style. Amendment effective July 1, 2011.

## 80-7-1010. Invasive species management area — regulation.

**Compiler's Comments**

*2021 Amendment:* Chapter 192 in (2) near middle of first sentence substituted "any state waters and the drain plug disengaged to drain the water before leaving the boat launch or parking area and being transported" for "any state waters before being transported" and inserted last two sentences concerning reengaging the drain plug after draining and alternate reasonable measures to comply with the draining requirement. Amendment effective October 1, 2021.

*Applicability:* Section 5, Ch. 192, L. 2021, provided: "[This act] applies to violations charged on or after [the effective date of this act]." Effective October 1, 2021.

*2017 Amendment:* Chapter 387 in (1) at end inserted "and provide proof of compliance upon request of a department or its designee". Amendment effective May 15, 2017.

*Code Commissioner Note:* Chapter 387, L. 2017, was not signed and approved until May 18, 2017.

*2013 Amendment:* Chapter 354 in (1) after "vessel" inserted "or equipment"; in (2) after "vessels" inserted "equipment"; and deleted former (3) that read: "(3) In a body of water designated as an invasive species management area, taking from the water or possessing any bait animal, dead or alive, including but not limited to crayfish, leeches, and minnows, is prohibited unless approved by the department of fish, wildlife, and parks." Amendment effective April 30, 2013.

## 80-7-1011. Check stations.

**Compiler's Comments**

*2017 Amendment:* Chapter 348 in (2) in second sentence at beginning substituted "Examination of" for "A department may examine" and near middle after "for compliance" inserted "may occur"; in (4) at beginning of second sentence substituted "Every effort must be made" for "The department shall make every effort". Amendment effective May 7, 2017.

*2013 Amendment:* Chapter 354 in (2) inserted "established under subsection (1)", after "vessels and" substituted "equipment" for "trailers transporting vessels", and after "a vessel" inserted "or equipment"; in (3) after "vessel" inserted "or equipment"; and in (4) after "a vessel or" substituted "equipment" for "a trailer transporting a vessel", after "that vessel or" substituted "equipment" for "trailer", after "station" inserted "without authorization", and inserted last sentence regarding expeditious decontamination. Amendment effective April 30, 2013.

*2011 Amendment:* Chapter 378 in (2) substituted "vessels and trailers transporting vessels" for "the exterior of vessels" and inserted last sentence relating to examination of any interior portion of a vessel that may contain water; in (3) at beginning deleted "Except as provided in subsection (3)(b)"; deleted former (3)(b) that read: "(b) If a check station is established under regulations pertaining to a statewide invasive species management area, a stop at that check station is required only for a vehicle transporting a vessel, excluding vessels that have never been used"; in (4) substituted "a vessel or a trailer transporting a vessel" for "the exterior of a vessel" and substituted "that vessel or trailer" for "upon the exterior of the vessel, that vessel"; and made minor changes in style. Amendment effective July 1, 2011.

## 80-7-1013. Emergency response.

**Compiler's Comments**

*2015 Amendment:* Chapter 289 inserted (1)(b) and (1)(c) concerning additional criteria for declaring invasive species emergency; inserted (3) allowing the invasive species trust fund to be appropriated under certain circumstances; and made minor changes in style. Amendment effective July 1, 2015.

## 80-7-1014. Penalty.

**Compiler's Comments**

*2017 Amendment:* Chapter 348 in (1)(a) at end inserted "for the first offense and $750 for subsequent offenses"; in (1)(b) at end of first sentence substituted "$975" for "$1,000" and inserted second sentence concerning forfeiture of fishing licenses, fishing privileges, and stickers and decals required to operate vessels on state waters; in (1)(c) near end of first sentence substituted "$10,000" for "$5,000" and in middle of second sentence inserted "surrender an involved vessel and"; and in (1)(d) near beginning substituted "$2,500" for "$250". Amendment effective May 7, 2017.

*2013 Amendment:* Chapter 354 in (1)(a) in two places, (1)(b) in two places, (1)(d) in two places, and (2) in two places after "80-7-1012" inserted "and 80-7-1015"; and in (1)(a) and (1)(b) after "area" inserted "or the statewide invasive species management area". Amendment effective April 30, 2013.

### 80-7-1015. Statewide invasive species management area.

**Compiler's Comments**

*2021 Amendment:* Chapter 192 in (7) near middle of first sentence substituted "any state waters and the drain plug disengaged to drain the water before leaving the boat launch or parking area and being transported" for "any state waters before being transported" and inserted last two sentences concerning reengaging the drain plug after draining and alternate reasonable measures to comply with the draining requirement. Amendment effective October 1, 2021.

*Applicability:* Section 5, Ch. 192, L. 2021, provided: "[This act] applies to violations charged on or after [the effective date of this act]." Effective October 1, 2021.

*2019 Amendment:* Chapter 472 in (1) near end, in (4) near middle, and in (6) at beginning inserted exception clause; and made minor changes in style. Amendment effective May 10, 2019.

*2017 Amendment:* Chapter 348 in (1) near middle substituted "entering the state" for "at key entry points to the state on a seasonal basis"; in (4) in second sentence at beginning substituted "Examination of" for "A department may examine" and near middle after "for compliance" inserted "may occur"; in (6) in second sentence at beginning substituted "Every effort must be made" for "The department shall make every effort". Amendment effective May 7, 2017.

*2015 Amendment:* Chapter 290 inserted (2) concerning cooperation between the department of transportation and the department of fish, wildlife, and parks regarding locations for check stations; and made minor changes in style. Amendment effective October 1, 2015.

*Effective Date:* Section 13(1), Ch. 354, L. 2013, provided that this section is effective on passage and approval. Approved April 30, 2013.

### 80-7-1016. Invasive species trust fund.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 3, Ch. 119, L. 2023. Amendment effective April 18, 2023.

*2017 Amendment:* Chapter 387 in (2), (3), and (4) substituted "$100 million" for "$10 million"; in (3) deleted reference to subsection (4) of this section; in (4) near end substituted "invasive species account" for "invasive species grant account" and at end substituted "80-7-1004" for "80-7-1017"; and deleted former (6) that read: "(6) If the invasive species trust fund is terminated, the money in the fund must be divided between all counties according to rules adopted by the department of natural resources and conservation for that purpose"; and made minor changes in style. Amendment effective May 15, 2017.

*Code Commissioner Note:* Chapter 387, L. 2017, was not signed and approved until May 18, 2017.

*Effective Date:* Section 6, Ch. 289, L. 2015, provided that this section is effective July 1, 2015.

### 80-7-1017. Invasive species grant account.

**Compiler's Comments**

*2017 Amendment:* Chapter 387 in (2) at end deleted "and deposits made pursuant to 80-7-1016"; in (4) near end of first sentence after "provisions of" deleted "80-7-1016 through"; and made minor changes in style. Amendment effective May 15, 2017.

*Code Commissioner Note:* Chapter 387, L. 2017, was not signed and approved until May 18, 2017.

*Effective Date:* Section 6, Ch. 289, L. 2015, provided that this section is effective July 1, 2015.

### 80-7-1018. Invasive species grant program — criteria — rulemaking.

**Compiler's Comments**

*2017 Amendment:* Chapter 387 in (9) after "provisions of" substituted "this section" for "80-7-1016 through 80-7-1018". Amendment effective May 15, 2017.

*Code Commissioner Note:* Chapter 387, L. 2017, was not signed and approved until May 18, 2017.

*Effective Date:* Section 6, Ch. 289, L. 2015, provided that this section is effective July 1, 2015.

### 80-7-1019. Enforcement.

**Compiler's Comments**

*2021 Amendment:* Chapter 192 in (1) at beginning inserted exception clause; inserted (2) concerning the conditions necessary for a peace officer to require a person who may be in violation of 80-7-1010(2) and 80-7-1015(7) to stop and a requirement that a peace officer provide a person with the opportunity to correct the violation; and made minor changes in style. Amendment effective October 1, 2021.

*Applicability:* Section 5, Ch. 192, L. 2021, provided: "[This act] applies to violations charged on or after [the effective date of this act]." Effective October 1, 2021.

*Effective Date:* This section is effective October 1, 2015.

**80-7-1025. Missouri River containment and quarantine program.**

**Compiler's Comments**

*Effective Date:* Section 17(1), Ch. 348, L. 2017, provided: "(1) Except as provided in subsection (2), [this act] is effective on passage and approval." Approved May 7, 2017.

**80-7-1030. Mandatory decontamination for vessels with ballast or bladders — legislative finding — fees.**

**Compiler's Comments**

*2021 Amendment:* Chapter 125 in (2) in first sentence at end substituted "for the preceding 45 days or meets other criteria determined by the department of fish, wildlife, and parks to render decontamination unnecessary" for "for the preceding 30 days"; and made minor changes in style. Amendment effective April 1, 2021.

*Effective Date:* Section 5, Ch. 472, L. 2019, provided: "[This act] is effective on passage and approval." Approved May 10, 2019.

**80-7-1031. Exemption from environmental review.**

**Compiler's Comments**

*Effective Date:* This section is effective October 1, 2023.

## Part 11
## Vertebrate Pest Management

**Part Compiler's Comments**

*1987 Statement of Intent:* The statement of intent attached to Ch. 144, L. 1987, provided: "This bill requires a statement of intent because section 6 [80-7-1108] authorizes the department of agriculture to adopt rules implementing the vertebrate pest management law. The department may operate management programs and may cooperate with other governmental and private entities for vertebrate pest management purposes.

It is the intent of the legislature that the department adopt rules for the orderly administration of the rodenticide fund and the collection of revenue as provided in the bill. The department shall provide a method of giving notice to the rodenticide registrant and a procedure for payment of the surcharge.

It is the intent of the legislature that the department adopt rules relating to the expenditure of funds generated by this bill. Specifically, the department shall use the criteria stated in 80-7-1102 and 80-7-1103 (now repealed) as the basis for the expenditure of the funds. The legislature intends that the money given in the form of grants and contracts be primarily on a cost-share basis. The department shall determine the ratio of cost sharing by considering the entity being given the money, its ability to find other sources of funding, the need for the project for which it receives the money, and the amount of benefit it bestows on the area involved. The legislature intends that projects involving greater community action and benefit receive increased priority."

*Transfer of Functions — Terminology Change.* Section 1, Ch. 65, L. 1983, provided: "(1) The functions of the department of livestock relating to rodent control as provided in Title 81, chapter 1, part 4, are transferred to the department of agriculture under Title 80, chapter 7.

(2) All references in Title 81, chapter 1, part 4, to the "department", meaning "department of livestock", are changed to mean "department of agriculture"."

**80-7-1101. Department to operate vertebrate pest management program.**

**Compiler's Comments**

*2017 Amendment:* Chapter 43 in (1) at end of second sentence substituted "snakes, voles, and depredatory and nuisance birds" for "and the following" and in third sentence inserted "are defined as"; inserted (2) concerning the nonapplicability of section to certain nongame wildlife; and made minor changes in style. Amendment effective October 1, 2017.

*1983 Amendment:* Throughout section, substituted "management" for "control"; at end of first sentence, inserted "vertebrate pests."; at beginning of second sentence, inserted "Vertebrate pests are defined as"; in middle of second sentence, substituted "skunks, raccoons, bats, and the following depredatory and nuisance birds: blackbirds, cowbirds, starlings, house sparrows, and feral pigeons" for "and other rodents and related animals in this state"; at end of second sentence, after "public" deleted "health"; in middle and at end of third sentence, substituted "vertebrate pests" for "noxious rodents and related animals"; and inserted last sentence explaining what is encompassed by vertebrate pest management.

### 80-7-1102. Expenditures authorized.

**Compiler's Comments**

*2003 Amendment:* Chapter 166 at beginning of (4) deleted "make grants to or"; and made minor changes in style. Amendment effective March 28, 2003.

*1987 Amendment:* In introductory clause, after "expenditures", substituted "to:" for "for"; at beginning of (1) inserted "purchase" and after "supplies" deleted "other expenses, including expenditures for"; inserted (2) allowing expenditures for obtaining data and research information; inserted (3) allowing expenditures to conduct research or evaluation studies; inserted (4) allowing expenditures to make certain grants or enter certain contracts; inserted (5) allowing expenditures for maintenance and support of current rodenticide registration; inserted (6) allowing funding for seeking alternative rodenticide registration; inserted (7) allowing expenditures to develop new pest management methods and crop damage assessment techniques; inserted (8) allowing funding of research and evaluation projects; inserted (9) allowing funds to educate the agricultural community; inserted (10) allowing funds to educate the general public; and inserted (11) allowing expenditures for related activities.

### 80-7-1108. Rules.

**Compiler's Comments**

*1987 Statement of Intent:* The statement of intent attached to Ch. 144, L. 1987, provided: "This bill requires a statement of intent because section 6 [80-7-1108] authorizes the department of agriculture to adopt rules implementing the vertebrate pest management law. The department may operate management programs and may cooperate with other governmental and private entities for vertebrate pest management purposes.

It is the intent of the legislature that the department adopt rules for the orderly administration of the rodenticide fund and the collection of revenue as provided in the bill. The department shall provide a method of giving notice to the rodenticide registrant and a procedure for payment of the surcharge.

It is the intent of the legislature that the department adopt rules relating to the expenditure of funds generated by this bill. Specifically, the department shall use the criteria stated in 80-7-1102 and 80-7-1103 (now repealed) as the basis for the expenditure of the funds. The legislature intends that the money given in the form of grants and contracts be primarily on a cost-share basis. The department shall determine the ratio of cost sharing by considering the entity being given the money, its ability to find other sources of funding, the need for the project for which it receives the money, and the amount of benefit it bestows on the area involved. The legislature intends that projects involving greater community action and benefit receive increased priority."

## Part 12
## Invasive Species Council

### 80-7-1201. Invasive species council — purpose.

**Compiler's Comments**

*Effective Date:* Section 17(1), Ch. 348, L. 2017, provided: "(1) Except as provided in subsection (2), [this act] is effective on passage and approval." Approved May 7, 2017.

### 80-7-1203. Duties — reporting — definition.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 2, Ch. 456, L. 2023. Amendment effective October 1, 2023.

*2021 Amendment:* See 2021 Session Law for amendment made by sec. 111, Ch. 261, L. 2021. Amendment effective April 20, 2021.

*Effective Date:* Section 17(1), Ch. 348, L. 2017, provided: "(1) Except as provided in subsection (2), [this act] is effective on passage and approval." Approved May 7, 2017.

# CHAPTER 8
# PESTICIDES

## Part 1
## General Administration

**80-8-102. Definitions.**

**Compiler's Comments**

*2019 Amendment:* Chapter 3 in definition of dealer at end substituted "home, yard, lawn, and garden" for "home, yard, garden, and lawn". Amendment effective October 1, 2019.

*2017 Amendment:* Chapter 244 deleted former definition that read: ""Antidote" means the most practical immediate treatment in case of poisoning and includes first-aid treatment"; in definition of dealer near end after "garden" deleted "home orchard, shade trees, ornamental trees, bushes"; in definition of fungi substituted "molds, and yeasts" for "molds, yeasts, and bacteria"; deleted former definition that read: ""Fungicide" means a substance or mixture of substances for preventing, destroying, repelling, or mitigating any fungus"; in definition of misbranded in (b)(ii) substituted "fails to bear the necessary information required by this chapter" for "bears any reference to registration under this chapter", in (b)(iii) substituted "that when followed provide adequate public protection" for "necessary and, if complied with, adequate for the protection of the public", and in (b)(vii) near beginning substituted "nematicide" for "nematocide"; deleted definition that read: ""Nematocide" means any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating nematodes"; deleted definition that read: ""Nematodes", "nemas", or "eelworms" means invertebrate animals of the phylum nemathelminthes and class nematoda, that is, unsegmented round worms with elongated, fusiform, or sac-like bodies covered with cuticle and inhabiting soil, water, animals, plants, or plant parts"; in definition of restricted-use pesticide near beginning after "department" inserted "or the environmental protection agency" and after "found and determined" deleted "subsequent to a hearing"; and made minor changes in style. Amendment effective May 3, 2017.

*Saving Clause:* Section 15, Ch. 244, L. 2017, was a saving clause.

*Severability:* Section 16, Ch. 244, L. 2017, was a severability clause.

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

*1993 Amendment:* Chapter 10 in definition of labeling substituted reference to Department of Health and Human Services for reference to Department of Health, Education, and Welfare; and made minor changes in style.

*1991 Amendment:* Inserted definition of waste pesticide. Amendment effective July 1, 1991.

*Preamble:* The preamble attached to Ch. 51, L. 1991, provided: "WHEREAS, Montana agricultural producers, government agencies, and citizens possess a substantial volume of waste pesticides that they cannot use in compliance with current regulatory requirements or are unable to beneficially use for a variety of other reasons; and

WHEREAS, all Montanans have an interest in providing for the proper disposal of waste pesticides for purposes of protecting public health and safety, ground water quality, and other resources."

**80-8-103. Purpose.**

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

**80-8-105. Rules.**

**Compiler's Comments**

*2019 Amendment:* Chapter 349 in (2)(o) at end substituted "recertification training" for "requalification training". Amendment effective October 1, 2019.

*Termination Provision Repealed:* Section 4, Ch. 216, L. 2003, repealed sec. 14, Ch. 465, L. 1993, and Ch. 362, L. 1999, which terminated certain amendments to this section. Effective April 3, 2003.

*Extension of Termination Date:* Section 1, Ch. 362, L. 1999, amended sec. 14, Ch. 465, L. 1993, by extending the termination date for subsections (2)(r) and (2)(s) imposed by Ch. 465 to December 31, 2003. Effective April 20, 1999.

*1993 Amendment:* Chapter 465 inserted (2)(r) and (2)(s) regarding standards and fees applicable to a waste pesticide and pesticide container recycling program; inserted (2)(t) regarding standards for pesticide storage, sites, and facilities; in first sentence of (5), after "writing", substituted "and must be available at the department for public inspection" for "shall be entered in full in books to be kept by the department for that purpose, shall be indexed, and shall be public records open for inspection at all times during reasonable office hours"; and made minor changes in style.

*1993 Statement of Intent:* The statement of intent attached to Ch. 465, L. 1993, provided: "A statement of intent is required for this bill to provide direction to the department of agriculture for adoption of rules to implement the standards and procedures needed for a waste pesticide and pesticide container collection, disposal, and recycling program, including fees on the volume, type, classification, or other characteristics of a waste pesticide or waste pesticide container, to offset the cost of conducting the program. The department shall establish special collection programs for persons who desire to dispose of or recycle unwanted pesticides or pesticide containers, provided that certain specific pesticides or pesticide containers may be excluded from this program. Persons who have complied with the waste pesticide or pesticide container collection, disposal, and recycling program may not be subject to any state administrative or judicial penalty. The department, when entering into a cooperative agreement with the Montana state university [now Montana state university-Bozeman] extension service, shall ensure in the agreement that at least $20 of the farm applicator fee imposed in [section 8] [80-8-209] is dedicated to county extension service programs for conducting local farm applicator pesticide educational and training programs for use of restricted-use pesticides."

*Severability:* Section 11, Ch. 465, L. 1993, was a severability clause.

*Termination:* Section 14, Ch 465, L. 1993, provided that subsections (2)(r) and (2)(s) of this section terminate June 30, 1999.

*1989 Amendment:* At beginning of (3)(a) inserted "Consistent with the provisions of Title 80, chapter 15". Amendment effective January 1, 1990.

*1983 Amendment:* In (2)(a), after "registration" inserted "suspension or cancellation of registration"; inserted (2)(o) allowing imposition of conditions for dealer, applicator, and operator license and permit renewal by Department rule; inserted (2)(p) establishing procedures for implementing civil penalties by Department rule; inserted (2)(q) establishing fees for training courses and materials by Department rule; in (3)(a) after "registration" inserted "suspension or cancellation of registration"; in (3)(a)(i) after "animals" inserted "crops"; and made minor changes in phraseology.

**Administrative Rules**

Title 4, chapter 10, subchapter 1, ARM Liability rules for pesticide applicators.
Title 4, chapter 10, subchapter 2, ARM Pesticide applicator and operator rules.
Title 4, chapter 10, subchapter 3, ARM Aquatic herbicide rules.
Title 4, chapter 10, subchapter 4, ARM Certification of farm applicator rules.
Title 4, chapter 10, subchapter 5, ARM Pesticide dealer and retailer rules.
Title 4, chapter 10, subchapter 7, ARM Restriction of pesticide rules.
Title 4, chapter 10, subchapter 8, ARM Rinsing and disposing of pesticide containers.
Title 4, chapter 10, subchapter 11, ARM Pesticide reporting, cleanup, and containment.
Title 4, chapter 10, subchapter 12, ARM 1080 Livestock protection collars.
Title 4, chapter 10, subchapter 14, ARM Registration and use of M-44 sodium cyanide capsules and devices.
ARM 4.10.1501 Pesticide terminology.
Title 4, chapter 10, subchapter 18, ARM Pesticide disposal program.

**Attorney General's Opinions**

*Public Disclosure:* Pesticide applicator and dealer records held by the Department of Agriculture are subject to the public disclosure requirements of the Montana Constitution. 38 A.G. Op. 1 (1979).

### 80-8-107. Notice — public information.

**Compiler's Comments**

*2017 Amendment:* Chapter 244 inserted (6)(b) regarding a state restricted-use pesticide; and made minor changes in style. Amendment effective May 3, 2017.

*Saving Clause:* Section 15, Ch. 244, L. 2017, was a saving clause.

*Severability:* Section 16, Ch. 244, L. 2017, was a severability clause.

*1997 Amendment:* Chapter 454 inserted (1) defining building operator and public building; inserted (2) concerning posting of pesticide application notice; inserted (3) concerning duration of posted notice; inserted (4) concerning record retention; inserted (5) concerning local government standards; and made minor changes in style.

*Local Implementation:* Section 2, Ch. 454, L. 1997, provided: "An ordinance adopted by a local government pursuant to 80-8-120 before October 1, 1997, must comply with [this act] by January 1, 1998."

*1989 Amendment:* At beginning inserted exception clause. Amendment effective January 1, 1990.

### 80-8-108. Advisory council.

**Compiler's Comments**

*2015 Amendment:* Chapter 30 in (2) substituted "essential support" for "essential items"; in (3) substituted "is entitled to compensation as provided in 2-15-122" for "must receive as compensation for services the sum of $25 a day"; and made minor changes in style. Amendment effective February 18, 2015.

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 80-8-109. Educational programs.

**Compiler's Comments**

*1989 Amendment:* In (2), in last sentence, substituted "employee of a state agency or of the Montana cooperative extension service" for "employee of the state or a unit of the Montana university system". Amendment effective July 1, 1989.

*Severability:* Section 7, Ch. 181, L. 1989, was a severability clause.

*1985 Amendment:* In (3) after "All fees collected", substituted present language for "in any fiscal year and not expended within that fiscal year must be placed in an educational and manuals account of the state special revenue fund for future use for that purpose".

*1983 Amendments:* Chapter 633, near beginning of (1), after "department" deleted "in cooperation with other state and federal agencies"; inserted (2) allowing departmental consultation with other entities in developing educational programs and providing for an administrative fee; and inserted (3) providing for deposit and allocation of fees.

Chapter 281, in (3), substituted "state special revenue fund" for "earmarked revenue fund".

**Administrative Rules**

ARM 4.10.210 Pesticide certification and training — fees.

### 80-8-110. Cooperation with other agencies.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 in (2), at beginning, substituted "department and the department of environmental quality" for "department of agriculture and the department of health and environmental sciences"; in (3), in second sentence after "wastewater", substituted "effluents" for "affluents", substituted "department of environmental quality" for "department of state lands", with regard to reclamation, and substituted "department of natural resources and conservation" for "department of state lands", with regard to slash and forest debris; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1981 Amendment:* Changed "the department of natural resources and conservation" to "the department of state lands" near the end of (3). Chapter 529, L. 1981, transferred the duty of administering the regulation of slash and forest debris from the department of natural resources and conservation to the department of state lands necessitating this amendment.

### 80-8-111. Waste pesticide and pesticide container collection, disposal, and recycling program.

**Compiler's Comments**

*2017 Amendment:* Chapter 244 deleted former (5) that read: "(5) The department shall provide pesticide applicators, dealers, and operators who participate in the waste pesticide and pesticide container collection, disposal, and recycling program and who are subject to a license or permit fee under 80-8-203, 80-8-205, 80-8-207, 80-8-209, or 80-8-213 with a credit against the fees levied pursuant to 80-8-105(2)(s), provided that:

(a) the credit does not exceed the amount of the license or permit fee paid by the applicator, dealer, or operator under 80-8-203, 80-8-205, 80-8-207, 80-8-209, or 80-8-213; and

(b) each applicator, dealer, or operator may receive only one credit for each permit or license period"; and made minor changes in style. Amendment effective May 3, 2017.

*Saving Clause:* Section 15, Ch. 244, L. 2017, was a saving clause.

*Severability:* Section 16, Ch. 244, L. 2017, was a severability clause.

*Repealer — Contingent Effective Date:* Section 3(2), Ch. 362, L. 1999, provided that sec. 2, Ch. 362, repealing this section, "is effective when the department of agriculture certifies that funds in the account in 80-8-112 are completely expended". Section 4, Ch. 216, L. 2003, repealed Ch. 362 prior to the department of agriculture certifying that the funds in the account in 80-8-112 were completely expended.

*1997 Amendment:* Chapter 42 in version effective July 1, 1999, in (2) and in (3), in third sentence after "by the legislature", deleted "in 1993". Amendment effective March 12, 1997.

*1993 Amendment:* Chapter 465 substituted present section regarding waste pesticide and pesticide container collection, disposal, and recycling program for former section that read: "(1) The department shall establish a voluntary reporting system to encourage pesticide applicators and other persons to report:

(a) the types and volume of waste pesticides in their possession; and

(b) the county where the waste pesticides are stored.

(2) The department shall inventory the waste pesticide information reported under subsection (1) and develop a proposed waste pesticide disposal program for consideration by the legislature in 1993.

(3) All waste pesticide information reported to the department under subsection (1) is confidential. The department may summarize the information for purposes of preparing a waste pesticide inventory report that is public information. If a waste pesticide disposal program is not approved by the legislature in 1993, the department shall destroy the waste pesticide information received under subsection (1)."

*1993 Statement of Intent:* The statement of intent attached to Ch. 465, L. 1993, provided: "A statement of intent is required for this bill to provide direction to the department of agriculture for adoption of rules to implement the standards and procedures needed for a waste pesticide and pesticide container collection, disposal, and recycling program, including fees on the volume, type, classification, or other characteristics of a waste pesticide or waste pesticide container, to offset the cost of conducting the program. The department shall establish special collection programs for persons who desire to dispose of or recycle unwanted pesticides or pesticide containers, provided that certain specific pesticides or pesticide containers may be excluded from this program. Persons who have complied with the waste pesticide or pesticide container collection, disposal, and recycling program may not be subject to any state administrative or judicial penalty. The department, when entering into a cooperative agreement with the Montana state university [now Montana state university-Bozeman] extension service, shall ensure in the agreement that at least $20 of the farm applicator fee imposed in [section 8] [80-8-209] is dedicated to county extension service programs for conducting local farm applicator pesticide educational and training programs for use of restricted-use pesticides."

*Severability:* Section 11, Ch. 465, L. 1993, was a severability clause.

*Termination:* Section 14, Ch 465, L. 1993, provided that this section terminates June 30, 1999.

*Preamble:* The preamble attached to Ch. 51, L. 1991, provided: "WHEREAS, Montana agricultural producers, government agencies, and citizens possess a substantial volume of waste pesticides that they cannot use in compliance with current regulatory requirements or are unable to beneficially use for a variety of other reasons; and

WHEREAS, all Montanans have an interest in providing for the proper disposal of waste pesticides for purposes of protecting public health and safety, ground water quality, and other resources."

*Effective Date:* Section 4, Ch. 51, L. 1991, provided that this section is effective July 1, 1991.

**Administrative Rules**

Title 4, chapter 10, subchapter 18, ARM Pesticide disposal program.

## 80-8-112. Deposit of waste pesticide and pesticide container collection, disposal, and recycling fees.

**Compiler's Comments**

*Repealer — Contingent Effective Date:* Section 3(2), Ch. 362, L. 1999, provided that sec. 2, Ch. 362, repealing this section, "is effective when the department of agriculture certifies that funds in the account in 80-8-112 are completely expended". Section 4, Ch. 216, L. 2003, repealed Ch. 362

prior to the department of agriculture certifying that the funds in the account in 80-8-112 were completely expended.

*1993 Statement of Intent:* The statement of intent attached to Ch. 465, L. 1993, provided: "A statement of intent is required for this bill to provide direction to the department of agriculture for adoption of rules to implement the standards and procedures needed for a waste pesticide and pesticide container collection, disposal, and recycling program, including fees on the volume, type, classification, or other characteristics of a waste pesticide or waste pesticide container, to offset the cost of conducting the program. The department shall establish special collection programs for persons who desire to dispose of or recycle unwanted pesticides or pesticide containers, provided that certain specific pesticides or pesticide containers may be excluded from this program. Persons who have complied with the waste pesticide or pesticide container collection, disposal, and recycling program may not be subject to any state administrative or judicial penalty. The department, when entering into a cooperative agreement with the Montana state university [now Montana state university-Bozeman] extension service, shall ensure in the agreement that at least $20 of the farm applicator fee imposed in [section 8] [80-8-209] is dedicated to county extension service programs for conducting local farm applicator pesticide educational and training programs for use of restricted-use pesticides."

*Severability:* Section 11, Ch. 465, L. 1993, was a severability clause.

*Termination:* Section 14, Ch. 465, L. 1993, provided that this section terminates June 30, 1999.

**Administrative Rules**

Title 4, chapter 10, subchapter 18, ARM Pesticide disposal program.

### 80-8-116. Pesticide management account — deposit of fees and penalties — investment.

**Compiler's Comments**

*1999 Amendment:* Chapter 65 deleted former (2)(b) that read: "(b) Any civil penalties collected under 80-8-306 must be deposited in the general fund"; and made minor changes in style. Amendment effective July 1, 1999.

*1991 Amendment:* Inserted (1) concerning existence of pesticide management account within state special revenue fund; in (2)(a), near beginning before "fees", substituted "devices and blending plant" for "equipment inspection", after "under" inserted reference to part 1, and after "chapter" inserted language concerning depositing fees into pesticide management account to be used to pay cost of equipment and facilities and of inspection, investigation, analyzation, and examination of pesticide products, users, sellers, equipment, facilities, and related pest and pesticide activities; inserted (3) concerning investment by Board of Investments of funds collected under section and crediting income from investments to pesticide management account; and made minor changes in style. Amendment effective July 1, 1991.

*Severability:* Section 9, Ch. 588, L. 1991, was a severability clause.

### 80-8-117. Pesticide cleanup special revenue account.

**Compiler's Comments**

*Effective Date:* Section 5, Ch. 65, L. 1999, provided that this section is effective July 1, 1999.

### 80-8-120. Local pesticide regulation.

**Compiler's Comments**

*2003 Amendment:* Chapter 114 in (1)(a) in introductory clause deleted reference to subsection (6) of 80-8-102; and in (1)(a)(v) near middle of first sentence substituted "weed management district" for "weed control district". Amendment effective October 1, 2003.

*1997 Amendment:* Chapter 180 substituted (1) specifying provisions for a local government to regulate the notification of pesticide application for former (1) through (4) that read: "(1) A unit of local government may adopt an ordinance to regulate pesticide application that may include notification, provided that the ordinance is fully consistent with the authorities provided for in Title 80, chapter 8, and rules adopted under Title 80, chapter 8. The department shall develop a policy for the review and approval of local pesticide ordinances. A unit of local government shall submit a proposed ordinance to the department for verification that the proposed ordinance is consistent with the authorities provided for in Title 80, chapter 8. The ordinance may not be adopted until it has been approved by the department.

(2) A unit of local government may petition the department in writing to adopt rules to address specific local conditions, as provided in 80-8-105(3)(a). The petition must document:

(a) the need for a rule, including the reason that existing rules do not address the particular pesticide application;

(b) the need for specific local rules; and

(c) that a situation exists that threatens or is likely to threaten public health or environmental quality in the jurisdiction of the unit of local government.

(3) Local rules may be administered, enforced, and financed by a unit of local government:

(a) through a cooperative agreement with the department as provided under this section; or

(b) after the department adopts rules authorizing a unit of local government to administer, enforce, and finance an ordinance.

(4) Within 30 days of receiving the petition, the department shall respond to the unit of local government, stating:

(a) whether the petition conforms to the purpose of Title 80, chapter 15, and to the provisions of this section; and

(b) the procedures and time period for the promulgation of rules by the department, provided that the petition conforms to the purpose of Title 80, chapter 15, and to the provisions of this section"; in (3), at beginning of first sentence, substituted "subsections (1) and (2), a unit of local government" for "subsection (1), a local government ordinance" and after "pesticides" inserted "or enact notification provisions more stringent than those provided for in subsections (1) and (2)"; and made minor changes in style. Amendment effective April 1, 1997.

*Preamble:* The preamble attached to Ch. 180, L. 1997, provided: "WHEREAS, statewide uniformity in regulations, specifically pesticide notification posting and notification regulations a unit of local government may choose to enact, is in the best interest of Montana citizens; and

WHEREAS, excessive regulation inhibits Montana's economic health and the freedom of its citizens; and

WHEREAS, a local government is entitled to local control and may wish to enact an ordinance or resolution on pesticide application notification; and

WHEREAS, pesticides are a vital and necessary tool to protect Montanans from the threat of disease and economic harm caused by mosquitoes, weeds, and other pests; and

WHEREAS, this bill is in the best interest of the citizens of Montana."

*Severability:* Section 3, Ch. 180, L. 1997, was a severability clause.

*Applicability:* Section 4, Ch. 180, L. 1997, provided: "An ordinance adopted by a local government under 80-8-120 before [the effective date of this act] [effective April 1, 1997] must comply with [this act] by January 1, 1998."

*1993 Statement of Intent:* The statement of intent attached to Ch. 465, L. 1993, provided: "A statement of intent is required for this bill to provide direction to the department of agriculture for adoption of rules to implement the standards and procedures needed for a waste pesticide and pesticide container collection, disposal, and recycling program, including fees on the volume, type, classification, or other characteristics of a waste pesticide or waste pesticide container, to offset the cost of conducting the program. The department shall establish special collection programs for persons who desire to dispose of or recycle unwanted pesticides or pesticide containers, provided that certain specific pesticides or pesticide containers may be excluded from this program. Persons who have complied with the waste pesticide or pesticide container collection, disposal, and recycling program may not be subject to any state administrative or judicial penalty. The department, when entering into a cooperative agreement with the Montana state university [now Montana state university-Bozeman] extension service, shall ensure in the agreement that at least $20 of the farm applicator fee imposed in [section 8] [80-8-209] is dedicated to county extension service programs for conducting local farm applicator pesticide educational and training programs for use of restricted-use pesticides."

*Severability:* Section 11, Ch. 465, L. 1993, was a severability clause.

*Effective Date:* Section 13, Ch. 465, L. 1993, provided that this section was effective on passage and approval. Approved April 21, 1993.

### 80-8-121. Penalty.

**Compiler's Comments**

*Preamble:* The preamble attached to Ch. 180, L. 1997, provided: "WHEREAS, statewide uniformity in regulations, specifically pesticide notification posting and notification regulations a unit of local government may choose to enact, is in the best interest of Montana citizens; and

WHEREAS, excessive regulation inhibits Montana's economic health and the freedom of its citizens; and

WHEREAS, a local government is entitled to local control and may wish to enact an ordinance or resolution on pesticide application notification; and

WHEREAS, pesticides are a vital and necessary tool to protect Montanans from the threat of disease and economic harm caused by mosquitoes, weeds, and other pests; and

WHEREAS, this bill is in the best interest of the citizens of Montana."

*Severability:* Section 3, Ch. 180, L. 1997, was a severability clause.

*Applicability:* Section 4, Ch. 180, L. 1997, provided: "An ordinance adopted by a local government under 80-8-120 before [the effective date of this act] [effective April 1, 1997] must comply with [this act] by January 1, 1998."

*Effective Date:* Section 5, Ch. 180, L. 1997, provided: "[This act] is effective on passage and approval." Approved April 1, 1997.

## Part 2

## Registration and Licensing

**Part Administrative Rules**

Title 4, chapter 10, subchapter 7, ARM Restriction of pesticide rules.

**Part Attorney General's Opinions**

*Licensing of Private Canal and Ditch Company:* A private canal and ditch company that applies pesticides to its own property and to property of adjoining landowners is not classified as a commercial applicator under the provisions of the Montana Pesticides Act as long as the company does not receive any compensation or consideration for the application of pesticide to property not its own. It is classified as a farm applicator and is consequently not required to license one of its employees as a commercial applicator. 36 A.G. Op. 3 (1975).

### 80-8-201. Registration.

**Compiler's Comments**

*2017 Amendment:* Chapter 244 in (2)(b) substituted "pesticide label" for "label of the pesticide, the United States environmental protection agency registration number if the pesticide is registered"; in (4)(a) substituted "pesticide registration fee" for "fee of $90"; inserted (4)(b) providing for a minimum and maximum annual pesticide registration fee and adjustment of the fee by rule; inserted (5) providing for a special needs fee to be used for the Montana state university extension service pesticide education program; in (9)(b) near end substituted "may issue" for "shall issue"; in (9)(d) at end of first sentence substituted "registration of the pesticide or device" for "registration of any pesticide"; in (10)(b) near middle after "used according to" deleted "environmental protection agency"; and made minor changes in style. Amendment effective May 3, 2017.

*Saving Clause:* Section 15, Ch. 244, L. 2017, was a saving clause.

*Severability:* Section 16, Ch. 244, L. 2017, was a severability clause.

*2001 Amendment:* Chapter 141 in (4) in first sentence increased annual fee from $70 to $90 and substituted introductory clause and (4)(a) through (4)(c) regarding purposes for which annual fee is paid for former second sentence that read: "A registration fee is not required to register a federally approved experimental use permit"; and in (8)(a) deleted former second sentence that read: "The applicant shall pay a one-time fee of $70 for a special local need or experimental-use permit registration." Amendment effective October 1, 2001.

*Saving Clause:* Section 3, Ch. 141, L. 2001, was a saving clause.

*1997 Amendment:* Chapter 73 in (8)(a), in four places, and in (8)(c) substituted "department of public health and human services" for "department of environmental quality"; and made minor changes in style. Amendment effective July 1, 1997.

*1995 Amendment:* Chapter 418 throughout section, after "department", deleted "of agriculture"; in (8)(a), in three places, substituted "department, the department of environmental quality, and the department of fish, wildlife, and parks" for "departments of health and environmental sciences, agriculture, and fish, wildlife, and parks"; in fourth sentence of (8)(a) and in (8)(c) substituted "environmental quality" for "health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1993 Amendments:* Chapters 139 and 465 throughout (5) and (6) substituted "pesticide" for "article"; in (9)(a), at beginning of third sentence, inserted exception clause; inserted (9)(b) allowing sale and use of certain pesticides up to 6 years from date distribution is terminated; and made minor changes in style. Amendment effective March 22, 1993.

*1993 Statement of Intent:* The statement of intent attached to Ch. 465, L. 1993, provided: "A statement of intent is required for this bill to provide direction to the department of agriculture for adoption of rules to implement the standards and procedures needed for a waste pesticide and pesticide container collection, disposal, and recycling program, including fees on the volume, type, classification, or other characteristics of a waste pesticide or waste pesticide container, to offset the cost of conducting the program. The department shall establish special collection programs for persons who desire to dispose of or recycle unwanted pesticides or pesticide containers, provided that certain specific pesticides or pesticide containers may be excluded from this program. Persons who have complied with the waste pesticide or pesticide container collection, disposal, and recycling program may not be subject to any state administrative or judicial penalty. The department, when entering into a cooperative agreement with the Montana state university [now Montana state university-Bozeman] extension service, shall ensure in the agreement that at least $20 of the farm applicator fee imposed in [section 8] [80-8-209] is dedicated to county extension service programs for conducting local farm applicator pesticide educational and training programs for use of restricted-use pesticides."

*Severability:* Section 11, Ch. 465, L. 1993, was a severability clause.

*1991 Amendment:* In (4) decreased annual fee from $75 to $70 and deleted last sentence concerning depositing collected fees into general fund; and in second sentence of (8)(a) decreased one-time fee from $75 to $70. Amendment effective January 1, 1992.

*Severability:* Section 9, Ch. 588, L. 1991, was a severability clause.

*1989 Amendment:* In (4) and (8)(a) increased fee to $75 from $50. Amendment effective July 1, 1989.

*Severability:* Section 7, Ch. 181, L. 1989, was a severability clause.

*1983 Amendment:* In (1), after "register all" inserted "federally"; in (3) after "restrict the" inserted "sale or", after "type of" inserted "dealer"; in (4) increased annual fee from $15 to $50, after "register" deleted "an" and inserted "a federally approved"; in third sentence of (6) after "this chapter", inserted "or wherever scientific evidence proves that the article endangers man or the general environment afforded protection under 80-8-105(3)(a)"; at end of (6) after "the registrant may" substituted "pursue administrative remedies under the Montana Administrative Procedure Act and rules of the department" for "appeal the department's decision"; in (8)(a) inserted second sentence imposing $50 fee; and inserted (9) explaining procedures necessitated by federal cancellation.

## 80-8-202. Prohibited acts.

### Compiler's Comments

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

## 80-8-203. Commercial applicator.

### Compiler's Comments

*2017 Amendment:* Chapter 244 in (1) at end of second sentence increased fee from $45 to $75; and in (3) at end inserted "in relation to transactions and activities of a veterinary practice". Amendment effective May 3, 2017.

*Saving Clause:* Section 15, Ch. 244, L. 2017, was a saving clause.

*Severability:* Section 16, Ch. 244, L. 2017, was a severability clause.

*2003 Amendment:* Chapter 216 in (5) in first sentence decreased annual license fee from $30 to $10 and inserted second and third sentences allowing the department to adjust the disposal fee for administering the waste pesticide and pesticide container collection, disposal, and recycling program and providing that the fee may not be less than $10 or more than $15. Amendment effective April 3, 2003.

*Termination Provision Repealed:* Section 4, Ch. 216, L. 2003, repealed sec. 14, Ch. 465, L. 1993, and Ch. 362, L. 1999, which terminated certain amendments to this section. Effective April 3, 2003.

*Extension of Termination Date:* Section 1, Ch. 362, L. 1999, amended sec. 14, Ch. 465, L. 1993, by extending the termination date for subsection (5) imposed by Ch. 465 to December 31, 2003. Effective April 20, 1999.

*1993 Amendment:* Chapter 465 in second sentence of (1), after "application", substituted "for a pesticide applicator's license must" for "shall" and deleted former third sentence that read: "Applicators applying for a dealer's license under this chapter shall be required to pay only a $20 licensing fee for the dealer's license"; inserted (5) allowing assessment of an additional fee to fund the recycling program; and made minor changes in style.

*1993 Statement of Intent:* The statement of intent attached to Ch. 465, L. 1993, provided: "A statement of intent is required for this bill to provide direction to the department of agriculture for adoption of rules to implement the standards and procedures needed for a waste pesticide and pesticide container collection, disposal, and recycling program, including fees on the volume, type, classification, or other characteristics of a waste pesticide or waste pesticide container, to offset the cost of conducting the program. The department shall establish special collection programs for persons who desire to dispose of or recycle unwanted pesticides or pesticide containers, provided that certain specific pesticides or pesticide containers may be excluded from this program. Persons who have complied with the waste pesticide or pesticide container collection, disposal, and recycling program may not be subject to any state administrative or judicial penalty. The department, when entering into a cooperative agreement with the Montana state university [now Montana state university-Bozeman] extension service, shall ensure in the agreement that at least $20 of the farm applicator fee imposed in [section 8] [80-8-209] is dedicated to county extension service programs for conducting local farm applicator pesticide educational and training programs for use of restricted-use pesticides."

*Severability:* Section 11, Ch. 465, L. 1993, was a severability clause.

*Termination:* Section 14, Ch. 465, L. 1993, provided that subsection (5) of this section terminates June 30, 1999.

*1989 Amendment:* In (1) increased fee for applicator's license to $45 from $35; and inserted (4) relating to an applicator's responsibility for an operator or employee. Amendment effective July 1, 1989.

*Severability:* Section 7, Ch. 181, L. 1989, was a severability clause.

*1983 Amendment:* In (1), increased applicator's license fee from $15 to $35, increased dealer's license fee from $10 to $20, and after "provisions of this" substituted "subsection" for "section".

## 80-8-204. Application for applicator's license.

### Compiler's Comments

*2001 Amendment:* Chapter 483 in (2) near end after "department of" substituted "transportation" for "commerce"; and made minor changes in style. Amendment effective July 1, 2001.

*1983 Amendment:* In (1), changed renewal date in two places from May 1 to March 1, and increased late renewal fee from $15 to $25.

*1981 Amendments:* Chapter 184 substituted language requiring the applicant to certify that he has met all federal aviation administration and department of community affairs requirements for language requiring the applicant to first meet the requirements to operate the equipment described in the application in (2).

Chapter 274 substituted "department of commerce" for "department of community affairs" in (2).

## 80-8-205. Commercial operator.

### Compiler's Comments

*Termination Provision Repealed:* Section 4, Ch. 216, L. 2003, repealed sec. 14, Ch. 465, L. 1993, and Ch. 362, L. 1999, which terminated certain amendments to this section. Effective April 3, 2003.

*Extension of Termination Date:* Section 1, Ch. 362, L. 1999, amended sec. 14, Ch. 465, L. 1993, by extending the termination date for subsection (2) imposed by Ch. 465 to December 31, 2003. Effective April 20, 1999.

*1993 Amendment:* Chapter 465 inserted (2) establishing a fee to fund the recycling program and providing for deposit of the fee.

*1993 Statement of Intent:* The statement of intent attached to Ch. 465, L. 1993, provided: "A statement of intent is required for this bill to provide direction to the department of agriculture for adoption of rules to implement the standards and procedures needed for a waste pesticide and pesticide container collection, disposal, and recycling program, including fees on the volume, type, classification, or other characteristics of a waste pesticide or waste pesticide container, to offset the cost of conducting the program. The department shall establish special collection programs for persons who desire to dispose of or recycle unwanted pesticides or pesticide containers, provided that certain specific pesticides or pesticide containers may be excluded from this program. Persons who have complied with the waste pesticide or pesticide container collection, disposal, and recycling program may not be subject to any state administrative or judicial penalty. The department, when entering into a cooperative agreement with the Montana state university [now Montana state university-Bozeman] extension service, shall ensure in the agreement that at least $20 of the farm applicator fee imposed in [section 8] [80-8-209] is dedicated to county extension service programs for conducting local farm applicator pesticide educational and training programs for use of restricted-use pesticides."

*Severability:* Section 11, Ch. 465, L. 1993, was a severability clause.

*Termination:* Section 14, Ch. 465, L. 1993, provided that subsection (2) of this section terminates June 30, 1999.

**Administrative Rules**

Title 4, chapter 10, subchapter 2, ARM Pesticide applicator and operator rules.

### 80-8-206. Applicator's and operator's examination.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

**Administrative Rules**

ARM 4.10.203 through 4.10.205 Applicator competency standards.

### 80-8-207. Dealers.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 11, Ch. 759, L. 2023. Amendment effective July 1, 2023.

*2017 Amendment:* Chapter 244 inserted (2) providing for dealer's license examination and requiring recertification credits for renewal of license; in (3) at end of first sentence increased fee from $45 to $75; and made minor changes in style. Amendment effective May 3, 2017.

*Saving Clause:* Section 15, Ch. 244, L. 2017, was a saving clause.

*Severability:* Section 16, Ch. 244, L. 2017, was a severability clause.

*2005 Amendment:* Chapter 467 in (4) in fourth sentence after "deposited in" inserted "an account in" and after "revenue" substituted "fund" for "account"; in (5) in first sentence after "37-7-302" deleted "and 37-7-303" and after "37-18-302" deleted "and 37-18-303"; and made minor changes in style. Amendment effective July 1, 2005.

*2003 Amendment:* Chapter 216 in (4) in first sentence decreased annual license fee from $30 to $10 and inserted second and third sentences allowing the department to adjust the disposal fee for administering the waste pesticide and pesticide container collection, disposal, and recycling program and providing that the fee may not be less than $10 or more than $15. Amendment effective April 3, 2003.

*Termination Provision Repealed:* Section 4, Ch. 216, L. 2003, repealed sec. 14, Ch. 465, L. 1993, and Ch. 362, L. 1999, which terminated certain amendments to this section. Effective April 3, 2003.

*1999 Amendment:* Chapter 65 in (3) in first sentence inserted option allowing for electronic verification of restricted pesticide purchaser's license or permit and inserted second sentence allowing adoption of rules concerning dealer verification of restricted pesticide purchaser's license or permit; and made minor changes in style. Amendment effective July 1, 1999.

*Extension of Termination Date:* Section 1, Ch. 362, L. 1999, amended sec. 14, Ch. 465, L. 1993, by extending the termination date for subsection (4) imposed by Ch. 465 to December 31, 2003. Effective April 20, 1999.

*1993 Amendment:* Chapter 465 substituted present (4) allowing assessment of an additional fee to fund the recycling program for former language that read: "Dealers may make one application for two annual licenses if the application is accompanied by a $45 licensing fee for each year of the state biennium"; and made minor changes in style.

*1993 Statement of Intent:* The statement of intent attached to Ch. 465, L. 1993, provided: "A statement of intent is required for this bill to provide direction to the department of agriculture for adoption of rules to implement the standards and procedures needed for a waste pesticide and pesticide container collection, disposal, and recycling program, including fees on the volume, type, classification, or other characteristics of a waste pesticide or waste pesticide container, to offset the cost of conducting the program. The department shall establish special collection programs for persons who desire to dispose of or recycle unwanted pesticides or pesticide containers, provided that certain specific pesticides or pesticide containers may be excluded from this program. Persons who have complied with the waste pesticide or pesticide container collection, disposal, and recycling program may not be subject to any state administrative or judicial penalty. The department, when entering into a cooperative agreement with the Montana state university [now Montana state university-Bozeman] extension service, shall ensure in the agreement that at least $20 of the farm applicator fee imposed in [section 8] [80-8-209] is dedicated to county extension service programs for conducting local farm applicator pesticide educational and training programs for use of restricted-use pesticides."

*Severability:* Section 11, Ch. 465, L. 1993, was a severability clause.

*Termination:* Section 14, Ch. 465, L. 1993, provided that subsection (4) of this section terminates June 30, 1999.

*1989 Amendment:* In (2) and (4) increased fee to $45 from $35. Amendment effective July 1, 1989.

*Severability:* Section 7, Ch. 181, L. 1989, was a severability clause.

*1983 Amendment:* In (2), increased license fee from $15 to $35, changed renewal date in two places from May 1 to March 1, and increased late renewal fee from $15 to $25; and in (4) increased fee from $15 to $35.

*1981 Amendment:* Substituted "any person" for "a dealer" and inserted "offer for sale" near the beginning of (1).

**Administrative Rules**

Title 4, chapter 10, subchapter 5, ARM Pesticide dealer and retailer rules.

## 80-8-208. Dealer's examination.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

**Administrative Rules**

ARM 4.10.503 Pesticide dealer requirements and standards.

## 80-8-209. Farm applicators.

**Compiler's Comments**

*2021 Amendment:* Chapter 14 deleted former (8) that read: "(8) On or before September 1, 2020, the department shall provide the economic affairs interim committee with a report in accordance with 5-11-210 on recertification requirements and efforts to initiate online training." Amendment effective October 1, 2021.

*2019 Amendment:* Chapter 349 in (5) at end of second sentence substituted "recertification training program" for "requalification training program" and inserted third and fourth sentences concerning online recertification training; and inserted (8) concerning reporting to the economic affairs interim committee. Amendment effective October 1, 2019.

*2017 Amendment:* Chapter 244 in (1) at end of second sentence increased fee from $35 to $45; in (1)(b) after "extension service:" deleted "for the development of educational materials for farm pesticide applicators"; inserted (1)(b)(i) regarding training of extension service agents; inserted (1)(b)(ii) regarding certification and training programs; in (1)(c) substituted "$25 to the cooperative extension service for conducting" for "$15 to the extension service of the county in which the permit applicant resides for"; in (5) at end of third sentence substituted "subsection (4)" for "subsection (3)"; and made minor changes in style. Amendment effective May 3, 2017.

*Saving Clause:* Section 15, Ch. 244, L. 2017, was a saving clause.

*Severability:* Section 16, Ch. 244, L. 2017, was a severability clause.

*Termination Provision Repealed:* Section 4, Ch. 216, L. 2003, repealed sec. 14, Ch. 465, L. 1993, and Ch. 362, L. 1999, which terminated certain amendments to this section. Effective April 3, 2003.

*Extension of Termination Date:* Section 1, Ch. 362, L. 1999, amended sec. 14, Ch. 465, L. 1993, by extending the termination date for subsection (7) imposed by Ch. 465 to December 31, 2003. Effective April 20, 1999.

*Name Change — Directions to Code Commissioner:* Pursuant to sec. 36, Ch. 308, L. 1995, in this section the Code Commissioner changed "Montana state university" to "Montana state university-Bozeman".

*1993 Amendment:* Chapter 465 in second sentence of (1) increased fee from $15 to $35 and after fourth sentence inserted remainder of (1) providing for expenditure of the permit fee; in second sentence of (3), after "course", substituted "must meet the minimum certification standards and procedures established by the environmental protection agency except as otherwise provided by this chapter" for former language that read: "shall require and demonstrate practical knowledge of the applicator's ability to:

(a) recognize common pests to be controlled and damage caused by them;

(b) read and understand the label and labeling information, including the common name of the pesticide(s) applied, pest(s) to be controlled, timing and methods of application, safety precautions, any preharvest or reentry restrictions, and any specific disposal procedures;

(c) apply pesticides in accordance with label instructions and warnings, including the ability to prepare the proper concentration of pesticides to be used under particular circumstances, taking into account such factors as area to be covered, speed at which application equipment will be driven, and the quantity dispersed in a given period of operation;

(d) recognize local environmental situations that must be considered during application to avoid contamination; and

(e) recognize poisoning symptoms and procedures to follow in case of a pesticide accident"; in first sentence of (5), after "attending", substituted "an approved training program" for "a program consisting of 6 hours of training"; inserted (7) allowing assessment of an additional fee to fund the recycling program; and made minor changes in style.

*1993 Statement of Intent:* The statement of intent attached to Ch. 465, L. 1993, provided: "A statement of intent is required for this bill to provide direction to the department of agriculture for adoption of rules to implement the standards and procedures needed for a waste pesticide and pesticide container collection, disposal, and recycling program, including fees on the volume, type, classification, or other characteristics of a waste pesticide or waste pesticide container, to offset the cost of conducting the program. The department shall establish special collection programs for persons who desire to dispose of or recycle unwanted pesticides or pesticide containers, provided that certain specific pesticides or pesticide containers may be excluded from this program. Persons who have complied with the waste pesticide or pesticide container collection, disposal, and recycling program may not be subject to any state administrative or judicial penalty. The department, when entering into a cooperative agreement with the Montana state university [now Montana state university-Bozeman] extension service, shall ensure in the agreement that at least $20 of the farm applicator fee imposed in [section 8] [80-8-209] is dedicated to county extension service programs for conducting local farm applicator pesticide educational and training programs for use of restricted-use pesticides."

*Severability:* Section 11, Ch. 465, L. 1993, was a severability clause.

*Termination:* Section 14, Ch. 465, L. 1993, provided that subsection (7) of this section terminates June 30, 1999.

*1985 Amendment:* In (5) in first sentence substituted "by attending a program consisting of 6 hours of training" for "by obtaining 100 training credits" and in second sentence substituted "program" for "credits".

*1983 Amendment:* In (1), inserted second sentence relating to permit fee; at end of (2) after "applicator" deleted "or as provided in (6) of this section"; in (3) after "qualify for" substituted "their first" for "the"; in (5) substituted existing text requiring farm applicators to requalify by attending a training program administered by the Department for former language, which read: "Farm applicators manifesting reading disabilities may become certified to use as many as two restricted-use pesticides by passing a specific oral examination on the particular pesticide(s) if the applicator documents that a certified applicator in the immediate vicinity can advise him."

*1981 Amendment:* In (1), changed to a special use permit, effective for 5 years, and a staggered system of issuing permits established by the department from a certificate issued for 5 years, but renewed annually; inserted "by such applicator" after "rented" in (2); changed to a graded written examination or a course with an ungraded written examination from a written examination or course with or without an examination in the first sentence in (3); substituted "The examinations and course shall require and demonstrate practical knowledge of the applicator's ability" for "The examination or course shall include practical knowledge as to the ability" in the second sentence of (3); substituted "manifesting" for "having verified" near the beginning of (5).

**Administrative Rules**

Title 4, chapter 10, subchapter 4, ARM Certification of farm applicator rules.

## 80-8-211. Revocation of licenses and permits.

**Compiler's Comments**

*1995 Amendment:* Chapter 189 inserted (1)(l) authorizing the Department to refuse to grant or renew or authorizing revocation or modification of a license or permit if a licensee or permittee fails to satisfy judgment entered as a result of a complaint on use of pesticide; and made minor changes in style. Amendment effective July 1, 1995.

*Severability:* Section 8, Ch. 189, L. 1995, was a severability clause.

*1981 Amendment:* Inserted "or modify" after "revoke" near the beginning of the second sentence in (1); inserted "or sold" after "applied" and the clause after "materials" in (1)(b); inserted (1)(k) providing that false statements made to induce engagement of services or misleading statements concerning pesticide effectiveness are grounds for Department refusal of licenses or permits.

**Administrative Rules**

ARM 4.10.106 Revocation of license.
ARM 4.10.208 Inconsistent use.
ARM 4.10.404 Improper purchase or use.
ARM 4.10.504 Records.

## 80-8-212. Retail sale of pesticides — education program.

**Compiler's Comments**

*Name Change — Directions to Code Commissioner:* Pursuant to sec. 36, Ch. 308, L. 1995, in this section the Code Commissioner changed "Montana state university" to "Montana state university-Bozeman".

*1991 Amendment:* Inserted (2) concerning cooperative agreement by Department and Montana State University Extension Service establishing education program on pests, pesticides, and alternative control methods. Amendment effective January 1, 1992.

*Severability:* Section 9, Ch. 588, L. 1991, was a severability clause.

**Administrative Rules**

ARM 4.10.502 Retail sale of pesticides.

## 80-8-213. Government agencies.

**Compiler's Comments**

*2017 Amendment:* Chapter 244 in (3)(a)(i) increased fee from $50 to $60; and in (3)(c) increased fee limit from $600 to $895. Amendment effective May 3, 2017.

*Saving Clause:* Section 15, Ch. 244, L. 2017, was a saving clause.

*Severability:* Section 16, Ch. 244, L. 2017, was a severability clause.

*2003 Amendment:* Chapter 216 in (3)(a)(ii) in first sentence decreased the fee for funding the waste pesticide and pesticide container collection, disposal, and recycling program from $25 to $10 and inserted second and third sentences allowing the department to adjust the fee and providing that the fee may not be less than $10 or more than $15; and in (3)(b)(ii) in first sentence decreased the fee for funding the waste pesticide and pesticide container collection, disposal, and recycling program from $15 to $10 and inserted second and third sentences allowing the department to adjust the fee and providing that the fee may not be less than $10 or more than $15. Amendment effective April 3, 2003.

*Termination Provision Repealed:* Section 4, Ch. 216, L. 2003, repealed sec. 14, Ch. 465, L. 1993, and Ch. 362, L. 1999, which terminated certain amendments to this section. Effective April 3, 2003.

*Extension of Termination Date:* Section 1, Ch. 362, L. 1999, amended sec. 14, Ch. 465, L. 1993, by extending the termination date for subsections (3)(a)(ii), (3)(b)(ii), and (3)(d) imposed by Ch. 465 to December 31, 2003. Effective April 20, 1999.

*1993 Amendment:* Chapter 465 in (2), near middle after "pesticides for", substituted "a state agency, municipal corporation, or any other governmental agency" for "such agencies"; inserted (3)(a)(i) and (3)(a)(ii) establishing the annual fee and an additional fee to fund the recycling program that are payable by a government agency for each of its first four employee applicators; inserted (3)(b)(i) and (3)(b)(ii) establishing the annual fee and an additional fee to fund the recycling program that are payable by a government agency for each additional employee applicator; inserted (3)(c) capping annual fee amounts payable by a government agency; inserted (3)(d) providing for deposit of recycling program fees; and made minor changes in style.

*1993 Statement of Intent:* The statement of intent attached to Ch. 465, L. 1993, provided: "A statement of intent is required for this bill to provide direction to the department of agriculture for adoption of rules to implement the standards and procedures needed for a waste pesticide and pesticide container collection, disposal, and recycling program, including fees on the volume, type, classification, or other characteristics of a waste pesticide or waste pesticide container, to offset the cost of conducting the program. The department shall establish special collection programs for persons who desire to dispose of or recycle unwanted pesticides or pesticide containers, provided that certain specific pesticides or pesticide containers may be excluded from this program. Persons who have complied with the waste pesticide or pesticide container collection, disposal, and recycling program may not be subject to any state administrative or judicial penalty. The department, when entering into a cooperative agreement with the Montana state university [now Montana state university-Bozeman] extension service, shall ensure in the agreement that at least $20 of the farm applicator fee imposed in [section 8] [80-8-209] is dedicated to county extension service programs for conducting local farm applicator pesticide educational and training programs for use of restricted-use pesticides."

*Severability:* Section 11, Ch. 465, L. 1993, was a severability clause.

*Termination:* Section 14, Ch. 465, L. 1993, provided that subsections (3)(a)(ii), (3)(b)(ii), and (3)(d) of this section terminate June 30, 1999.

*1983 Amendment:* In (2), after "applicator's" deleted "operator's"; after "license" substituted "for an annual fee of $50" for "without a fee"; after "such" substituted "applicator or dealer is" for "applicators, operators, and dealers are"; inserted (3) providing fees for government employee applicators; inserted (4) relating to government employees qualifying for conducting pesticide education courses; and made a minor change in phraseology.

### 80-8-214. Liability.

**Compiler's Comments**

*Repealer Ineffective:* Section 2, Ch. 13, L. 2019, repealed sec. 14, Ch. 244, L. 2017, which would have repealed this section effective October 1, 2019. Because the repealer had not gone into effect, the repeal of this section is repealed and is not in effect. Effective February 19, 2019.

**Administrative Rules**

Title 4, chapter 10, subchapter 1, ARM Liability rules for pesticide applicators.

ARM 4.10.317 Personal liability for damages by aquatic herbicides.

**Attorney General's Opinions**

*State Agencies Exempt:* State agencies who apply pesticides in the same manner as commercial applicators need not comply with the financial responsibility requirements of this section. 35 A.G. Op. 49 (1973).

## Part 3
## Enforcement and Penalties

**Part Compiler's Comments**

*Severability Clause:* Section 18, Ch. 462, L. 1977, was a severability clause. Section 33, Ch. 403, L. 1971, was a severability clause.

**Part Administrative Rules**

ARM 4.10.208 and 4.10.404 Violations of pesticide rules.

Title 4, chapter 10, subchapter 10, ARM Civil penalties.

### 80-8-301. Report of loss or damage — effect of failure to report.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

*1981 Amendment:* Inserted "of itself" before "be considered" in (2).

### 80-8-302. Sampling and analysis.

**Compiler's Comments**

*2017 Amendment:* Chapter 244 in (2) substituted "must be based on:" for "shall be those adopted by the department from sources such as the Journal of the Association of Official Analytical Chemists"; inserted (2)(a) regarding validated methods for the laboratory; inserted (2)(b) regarding standard methods and guidance for the sampling; and made minor changes in style. Amendment effective May 3, 2017.

*Saving Clause:* Section 15, Ch. 244, L. 2017, was a saving clause.

*Severability:* Section 16, Ch. 244, L. 2017, was a severability clause.

*1981 Amendment:* Inserted subsection (3) relating to official analysis.

### 80-8-303. Embargo.

**Compiler's Comments**

*2017 Amendment:* Chapter 244 in (1) near middle of first sentence substituted "80-8-201" for "80-8-201(5). Amendment effective May 3, 2017.

*Saving Clause:* Section 15, Ch. 244, L. 2017, was a saving clause.

*Severability:* Section 16, Ch. 244, L. 2017, was a severability clause.

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

*1981 Amendment:* Substituted "Any person who" for "It is unlawful for any person" and added clauses relating to criminal and administrative penalties in the last sentence of (1).

## 80-8-304. Investigation and enforcement authority.

### Compiler's Comments

*1995 Amendment:* Chapter 189 at beginning of (1)(d) inserted "handling, use, application"; in (1)(e), at end, inserted "or agricultural commodities"; inserted (1)(h) authorizing Department to enter private or public property with warrant or consent to inspect or investigate person's compliance with pesticide worker protection standards and labeling; inserted (1)(i) concerning compliance with pesticide ground water and endangered species standards; inserted (1)(j) concerning compliance with licensing, labeling, permitting, and certification requirements; in (2), after "application", inserted "sale" and at end, after "persons", deleted "other than the applicator"; in (3), after "investigation", inserted "or inspection" and after "permit" deleted "only upon receipt of a complaint or report of an incident"; and made minor changes in style. Amendment effective July 1, 1995.

*Severability:* Section 8, Ch. 189, L. 1995, was a severability clause.

*1981 Amendment:* Substituted "used for applying pesticides" for "subject to this chapter" in (1)(a); substituted "any person" for "persons licensed or regulated under this chapter" in (1)(d); deleted "sample" at the beginning and added "and to sample the pesticides" at the end of (1)(e); inserted (1)(g) allowing Department investigation and collection of samples from affected environments; inserted (2) authorizing Department investigation of potentially adverse pesticide incidents; and inserted (3) allowing investigation authority over nonlicensed persons only upon receipt of complaints or incident reports.

## 80-8-305. General violations — compliance orders.

### Compiler's Comments

*1995 Amendments:* Chapter 189 inserted (3)(b) providing that subsection (3) does not affect liability or indemnity agreements between owner, lessee, or possessor and seller, lessor, or person relinquishing possession of site; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 418 in (4), in three places, substituted "department of environmental quality" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

*Severability:* Section 8, Ch. 189, L. 1995, was a severability clause.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1991 Amendment:* Inserted (3) concerning Department issuing compliance order to any person, employee, agent, or subcontractor violating requirements of chapter; inserted (4) concerning compliance order requiring violator to clean up and dispose of contaminated soil, requiring Department of Health and Environmental Sciences to regulate cleanup and disposal, and requiring on a case-by-case basis approval by Department of Health and Environmental Sciences or U.S. Environmental Protection Agency, or both, of disposal of soils contaminated by a canceled or suspended pesticide; inserted (5) concerning Department requiring violator to conduct monitoring of presence or level of concentration of pesticides; and inserted (6) concerning compliance order specifying violation and setting time schedule for compliance and concerning service of compliance order. Amendment effective July 1, 1991.

*Severability:* Section 9, Ch. 588, L. 1991, was a severability clause.

*1989 Amendments:* Chapter 181 inserted (1)(e) relating to use of certain unregistered agents. Amendment effective July 1, 1989.

Chapter 668 at beginning of (1) inserted "Consistent with the provisions of Title 80, chapter 15". Amendment effective January 1, 1990.

*Severability:* Section 7, Ch. 181, L. 1989, was a severability clause.

*1981 Amendment:* Inserted (1)(b) prohibiting dangerous pesticide handling; inserted (1)(c) prohibiting use of pesticides not properly labeled; inserted (1)(d) prohibiting application inconsistent with label instructions; and inserted (2) prohibiting manufacture, formulation, or storage of pesticides or byproducts in a manner precluding containment, except odor, within land of person involved.

### 80-8-306. Penalties.

**Compiler's Comments**

*1995 Amendment:* Chapter 189 in (1) deleted "impede, obstruct, hinder"; in (2), in first sentence after "court of the", deleted "county or any"; in (5)(a) inserted "in addition to other penalties provided in this chapter", increased civil penalty on registrant, applicator, dealer, retailer, or other violator from $1,000 to $2,500, and increased first offense penalty on farm applicator from $200 to $500; in (5)(b), after "hearing", inserted "and an appeal"; inserted (5)(c)(i) authorizing up to $25,000 civil penalty for each major offense; inserted (5)(c)(ii) requiring up to $50,000 civil penalty, 10-year prison term, or both, for conviction of felony violation; in (5)(d), before "health", inserted "human" and after "agricultural" substituted "commodities" for "crops"; in (5)(e)(i), after "results in", inserted "proven exposure of humans, agricultural commodities, or livestock or results in" and inserted second sentence defining misuse; inserted (5)(e)(vi) concerning noncompliance with pesticide worker protection standards and labeling; inserted (5)(e)(vii) concerning noncompliance with pesticide ground water and endangered species standards and labeling; inserted (5)(e)(viii) concerning noncompliance with pesticide or container disposal, labeling, or handling requirements or standards; in (5)(e)(ix) substituted "2 years of the first violation" for "the same calendar year"; deleted (6) that provided de novo appeal within 30 days of final agency action and jury trial upon request; adjusted subsection references; and made minor changes in style. Amendment effective July 1, 1995.

*Severability:* Section 8, Ch. 189, L. 1995, was a severability clause.

*1983 Amendment:* At end of (1), increased maximum fine from $500 to $1,500 and deleted "or imprisoned in the county jail for a term not to exceed 6 months, or both"; inserted (5) defining major violation and providing penalties therefor; and inserted (6) providing for appeal of assessment of penalties for major violations.

*1981 Amendment:* Added the last clause in (1) to provide penalties for chapter violations; added next to last sentence in (2) providing for jurisdiction in cases where pesticide applications are made in more than one county; inserted "or by a lawful written order" after "in writing" near the middle of (3); deleted "Notwithstanding any other provisions of this section, if" at the beginning of (4); deleted former subsection (5) relating to the use of a copy of the report of the official analysis in legal proceedings which was added to 80-8-302.

**Administrative Rules**

ARM 4.10.208 and 4.10.404 Violations of pesticide rules.

Title 4, chapter 10, subchapter 10, ARM Civil penalties.

ARM 4.10.1009 Noncompliance with pesticide worker protection standards and labeling.

## Part 4
## Model Integrated Pest and Pesticide Management Safety Program

### 80-8-401. Short title.

**Compiler's Comments**

*2017 Amendment:* Chapter 244 after "Model" deleted "School". Amendment effective May 3, 2017.

*Saving Clause:* Section 15, Ch. 244, L. 2017, was a saving clause.

*Severability:* Section 16, Ch. 244, L. 2017, was a severability clause.

### 80-8-404. Model integrated pest and pesticide management safety program.

**Compiler's Comments**

*2017 Amendment:* Chapter 244 in (1) substituted first sentence regarding development of a model program for "The department shall develop a model school integrated pest and pesticide management safety program and distribute the program to school districts by July 1, 1994", in second sentence near middle after "recommendations" deleted "to school districts", and at end substituted "a facility and on facility grounds" for "schools and on school grounds"; in (2) near beginning of second sentence and near end of third sentence substituted "the affected populations" for "school children"; in (3) near middle substituted "facility personnel" for "school personnel" and after "aspect of the model" deleted "school"; and made minor changes in style. Amendment effective May 3, 2017.

*Saving Clause:* Section 15, Ch. 244, L. 2017, was a saving clause.

*Severability:* Section 16, Ch. 244, L. 2017, was a severability clause.

# CHAPTER 9
# COMMERCIAL FEEDS

**Chapter Compiler's Comments**

*Severability Clause:* Section 16, Ch. 356, L. 1973, was a severability clause.

**Chapter Administrative Rules**

Title 4, chapter 12, subchapter 2, ARM Feed and pet food regulations.

Title 4, chapter 12, subchapter 4, ARM Commercial feed enforcement and penalties.

## Part 1
## General Provisions

### 80-9-101. Definitions.

**Compiler's Comments**

*2021 Amendment:* Chapter 179 in definition of commercial feed inserted (b) and (b)(i) regarding hemp for use as feed or mixing in feed for a pet, specialty pet, or horse and inserted (b)(ii) regarding hemp for use as feed or mixing in feed for other livestock; inserted definition of hemp; and made minor changes in style. Amendment effective April 11, 2021, except for subsection (3)(b)(ii), which is effective on occurrence of contingency.

*2019 Amendment:* Chapter 365 inserted definition of pet treat; and made minor changes in style. Amendment effective July 1, 2019.

*2017 Amendment:* Chapter 46 inserted definition of supplier; deleted definition that read: ""Distributor" means a person who distributes commercial feed"; in definition of brand name substituted "licensee" for "distributor"; and made minor changes in style. Amendment effective October 1, 2017.

*2005 Amendment:* Chapter 37 inserted definitions of facility and guarantor; and made minor changes in style. Amendment effective March 18, 2005.

*2003 Amendment:* Chapter 148 in definition of commercial feed near end of (a) after "specifically" substituted "excluded" for "exempted" and in (b) near beginning of second sentence after "rule" substituted "exclude" for "exempt"; in definition of distributor at end after "distributes" inserted "commercial feed"; in definition of feed ingredient at end after "commercial feed" inserted "or a noncommercial feed"; inserted definition of noncommercial feed; and made minor changes in style. Amendment effective March 26, 2003.

*1999 Amendment:* Chapter 396 inserted definition of AOAC international; in definition of commercial feed in first sentence near beginning substituted "or combinations of materials that" for "except the mixed or unmixed whole seeds or physically altered mixed or unmixed entire seeds of cereal grains with or without molasses added, when not adulterated within the meaning of subsections (1) through (5) of 80-9-204, which", inserted "or intended for distribution", and inserted "unless the materials are specifically exempted by law", inserted second sentence concerning exemption for certain seeds, and in third sentence after "not intermixed" deleted "or mixed" and deleted reference to subsections (1) through (5) of 80-9-204; inserted definition of contract feeder; in definition of customer formula feed at beginning substituted "customer formula" for "custom mixed" and substituted "specific instructions of the final purchaser" for "specifications mutually agreed to by the purchaser and the manufacturer" and deleted former second sentence that read: "A copy of the specifications or a list of the ingredients, but not necessarily the percentage of each ingredient, shall be on file at the manufacturing facility"; in definition of distribute inserted "or to supply, furnish, or otherwise provide commercial feed to a contract feeder"; in definition of official sample deleted reference to subsections (3), (5), or (6) of 80-9-301; inserted definition of quantity statement; and made minor changes in style. Amendment effective October 1, 1999.

**Administrative Rules**

ARM 4.12.219 Adoption of model feed and pet food regulations.

### 80-9-103. Rules — adoption by department.

**Compiler's Comments**

*1999 Amendment:* Chapter 396 in (1) at end inserted "including rules related to"; inserted (1)(a) through (1)(i) listing subject matter of authorized rules; and made minor changes in style. Amendment effective October 1, 1999.

**Administrative Rules**

Title 4, chapter 12, subchapter 2, ARM Feed and pet food regulations.

**80-9-105. Publications.**

**Compiler's Comments**

*1999 Amendment:* Chapter 396 in first sentence near beginning substituted "may publish" for "shall publish at least annually"; and made minor changes in style. Amendment effective October 1, 1999.

## Part 2
## Production and Distribution

**80-9-201. Licenses and registration.**

**Compiler's Comments**

*2021 Amendment:* Chapter 179 in (4)(b)(ii), (6)(a)(ii), and (6)(b) substituted "80-9-101(22)(b)" for "80-9-101(21)(b)"; and made minor changes in style. Amendment effective April 11, 2021.

*2019 Amendment:* Chapter 365 inserted (4)(b)(ii) regarding pet treats; in (6)(a) near middle of first sentence after "specialty pet food" inserted "or pet treat" and in middle of second sentence after "Except as otherwise provided in" substituted "subsection (6)(b)" for "this subsection (6)(a)"; inserted (6)(a)(ii) regarding $25 registration fee for pet treat products; in (6)(b) at end of second sentence after "more than $60 a year" inserted provision regarding pet food, specialty pet food, and pet treats; in (6)(c), (7), and (8) after "specialty pet food" inserted reference to pet treats; and made minor changes in style. Amendment effective July 1, 2019.

*2017 Amendment:* Chapter 46 in (2)(b)(i), (2)(b)(ii), and (6)(a) in second sentence after "Except as" inserted "otherwise"; and in (4)(b) near middle substituted "person" for "distributor". Amendment effective October 1, 2017.

*2005 Amendment:* Chapter 37 in (1) after "required of a" inserted "facility or"; in (2) at beginning of second sentence after "facility" inserted "or person"; in (2)(b)(i) at beginning of first sentence inserted exception clause, near middle increased fee from $75 to $100, and at end after "facility" deleted "distribution point, or point of invoicing", inserted second sentence concerning adjustment of fee, and inserted third sentence concerning minimum and maximum fee; in (2)(b)(ii) at beginning of first sentence inserted exception clause and near end increased fee from $50 to $75, inserted second sentence concerning adjustment of fee, and inserted third sentence concerning minimum and maximum fee; inserted (3)(d) concerning application for licensure as a guarantor; in (6)(a) at end of first sentence inserted "or the guarantor", at beginning of second sentence inserted exception clause and near end increased fee from $25 to $50, inserted third sentence concerning adjustment of fee, and inserted fourth sentence concerning minimum and maximum fee; and made minor changes in style. Amendment effective March 18, 2005.

*1999 Amendment:* Chapter 396 inserted (1) concerning requirement for license and exception; substituted (1)(a) concerning manufacturer of commercial feed for former text that read: "(a) No person may manufacture for distribution or distribute a commercial feed in this state unless he has obtained a permit by filing with the department, on forms provided by the department, his name, place of business, and location of manufacturing facility, distribution point, or point of invoicing. All new applicants or those failing to renew a permit by January 1 of each year shall pay a nonrefundable fee of $25 per calendar year for each facility, distribution point, or point of invoicing. A permit will remain in force until the end of the calendar year for which it is issued or until canceled by the permit holder or canceled for cause by the department. No refund may be made at the time of cancellation. No transfer of permits will be made. A distributor who distributes only pet foods or specialty pet foods is exempt from this provision"; substituted (1)(b) regarding person who distributes commercial feed for former text that read: "(b) Feed permit renewals received by the department prior to January 1 of each year must be accompanied by a nonrefundable renewal fee of $25 for each permit"; inserted (1)(c) regarding person whose name appears on label; inserted (2) through (5) regarding licensing; in (6)(a) in first sentence inserted "not manufacture for distribution or" and substituted "pet food or specialty pet food" for "commercial feed, except a custom-mixed feed, which" and in second sentence after "nonrefundable fee" deleted "of $6.50 for each product other than a pet food or specialty pet food and a nonrefundable fee"; in (6)(b) substituted "pet food" for "commercial feeds" and substituted "January 1" for "October 1" and "December 31" for "September 30"; in (7) inserted "of a pet food or specialty pet food"; in (7)(b) substituted "standard list of all products being registered" for "copy of the label or label facsimile that will appear on the product"; deleted former (7)(c) and (7)(d) that read: "(c) when requested by the department, promotional material and claims made about the product; and

(d) any other necessary information requested by the department"; in (8) in first sentence near beginning substituted "a pet food or specialty pet food" for "any commercial feed"; and made minor changes in style. Amendment effective October 1, 1999.

*Applicability:* Section 14, Ch. 396, L. 1999, provided: "Because 80-9-201(6)(b) changes the period of registration of a pet food or specialty pet food from October 1 through September 30 to January 1 through December 31 of each year, it is intended that registrations issued after October 1, 1998, be valid through December 31, 1999, in order to coordinate registration issuance with the new period of registration."

*1989 Amendment:* In (1)(a), at beginning of second sentence, inserted "All new applicants or those failing to renew a permit by January 1 of each year"; inserted (1)(b) requiring a renewal fee of $25; in (2)(a) changed fee for registering commercial feed, other than pet food, from $5 to $6.50; inserted (1)(b) providing registration period; deleted former (4) that provided for a continuous certificate of registration; and made minor changes in style.

*Severability:* Section 4, Ch. 38, L. 1989, was a severability clause.

*Transition:* Section 5, Ch. 38, L. 1989, provided: "All commercial feeds registered on or before [the effective date of this act] must be registered for the upcoming year by October 1, 1989." Effective October 1, 1989.

*1985 Amendment:* In (1) and (2) inserted "nonrefundable" before the three fees set with dollar amounts; inserted (3) delineating required registration information.

## 80-9-202. Labeling.

**Compiler's Comments**

*2021 Amendment:* Chapter 179 in (1)(c) near beginning of third sentence substituted "80-9-101(22)(b)" for "80-9-101(21)(b)". Amendment effective April 11, 2021.

*2019 Amendment:* Chapter 365 in (1)(c) inserted last sentence regarding pet treats exemption; and made minor changes in style. Amendment effective July 1, 2019.

*2005 Amendment:* Chapter 37 at end of (1)(e) and (2)(a) inserted reference to guarantor; and made minor changes in style. Amendment effective March 18, 2005.

*1999 Amendment:* Chapter 396 throughout section substituted "customer formula" for "custom mixed"; in (1)(a) substituted "quantity statement" for "net weight"; inserted (2)(g) regarding drug-containing product in customer formula feed; and made minor changes in style. Amendment effective October 1, 1999.

**Administrative Rules**

Title 4, chapter 12, subchapter 2, ARM Feed and pet food regulations.

ARM 4.12.219 Adoption of model feed and pet food regulations.

## 80-9-203. Misbranded feed.

**Administrative Rules**

ARM 4.12.219 Adoption of model feed and pet food regulations.

## 80-9-204. Adulterated feed.

**Compiler's Comments**

*1999 Amendment:* Chapter 396 in (5) substituted "section 721" for "section 706"; "inserted (6) through (11) specifying instances in which commercial feed is considered adulterated; in (13) substituted "the composition or quality that is purported or represented to possess by its labeling" for "that stated on its label"; and made minor changes in style. Amendment effective October 1, 1999.

**Administrative Rules**

ARM 4.12.219 Adoption of model feed and pet food regulations.

## 80-9-205. Prohibitions.

**Compiler's Comments**

*1999 Amendment:* Chapter 396 at beginning inserted proviso regarding 80-9-303; in (3) extended reference to subsections (6) through (11) of 80-9-204; in (5) substituted "license" for "permit"; inserted (8) through (11) regarding prohibited acts; and made minor changes in style. Amendment effective October 1, 1999.

## 80-9-206. Inspection fees — filing of annual statement.

**Compiler's Comments**

*2019 Amendment:* Chapter 365 in (1) near end after "specialty pet foods" inserted "and pet treats"; and made minor changes in style. Amendment effective July 1, 2019.

*2017 Amendments — Composite Section:* Chapter 46 substituted current (1)(a) concerning payment of inspection fees for former (1)(a) that read: "(a) The feed manufacturer has primary responsibility for paying inspection fees. However, the distributor is responsible for inspection fees if the manufacturer has not paid them"; in (1)(b) after "Except as" inserted "otherwise"; in (1)(c) near end substituted "responsible for inspection fees" for "responsible for any unpaid inspection fees on commercial feed purchased by that person and"; in (2) in introductory clause substituted "Each in-state guarantor or manufacturer who distributes commercial feed in this state and each supplier who distributes commercial feed into this state shall" for "Each person who holds a license as required in 80-9-201(1) shall"; inserted (3) regarding persons exempt from the reporting requirements under (2); and made minor changes in style. Amendment effective October 1, 2017.

Chapter 339 inserted (1)(d) requiring that fees be paid only if they total more than $5 in an annual reporting period; and in (2)(a) near middle substituted "$25" for "$10". Amendment effective May 7, 2017.

*Saving Clause:* Section 11, Ch. 339, L. 2017, was a saving clause.

*Severability:* Section 12, Ch. 339, L. 2017, was a severability clause.

*2005 Amendment:* Chapter 37 at beginning of (1)(b) inserted exception clause, inserted third sentence concerning adjustment of inspection fee, and inserted fourth sentence concerning minimum and maximum fee; and made minor changes in style. Amendment effective March 18, 2005.

*1999 Amendment:* Chapter 396 in (1) substituted "customer formula" for "custom mix"; deleted former (1)(a) that read: "(a) The inspection fee must be set by rule on a cents-per-ton basis, except that the first 10 tons are exempt. The department may adjust the fee by rule to adequately fund the administration of this chapter. Adjustments may be made only after holding a public hearing on the proposed changes as required in 80-9-103 and must remain within the limits of 5 cents to 25 cents per ton. The effective date of any rule adjusting fees is January 1 of the calendar year following the issuance of the rule. All permit holders are to be notified immediately of any changes in fees"; in (1)(b) inserted first sentence regarding inspection fee, in second sentence substituted "customer formula" for "custom mix", and in third sentence after "feed plant" deleted "are exempt but not premixes", after "or" deleted "ingredients", and at end inserted "are exempt"; in (2) substituted "license" for "permit"; in (2)(a) after "pay the inspection fee" deleted "at the rate stated in subsection (1)"; in (2)(c) substituted "license" for "permit"; and made minor changes in style. Amendment effective October 1, 1999.

*1991 Amendment:* In (2)(a), before "before January 31", inserted "on or"; and made minor changes in style.

*1989 Amendment:* In middle of (1) inserted "including custom-mix feeds"; at end of first sentence in (1)(a) changed fee of 10 cents per ton to a fee to be established by rule and exempted first 10 tons from the fee; at beginning of second sentence of (1)(a) deleted "However, after May, 1975"; in (1)(c), in middle of first sentence, inserted "custom-mix feeds and"; in (2)(a) changed filing date from February 28 to January 31 and in middle of second sentence substituted "before January 31" for "within 15 days following the due date"; and made minor changes in phraseology.

*Severability:* Section 4, Ch. 38, L. 1989, was a severability clause.

**Administrative Rules**

ARM 4.12.218 Inspection fee.

**80-9-207. Deposit of fees.**

**Compiler's Comments**

*1999 Amendment:* Chapter 396 in (1) near beginning substituted "licenses" for "permits"; inserted (3) regarding account in subsection (1); inserted (4) regarding administrative civil penalties; and made minor changes in style. Amendment effective October 1, 1999.

*1983 Amendment:* Substituted references to state special revenue fund for references to earmarked revenue fund.

## Part 3
## Enforcement and Penalties

**Part Administrative Rules**

Title 4, chapter 12, subchapter 4, ARM Commercial feed enforcement and penalties.

### 80-9-301. Enforcement — inspection — notice — sampling and analysis.

**Compiler's Comments**

*2005 Amendment:* Chapter 37 in (8) near middle after "sample" deleted "as defined in 80-9-101(15) and"; and made minor changes in style. Amendment effective March 18, 2005.

*2003 Amendment:* Chapter 148 inserted (2) allowing the department to enter premises to inspect, sample, and analyze noncommercial feeds and ingredients under certain circumstances; and made minor changes in style. Amendment effective March 26, 2003.

*1999 Amendment:* Chapter 396 in (1) after "appropriate credentials" deleted "and a written notice to the owner, operator, or agent in charge", substituted "at reasonable times or under emergency conditions" for "during normal business hours", after "processed, packed" inserted "distributed", and at end substituted reference to subsection (14) for reference to subsection (8) of 80-9-204; in (2) deleted former first sentence that read: "A separate notice shall be given for each inspection, but a notice is not required for each entry made during the period covered by the inspection"; deleted former (4) that provided: "(4) If the owner of a factory, warehouse, or establishment described in subsection (1) or his agent refuses to allow an inspection, the department may obtain from the district court a warrant directing the owner or his agent to allow inspection of the premises described in the warrant"; in (7) substituted reference to subsection (14) of 80-9-101 for reference to subsection (12) of that section; in (8) in first sentence substituted "official analyses" for "chemical analyses" and inserted second sentence regarding arrangements for specific analyses; and made minor changes in style. Amendment effective October 1, 1999.

*Name Change — Directions to Code Commissioner:* Pursuant to sec. 36, Ch. 308, L. 1995, in this section the Code Commissioner changed "Montana state university" to "Montana state university-Bozeman".

### 80-9-302. Enforcement — embargo order — condemnation.

**Compiler's Comments**

*2017 Amendment:* Chapter 46 in (1) near end substituted "licensee" for "distributor". Amendment effective October 1, 2017.

*1999 Amendment:* Chapter 396 in first sentence after "commercial feed" inserted "or other feed" and in third sentence in middle inserted "manufacturer, distributor"; and made minor changes in style. Amendment effective October 1, 1999.

### 80-9-303. Violation — penalty — injunction — appeal.

**Compiler's Comments**

*1999 Amendment:* Chapter 396 in (1) substituted "is convicted of violating" for "violates", inserted "or rules adopted under this chapter", and substituted "is subject to one or both of the following penalties" for "is guilty of"; inserted (1)(b) concerning assessment of administrative civil penalty; inserted (2) regarding penalty matrix and assessment of civil penalties; in (3) inserted "issue civil penalties"; in (4) substituted "person" for "distributor"; in (5) inserted "in the district court of the first judicial district"; in (6) substituted "of the first judicial district" for "where the person resides or has his place of business"; and made minor changes in style. Amendment effective October 1, 1999.

### 80-9-304. Disclosure of information prohibited.

**Compiler's Comments**

*1999 Amendment:* Chapter 396 in (2) inserted second sentence regarding nonrelease of information; and made minor changes in style. Amendment effective October 1, 1999.

## CHAPTER 10
## COMMERCIAL FERTILIZERS

**Chapter Administrative Rules**

Title 4, chapter 12, subchapter 6, ARM Fertilizer regulations.
Title 4, chapter 12, subchapter 7, ARM Anhydrous ammonia rules.

## Part 1
## General Provisions

### 80-10-101. Definitions.

**Compiler's Comments**

*2017 Amendment:* Chapter 339 deleted definition that read: ""Distributor" means a person who distributes"; deleted definition that read: ""Quarterly" means the periods from January 1 through March 31, April 1 through June 30, July 1 through September 30, and October 1 through December 31"; and made minor changes in style. Amendment effective May 7, 2017.

*Saving Clause:* Section 11, Ch. 339, L. 2017, was a saving clause.

*Severability:* Section 12, Ch. 339, L. 2017, was a severability clause.

*2009 Amendments — Composite Section:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Chapter 395 inserted definitions of blending, custom blend, deficiency, guaranteed analysis, investigational allowance, label, labeling, local legislation, other ingredients, political subdivision, primary nutrient, quarterly, supplier, and unmanipulated animal or vegetable manures; in definition of commercial fertilizer in (b)(ii)(A) after "nutrients" deleted "(nitrogen, phosphoric acid, and potash)", in (b)(ii)(B) at beginning substituted "85% or more" for "approximately 85%", deleted former (d) that read: "(d) "Packaged fertilizer" is commercial fertilizer (dry or liquid) distributed in sealed containers of 1,000 pounds or less", and in (b)(iv) after "nonfarm use" deleted "such as home gardens, lawns, shrubbery, flowers, golf courses, municipal parks, cemeteries, greenhouses, and nurseries"; in definition of grade near beginning of first sentence after "available" substituted "phosphate" for "phosphorus or phosphoric acid, and soluble potassium" and inserted second sentence allowing specialty fertilizers to be guaranteed in fractional units; in definition of licensee after "means" substituted "a person licensed under 80-10-202" for "any person who has obtained a license from the department so he may legally distribute commercial fertilizer other than specialty fertilizers or soil amendment in this state"; deleted former definition of manipulated manures that read: ""Manipulated manures" means substances composed primarily of excreta, plant remains, or mixtures of such substances which have been processed in any manner, including the addition of plant nutrients, drying, grinding, and other means"; in definition of soil amendment in (a) after "means any" substituted "substance that is intended to improve the physical or chemical characteristics of soil" for "material not included under commercial fertilizer or those products subject to the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, which is added to soil or to plants for purposes of influencing the growth, yield, or quality of the crop, soil flora or fauna, or other soil characteristics" and inserted (b) providing that the term does not include ingredients exempted from the definition by rule; and made minor changes in style. Amendment effective July 1, 2009.

*1985 Amendment:* Inserted (8) defining manufacture; and inserted (9) defining manufacturer.

*Severability Clause:* Section 16, Ch. 279, L. 1975, was a severability clause.

### 80-10-102. Guaranteed analysis.

**Compiler's Comments**

*2009 Amendment:* Chapter 395 in (1) at beginning deleted "Until the department prescribes the alternative form under subsection (2) of this section"; in (1)(a) after "Available" substituted "phosphate" for "phosphoric acid"; in (1)(b) after "slag" substituted "bone" for "bonemeal" and after "total" substituted "phosphate" for "phosphoric acid"; in (1)(c) near end of third sentence after "included" deleted "as a parenthetical statement" and inserted fifth sentence providing that plant nutrients are subject to inspection; deleted former (2) and (3) that read: "(2) If the department finds, after public hearing, that the requirement for expressing the guaranteed analysis of phosphorus and potassium in elemental form would not impose an economic hardship on distributors and users of fertilizer by reason of conflicting labeling requirements among the states, it may require by department rule that the guaranteed analysis be in the following form:

Total nitrogen (N) ------ %
Available phosphorus (P) ------ %
Soluble potassium (K) ------ %

(3) The effective date of the rule may not be less than 6 months following the adoption of the rule. For a period of 2 years following the effective date of the rule, the equivalent of phosphorus and potassium may also be shown in the form of phosphoric acid and potash. However, after the effective date of a rule requiring that phosphorus and potassium be shown in the elemental form, the guaranteed analysis for nitrogen, phosphorus, and potassium is the grade for those elements"; in (2) in first sentence after "guarantee" substituted "each soil amending ingredient

and the total other ingredients" for "the minimum quantity of each active ingredient"; and made minor changes in style. Amendment effective July 1, 2009.

**Administrative Rules**

ARM 4.12.601 Plant nutrients in addition to nitrogen, phosphate, and potash.

### 80-10-103. Assessment to fund educational and experimental programs — collection.

**Compiler's Comments**

*2009 Amendments — Composite Section:* Chapter 395 at end of first sentence before "Montana" substituted "manufactured in or distributed into" for "sold within" and at end of second sentence substituted "payment is the responsibility of the in-state manufacturer or of the supplier if the fertilizer is not manufactured in Montana" for "shall be collected from the manufacturer"; and made minor changes in style. Amendment effective July 1, 2009.

Chapter 423 in first sentence increased assessment from 35 cents per ton to 75 cents per ton; and made minor changes in style. Amendment effective July 1, 2009.

*1985 Amendment:* At beginning changed "will" to "must"; and at end substituted "manufacturer" for "licensee or registrant of fertilizer".

**Administrative Rules**

ARM 4.12.608 Bi-annual inspection fee statement and fee assessments.

### 80-10-104. Allocation of assessment.

**Compiler's Comments**

*2009 Amendment:* Chapter 423 at beginning of first sentence after "assessment" inserted "provided for in 80-10-103"; in second sentence decreased from 50% to 25% the amount of the assessment for use by the cooperative extension service and increased from 50% to 75% the amount of the assessment for use by the agricultural experiment station; and made minor changes in style. Amendment effective July 1, 2009.

*1983 Amendment:* Substituted reference to state special revenue fund for reference to earmarked revenue fund.

### 80-10-110. Regulation of commercial fertilizers and soil amendments by political subdivision prohibited.

**Compiler's Comments**

*Effective Date:* Section 18, Ch. 395, L. 2009, provided: "[This act] is effective July 1, 2009."

## Part 2

## Licensing and Registration

**Part Compiler's Comments**

*Severability Clause:* Section 16, Ch. 279, L. 1975, was a severability clause.

### 80-10-201. Registration.

**Compiler's Comments**

*2017 Amendment:* Chapter 339 in (3) before "licensee" deleted "distributor or". Amendment effective May 7, 2017.

*Saving Clause:* Section 11, Ch. 339, L. 2017, was a saving clause.

*Severability:* Section 12, Ch. 339, L. 2017, was a severability clause.

*2009 Amendments — Composite Section:* Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

Chapter 395 in (1)(a) in first sentence after "registered by" inserted "the manufacturer or the supplier" and in second sentence before "approved" deleted "furnished or"; inserted (1)(a)(iii) regarding a $10 fee; inserted (2)(a)(v) requiring that net weight for packaged products be included in the application; in (2)(a)(vi) at beginning substituted "an electronic copy of each label and labeling" for "a copy or facsimile of each label and promotional material"; in (3) at beginning after "distributor" inserted "or licensee"; inserted (4) regarding registration of custom blends; in (5) at beginning after "manufacturer" inserted "or supplier", after "not" substituted "register" for "reregister", and at end after "department" inserted "for each product"; and made minor changes in style. Amendment effective July 1, 2009.

*2003 Amendment:* Chapter 8 in (1) in second sentence increased grade registration fee from $10 to $20 and increased soil amendment registration fee from $25 to $35; inserted (2)(a)(vi) concerning analytical information on nutrient and nonnutrient ingredients; and made minor changes in style. Amendment effective February 11, 2003.

*1989 Amendment:* In second sentence of (1) inserted "nonrefundable" before "fee of $10", after "specialty fertilizers" deleted "in packages of 10 pounds or less", and inserted "nonrefundable" before "fee of $25 each".

*Severability:* Section 5, Ch. 27, L. 1989, was a severability clause.

*1985 Amendment:* In first sentence of (1) inserted "or on behalf of"; and inserted (4) precluding manufacturer reregistration without full payment of assessment fees.

**Administrative Rules**

ARM 4.12.621 Registration.

### 80-10-202. License required.

**Compiler's Comments**

*2017 Amendment:* Chapter 339 in second sentence after "All new applicants" deleted "or those failing to renew their licenses by January 1 of each year"; inserted (3) concerning collection of penalty for late license renewal; and made minor changes in style. Amendment effective May 7, 2017.

*Saving Clause:* Section 11, Ch. 339, L. 2017, was a saving clause.

*Severability:* Section 12, Ch. 339, L. 2017, was a severability clause.

*2009 Amendment:* Chapter 395 in introduction deleted former third sentence that read: "The department may exempt, by rule, manufacturers"; in (1) after "forms" substituted "approved" for "provided"; deleted former (2) that read: "(2) The licensee is not required to register a grade of fertilizer registered by the manufacturer or blended to grade from registered products by the licensee"; inserted (3) requiring licensure as a supplier; and made minor changes in style. Amendment effective July 1, 2009.

*1989 Amendment:* At end of first sentence, after "this state", deleted "upon payment of"; inserted second sentence relating to failure to renew licenses by January 1 and increasing the fee from $50 to a nonrefundable $75 fee; deleted former (2) that read: "(2) The applicant shall provide a sample copy of labeling to be used. The form of labeling shall meet department standards, established by rule, and all labeling shall be in proper form"; inserted (3) establishing a $50 fee for renewals received prior to January 1; and made minor changes in form.

*Severability:* Section 5, Ch. 27, L. 1989, was a severability clause.

### 80-10-203. Fertilizer to be uniform.

**Compiler's Comments**

*2017 Amendment:* Chapter 339 in (2) in first sentence substituted "licensee" for "distributor". Amendment effective May 7, 2017.

*Saving Clause:* Section 11, Ch. 339, L. 2017, was a saving clause.

*Severability:* Section 12, Ch. 339, L. 2017, was a severability clause.

### 80-10-204. Labeling.

**Compiler's Comments**

*2017 Amendment:* Chapter 339 in (3)(b) substituted "licensee" for "distributor". Amendment effective May 7, 2017.

*Saving Clause:* Section 11, Ch. 339, L. 2017, was a saving clause.

*Severability:* Section 12, Ch. 339, L. 2017, was a severability clause.

*2009 Amendments — Composite Section:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Chapter 395 in (1) after "affixed to" deleted "or printed on"; in (1)(b) after "address of the" substituted "registrant or guarantor" for "manufacturer or distributor guaranteeing the analysis"; in (1)(c) after "brand" deleted "and product name"; in (1)(d) after "grade" inserted "except if no primary nutrients are claimed"; inserted (1)(f) requiring directions for fertilizer use; in (3) at end of first sentence after "delivery" deleted "and at the time his invoice is delivered"; in (3)(b) after "distributor" substituted "registrant, or guarantor" for "or manufacturer guaranteeing the analysis"; in (3)(c) before "fertilizer" substituted "custom-blended" for "blended"; in (4)(a) near beginning after "affixed to" deleted "or printed on" and after "container" substituted "setting forth in clearly legible and conspicuous form" for "When delivered in bulk the label shall be clearly legible and shall accompany the delivery of the product. This label shall be supplied to the purchaser at the time of delivery and at the time of invoicing. The label shall contain"; in (4)(a)(ii) after "registrant or" substituted "guarantor" for "licensee who is responsible for the product"; inserted (4)(a)(v) requiring listing of soil amendment ingredients; inserted (4)(a)(vi) requiring information on the purpose of the product; inserted (4)(b) regarding required information on bulk shipments of soil amendments; and made minor changes in style. Amendment effective July 1, 2009.

*1985 Amendment:* Inserted (2) requiring labeling of bins in which commercial fertilizer is stored for distribution.

**Administrative Rules**

ARM 4.12.602 Guarantees for soil amendments.

ARM 4.12.604 Labeling.

### 80-10-205. Misbranding and adulteration prohibited.

**Compiler's Comments**

*2009 Amendment:* Chapter 395 in (1) in introduction in first sentence after "misbranded" deleted "or adulterated" and in second sentence at beginning after "A" deleted "commercial"; in (1)(a) substituted "its labeling is false or misleading in any manner" for "carries any false or misleading statement upon or attached to the container or if false or misleading statements concerning its agricultural value are made on the container or in any advertising matter accompanying or associated with the product"; in (1)(b) after "another" inserted "fertilizer or soil amendment"; inserted (1)(d) regarding adequate warning statements or directions for use; in (1)(e) in four places substituted reference to fertilizer or soil amendment for reference to commercial fertilizer; inserted (2) prohibiting distribution of adulterated fertilizer or soil amendments and describing adulterated; and made minor changes in style. Amendment effective July 1, 2009.

**Administrative Rules**

ARM 4.12.606 Definitions for commercial fertilizers.

ARM 4.12.620 Adulteration of fertilizers and soil amendments by trace metals.

### 80-10-206. Inspection, sampling, and analysis.

**Compiler's Comments**

*2009 Amendment:* Chapter 395 in (1) near beginning of first sentence after "department" substituted "may" for "in cooperation with the agricultural experiment station of Montana state university-Bozeman, shall"; in (3) in first sentence substituted "any deficiency occurred in a commercial fertilizer or soil amendment" for "any commercial fertilizer is deficient in plant food or soil amendment is deficient" and inserted second sentence allowing the department to arrange for analysis by other laboratories; in (4) in first sentence after "forward to the" substituted "responsible party" for "registrant" and after "violation" deleted "at least 10 days before its report is made public"; in (5) in first sentence after "furnish to the" substituted "responsible party" for "registrant" and inserted second and subsequent sentences regarding challenges to the department's determination of a violation; and made minor changes in style. Amendment effective July 1, 2009.

*Name Change — Directions to Code Commissioner:* Pursuant to sec. 36, Ch. 308, L. 1995, in this section the Code Commissioner changed "Montana state university" to "Montana state university-Bozeman".

**Administrative Rules**

ARM 4.12.607 Investigational allowances and overall index value.

### 80-10-207. Fees.

**Compiler's Comments**

*2017 Amendment:* Chapter 339 inserted (1)(c) requiring that fees be paid only if they total more than $5 in a reporting period; in (2)(b) before "reporting period" deleted "quarterly"; in (3)(a)(i) in first sentence near end substituted "tonnage statement for the reporting periods" for "statement for the periods", in third sentence substituted "tonnage statement" for "report" and inserted "30 days after the last day of the reporting period", and in last sentence substituted "tonnage statement" for "report"; in (3)(a)(ii) in first sentence at end substituted "an inspection fee statement for each of the reporting periods ending June 30 and December 31" for "a quarterly statement", in second sentence substituted "reporting period" for "quarter", and in third sentence after "due" substituted "30 days after the last day of the reporting period" for "on or before 30 days after the end of the quarterly reporting period"; in (3)(b) in first sentence substituted "inspection fee statement" for "tonnage report" and substituted "end of the reporting period, a late fee of 10% on the amount due but not less than $25" for "end of the quarterly reporting period, a collection fee of 15% annual percentage rate on the amount due but not less than $10"; and made minor changes in style. Amendment effective May 7, 2017.

*Saving Clause:* Section 11, Ch. 339, L. 2017, was a saving clause.

*Severability:* Section 12, Ch. 339, L. 2017, was a severability clause.

*2009 Amendment:* Chapter 395 in (1)(a) at beginning of first sentence substituted “Each in-state manufacturer or out-of-state supplier” for “A manufacturer registering under 80-10-201(1)”; in (1)(a)(i) at beginning deleted “for inspection of fertilizers other than anhydrous ammonia, 20 cents per ton” and at beginning of fourth sentence after “All” substituted “in-state manufacturers and out-of-state suppliers of nonexempt products” for “manufacturers”; in (1)(a)(ii) at beginning deleted “for inspection of anhydrous ammonia, 65 cents per ton” and at beginning of fourth sentence after “All” substituted “in-state manufacturers and out-of-state suppliers” for “registrants and manufacturers”; in (1)(b) at end substituted “a fee is due only on the fertilizer material or soil amendment for which a fee has not been paid” for “a fee must be paid under that subsection, but only on the added fertilizer or soil amendment”; in (2)(b) at end after “sold in a” substituted “quarterly reporting period, no payment is due” for “6-month period, there must be paid to the department a fee of $5 for each soil amendment for each 6-month period in lieu of the fee of 10 cents per ton. Inspection fees must be used by the department for administration of this part”; in (3)(a)(i) near beginning of first sentence after “unmanipulated” inserted “animal or vegetable”, after “unlicensed” deleted “or unregistered”, after “forms” deleted “furnished or”, and inserted last sentence providing that there are no fees associated with the report; in (3)(a)(ii) at beginning of first sentence after “Each” substituted “in-state manufacturer and out-of-state supplier who distributes” for “manufacturer who registers or a person who registers on the manufacturer’s behalf”, after “state” inserted “to a person regardless of license status”, after “unmanipulated” inserted “animal or vegetable”, after “forms” deleted “furnished or”, before “statement” substituted “quarterly” for “monthly”, after “each” deleted “registered”, and near end after “during the” substituted “quarter” for “month”, at end of second sentence after “before” substituted “30 days after the end of the quarterly reporting period” for “the 30th day of the following month”, and at beginning of third sentence after “The” substituted “in-state manufacturer or out-of-state supplier” for “manufacturer or person registering on behalf of the manufacturer”; in (3)(b) near middle after “end of the” inserted “quarterly reporting”, after “fee” substituted “of 15% annual percentage rate on” for “amounting to 10% of”, and in two places after “against the” substituted “in-state manufacturer or out-of-state supplier” for “manufacturer”; and made minor changes in style. Amendment effective July 1, 2009.

*2003 Amendment:* Chapter 8 in (1)(a)(i) in first full sentence after “rule” deleted “after hearing” and after “fee” deleted “not to exceed a maximum of 25 cents per ton” and inserted second full sentence concerning minimum and maximum fee; in (1)(a)(ii) near beginning increased inspection fee from 20 cents to 65 cents and in first full sentence after “rule” deleted “after hearing” and after “fee” deleted “not to exceed a maximum of 65 cents per ton” and inserted second full sentence concerning minimum and maximum fee; and made minor changes in style. Amendment effective February 11, 2003.

*1995 Amendment:* Chapter 220 in (5) inserted second and third sentences concerning investment of funds and deposit of income; and made minor changes in style. Amendment effective March 24, 1995.

*1989 Amendment:* In middle of (1)(a), after “specialty fertilizers”, deleted “sold in packages of 10 pounds or less”; near beginning of first sentence of (3)(a)(i), after “specialty fertilizer”, deleted “in packages of 10 pounds or less”; and near beginning of first sentence of (3)(a)(ii), after “specialty fertilizer”, deleted “in packages of 10 pounds or less”.

*Severability:* Section 5, Ch. 27, L. 1989, was a severability clause.

*1985 Amendments:* Chapter 197 at beginning of (1)(a) substituted “A manufacturer registering under 80-10-201(1) shall pay” for “There shall be paid”; near end of (1)(a)(i) changed “registrants” to “manufacturers”; inserted (1)(b) requiring a fee on added fertilizer or soil amendment; in (3)(a)(i) at beginning after “Every”, deleted “registrant and” and at end deleted “The registrant or licensee shall pay the proper fees, as set forth in subsection (1) of this section, at that time”; inserted (3)(a)(ii) requiring manufacturer’s monthly statements of net tons of commercial fertilizer and soil amendment distributed and to whom distributed and providing exceptions; and in (3)(b) near beginning, inserted “required by subsection (3)(a)(ii)” and near middle and end, substituted “manufacturer” for “registrant or licensee”.

Chapter 310 near beginning of (1)(a)(i) after “inspection”, inserted “of fertilizers other than anhydrous ammonia”; inserted (1)(a)(ii) providing fees for inspection of anhydrous ammonia; at beginning of (4) inserted exception clause; and inserted (5) providing for deposit and expenditure of anhydrous ammonia inspection fees.

*1983 Amendment:* Substituted references to state special revenue fund for references to earmarked revenue fund.

**Administrative Rules**

ARM 4.12.608 Bi-annual inspection fee statement and fee assessments.
ARM 4.12.609 Semiannual tonnage statement.

### 80-10-208. Penalties.

**Compiler's Comments**

*2009 Amendment:* Chapter 395 in (1) in introductory clause after "determined by the" substituted "retail price based on a semiannual state survey, may" for "dealer's or manufacturer's price on the date of sampling of the deficiency or deficiencies, shall"; in (1)(a) after "primary" substituted "nutrients" for "plant foods (NPK)"; in (3) near middle in two places substituted "may" for "shall" and at end after "determined by the" substituted "retail price based on a semiannual state survey" for "dealer's retail price on the date of sampling"; in (5) at end of first sentence substituted "responsible party" for "registrant or licensee"; inserted (6) regarding determination of lot size; inserted (7) regarding deficiency in an official sample; and made minor changes in style. Amendment effective July 1, 2009.

*1983 Amendment:* Substituted reference to state special revenue fund for reference to earmarked revenue fund.

### 80-10-209. Publications.

**Compiler's Comments**

*2009 Amendment:* Chapter 395 at beginning after "department" substituted "may publish by electronic or other means annual" for "shall publish at least annually" and near middle before "report" substituted "may" for "shall"; and made minor changes in style. Amendment effective July 1, 2009.

### 80-10-211. Cancellation or refusal of registration or licenses.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

**Administrative Rules**

ARM 4.12.608 Bi-annual inspection fee statement and fee assessments.
ARM 4.12.609 Semiannual tonnage statement.

## Part 3
## Enforcement

**Part Compiler's Comments**

*Severability Clause:* Section 16, Ch. 279, L. 1975, was a severability clause.

### 80-10-301. Rules — adoption by department.

**Administrative Rules**

Title 4, chapter 12, subchapter 6, ARM Fertilizer regulations.

### 80-10-303. Violations — enforcement proceedings — judicial review.

**Compiler's Comments**

*2017 Amendment:* Chapter 339 in (1) in first sentence near middle after "licensee" deleted "distributor"; in (6) in last sentence substituted "80-10-202" for "80-10-202(3)" and substituted "reporting period" for "quarter"; and made minor changes in style. Amendment effective May 7, 2017.

*Saving Clause:* Section 11, Ch. 339, L. 2017, was a saving clause.

*Severability:* Section 12, Ch. 339, L. 2017, was a severability clause.

*2009 Amendments — Composite Section:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Chapter 395 in (2) in first sentence after "duty" substituted "may" for "under this chapter is guilty of a misdemeanor and shall" and at beginning of second sentence after "all" substituted "actions" for "prosecutions"; inserted (6) establishing fines; and made minor changes in style. Amendment effective July 1, 2009.

*1985 Amendment:* Near beginning of (1) after "fertilizer", inserted "or from the inspection of any anhydrous ammonia facility".

## Part 5
## Anhydrous Ammonia Facilities

**Part Compiler's Comments**

*Statement of Intent:* The statement of intent attached to Ch. 310, L. 1985, provided: "It is the intent of the legislature that the department of agriculture adopt rules to establish enforceable standards for the safe storage and handling of anhydrous ammonia. In adopting these rules, the department shall demonstrate strong consideration of the safety standards for the storage and handling of anhydrous ammonia published by the American national standards institute, a private, nationally recognized institute with expertise in matters pertaining to industrial safety and design standards. It is the intent of the legislature that the department of agriculture adopt other rules necessary to administer the provisions of this act."

**Part Administrative Rules**

Title 4, chapter 12, subchapter 7, ARM Anhydrous ammonia rules.

### 80-10-501. Short title.

**Compiler's Comments**

*Preamble:* The preamble to Ch. 310, L. 1985, provided: "WHEREAS, commercial fertilizer, primarily anhydrous ammonia, is a necessary enhancement to agricultural production in Montana; and

WHEREAS, there is continuing and growing demand for anhydrous ammonia in Montana and new anhydrous ammonia facilities will be constructed and operated in this state; and

WHEREAS, there is no central, statewide coordination of a safety program and location standards for commercial anhydrous ammonia facilities; and

WHEREAS, the State of Montana does not have an existing safety code for anhydrous ammonia storage, manufacturing, and distribution facilities; and

WHEREAS, the public interest in health and safety requires that such facilities be properly located and operated, according to acceptable and defined industry standards.

THEREFORE, the Legislature finds it necessary and appropriate to enact legislation providing that the Montana Department of Agriculture act as the coordinator of a comprehensive safety program for commercial anhydrous ammonia facilities."

### 80-10-503. Rulemaking authority and requirements.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

*2005 Amendment:* (Temporary version) Chapter 334 in (1) near middle of third sentence after "phone number" inserted "and a lock"; inserted (4) regarding the disbursement of locks and providing for penalties; and made minor changes in style. Amendment effective July 1, 2005, and terminates June 30, 2007.

**Administrative Rules**

Title 4, chapter 12, subchapter 7, ARM Anhydrous ammonia rules.

## CHAPTER 11
## MARKETING

## Part 1
## Agricultural Marketing and Transportation

### 80-11-103. Department's marketing duties.

**Compiler's Comments**

*2021 Amendment:* Chapter 564 inserted (12) regarding grants from the agricultural transportation enhancement account; and made minor changes in style. Amendment effective July 1, 2021.

**Administrative Rules**

Title 4, chapter 20, ARM Mediation services.

**80-11-105. Agricultural transportation enhancement account.**

**Compiler's Comments**

*Effective Date:* Section 7, Ch. 564, L. 2021, provided: "[This act] is effective July 1, 2021."

## Part 2
## Wheat and Barley Research and Marketing

**Part Administrative Rules**

Title 4, chapter 9, ARM Montana Wheat Research and Marketing Committee rules.

**Part Attorney General's Opinions**

*Appropriations — Legislative Control Over Marketing Assessment Funds:* Although the control of the Legislature over appropriations to state agencies is based upon broad constitutional provisions, certain money may either be exempt from the appropriation process or the purposes for which that money may be appropriated may be limited by statute. Thus, the Legislature may control appropriations from the Wheat Marketing and Research Account (now Wheat and Barley Account), but those appropriations are subject to the statutorily stated purposes of the Account. Any attempt by the Legislature in an appropriation bill to alter the purposes for which appropriations from the Account are made is subject to the constitutional restriction that the purpose of legislation must be clearly stated in the title of the bill. 39 A.G. Op. 3 (1981).

**80-11-201. Definitions.**

**Compiler's Comments**

*1987 Amendment:* Changed definition of "committee" to Wheat and Barley Committee from Wheat Research and Marketing Committee.

*1983 Amendment:* Amendment terminated July 1, 1985, pursuant to sec. 6, Ch. 630, L. 1983. The amendment inserted former (4), (5), (7), and (9) that read: "(4) "Grain" means wheat or barley.

(5) "Grain dealer" means any person, association, dealer, partnership, or corporation or its agent or representative who is licensed by the state or federal government and engaged in the business of buying, receiving, selling, exchanging, warehousing, or negotiating for the sale of grain. The term also includes anyone who solicits the sale, resale, exchange, or transfer of any grain purchased from a grower; receives grain on consignment from a grower; or receives grain to be handled on a net return basis from the grower.

(7) "Loss" means any monetary loss to a grower resulting from the delivery of grain to a grain dealer due to an extraordinary cause, including but not limited to bankruptcy, embezzlement, theft, or fraudulent disposition by the grain dealer.

(9) "Warehousing" means any method by which grain owned by another is held for him by one who is not the direct owner of the grain. The term does not include transportation of grain for another."

**Administrative Rules**

ARM 4.9.101 Organizational rules.

**80-11-202. Declaration of policy.**

**Compiler's Comments**

*1991 Amendment:* In two places, after "wheat", inserted "and barley" and near middle, after "competitive in character", deleted "and that barley is also an important crop"; and made minor changes in style. Amendment effective July 1, 1991.

**Administrative Rules**

Title 4, chapter 9, subchapter 3, ARM Grants.

**Attorney General's Opinions**

*Role of Montana Wheat Research and Marketing Committee (now Montana Wheat and Barley Committee) in Political Action and Legal Action:* "Marketing" is to be interpreted in its broadest sense to include the transportation of goods, including transportation rates. The committee may take action to assure reasonable transportation rates if it is in the best interest of the wheat and barley growers of Montana as a whole. Political action, not legal action, is prohibited. Although in some situations lawsuits against purchasers or growers of wheat or barley for violation of the wheat research and marketing statutes must be brought by the Department of Agriculture, that requirement did not govern a situation when the litigation in question was brought not merely to enforce the procedural requirements of the wheat research and marketing statutes but also to assure reasonable transportation rates. Actual use of committee funds for permissible legal action is impermissible if the use of the funds is not under state control. The committee also is prohibited from contributing to a legal fund over which it has no control; however, the committee is not prohibited from engaging indirectly in litigation by funding research if it controls the expenditure of the funds for the studies by way of contract or agreement. 39 A.G. Op. 8 (1981).

### 80-11-203. Compensation — per diem.

**Compiler's Comments**

*2015 Amendment:* Chapter 30 substituted "may not receive a salary but are entitled to compensation as provided in 2-15-122" for "shall receive no salary but shall be paid from the wheat and barley account in the state special revenue fund a per diem of $25"; substituted "and must be reimbursed for travel expenses" for "together with their actual and necessary travel expenses"; and made minor changes in style. Amendment effective February 18, 2015.

*1989 Amendment:* Before "special" substituted "state" for "other"; and made minor changes in grammar. Amendment effective July 1, 1989.

*1987 Amendment:* Changed name of account to wheat and barley account from wheat research and marketing account.

*1983 Amendment:* Substituted "other special revenue funds" for "federal and private revenue fund".

### 80-11-204. Election of presiding officer — time of meetings.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 80-11-205. Powers of the committee.

**Compiler's Comments**

*1991 Amendment:* In (1)(d) substituted "with units of the Montana university system" for "with Montana state university"; and made minor changes in style. Amendment effective July 1, 1991.

*1983 Amendment:* Amendment terminated July 1, 1985, pursuant to sec. 6, Ch. 630, L. 1983. The amendment inserted former (1)(e) that read: "authorize the department to enter into insurance contracts and pay premiums therefor from the wheat research and marketing account for the purpose of providing insurance coverage to growers who, after the contract has been entered into, suffer a loss as defined in 80-11-201".

**Administrative Rules**

Title 4, chapter 9, ARM Montana Wheat Research and Marketing Committee rules.

**Attorney General's Opinions**

*Role of Montana Wheat Research and Marketing Committee (now Montana Wheat and Barley Committee) in Political Action and Legal Action:* "Marketing" is to be interpreted in its broadest sense to include the transportation of goods, including transportation rates. The committee may take action to assure reasonable transportation rates if it is in the best interest of the wheat and barley growers of Montana as a whole. Political action, not legal action, is prohibited. Although in some situations lawsuits against purchasers or growers of wheat or barley for violation of the wheat research and marketing statutes must be brought by the Department of Agriculture, that requirement did not govern a situation when the litigation in question was brought not merely to enforce the procedural requirements of the wheat research and marketing statutes but also to assure reasonable transportation rates. Actual use of committee funds for permissible legal action is impermissible if the use of the funds is not under state control. The committee also is prohibited from contributing to a legal fund over which it has no control; however, the committee is not prohibited from engaging indirectly in litigation by funding research if it controls the expenditure of the funds for the studies by way of contract or agreement. 39 A.G. Op. 8 (1981).

### 80-11-206. Maximum annual assessment on wheat and barley grown, delivered, or stored.

**Compiler's Comments**

*2019 Amendment:* Chapter 84 in (1) increased the mills per bushel on wheat from 20 mills to 40 mills and increased the mills per hundredweight on barley from 30 mills to 60 mills; and made minor changes in style. Amendment effective July 1, 2019.

*2003 Amendment:* Chapter 270 in (1) increased annual assessment from not more than 10 mills to not more than 20 mills per bushel on wheat and from not more than 15 mills to not more than 30 mills per hundredweight on barley. Amendment effective April 9, 2003.

*1993 Amendments — Composite Section:* Chapter 51 near beginning of (2)(b), after "program", inserted "other than the commodity credit corporation"; inserted (2)(c) regarding collection of the assessment on wheat or barley pledged under the federal commodity credit corporation; and made minor changes in style. Amendment effective July 1, 1993.

Chapter 576 in (1), after "wheat", deleted "grown" and after "barley grown" inserted "delivered, or stored"; in (2), after "imposed", deleted "on each grower of wheat or barley in the state of Montana"; in (2) and (3) substituted "seller" for "grower"; in (2)(a), before "sale", substituted "first" for "any"; and made minor changes in style. Amendment effective April 28, 1993.

Style changes in (2)(b) and (3) were slightly different in the two chapters. The codifier chose the more appropriate of the two.

*Applicability:* Section 3, Ch. 576, L. 1993, provided that the chapter is not intended to affect or impair an agreement for collection of the assessment entered into on or before April 28, 1993, the chapter's effective date, or to preclude entry into an agreement for collection of the assessment after the effective date.

*Severability:* Section 4, Ch. 576, L. 1993, was a severability clause.

*1983 Amendment:* Increased the maximum annual assessment on wheat from 5 to 10 mills and on barley from 10 to 15 mills.

**Administrative Rules**

ARM 4.9.401 Wheat and barley assessment and refunds.

**Attorney General's Opinions**

*Appropriations — Legislative Control Over Marketing Assessment Funds:* Although the control of the Legislature over appropriations to state agencies is based upon broad constitutional provisions, certain money may either be exempt from the appropriation process or the purposes for which that money may be appropriated may be limited by statute. Thus, the Legislature may control appropriations from the Wheat Marketing and Research Account (now Wheat and Barley Account), but those appropriations are subject to the statutorily stated purposes of the Account. Any attempt by the Legislature in an appropriation bill to alter the purposes for which appropriations from the Account are made is subject to the constitutional restriction that the purpose of legislation must be clearly stated in the title of the bill. 39 A.G. Op. 3 (1981).

*Appropriation of Specially Assessed Funds — Due Process of Law:* The Legislature may appropriate wheat research and marketing funds, which are funds derived from a special tax on the growers of wheat and barley, to the Centralized Services Division of the Department of Agriculture in order to pay for administrative services used by the Wheat Research and Marketing Committee (now Montana Wheat and Barley Committee) because the Committee is required by law to use the services of the Division and that requirement implies a duty to pay for the services. Because the money appropriated is taxed to the grower for a specific purpose, the amount appropriated to the Centralized Services Division must be for a purpose substantially related to the purposes of the tax. 39 A.G. Op. 3 (1981).

### 80-11-207. Delivery of invoice — form — filing of sworn statement — payment of assessment — refund.

**Compiler's Comments**

*1993 Amendment:* Chapter 576 in (1), after "purchase", inserted "delivery, or storage charge" and substituted "seller or person delivering the wheat or barley or entering it into storage" for "grower"; in (1)(a) substituted "seller or of the person delivering the wheat or barley or entering it into storage" for "grower and seller"; in (1)(c), at end, inserted "delivered, or stored"; in (1)(d), after "pledge", inserted "delivery, or storage"; in (2), near middle of first sentence in two places before "wheat or barley", deleted "a grower's" and at end inserted "or the number of bushels of wheat or hundredweights of barley delivered or stored"; in (4), in first sentence, inserted "under 80-11-206(2)" and throughout subsection substituted "seller" for "grower"; and made minor changes in style. Amendment effective April 28, 1993.

*Applicability:* Section 3, Ch. 576, L. 1993, provided that the chapter is not intended to affect or impair an agreement for collection of the assessment entered into on or before April 28, 1993, the chapter's effective date, or to preclude entry into an agreement for collection of the assessment after the effective date.

*Severability:* Section 4, Ch. 576, L. 1993, was a severability clause.

*1989 Amendment:* Near end of (2) substituted "state" for "other"; and made minor changes in grammar. Amendment effective July 1, 1989.

*1987 Amendment:* At end of (2) changed name of account to wheat and barley account from wheat research and marketing account.

*1983 Amendment:* At end of (2), substituted "the other special revenue funds" for "the revolving fund".

**Administrative Rules**

ARM 4.9.402 Requirements for reports.

**80-11-210. Wheat and barley account — sources — use — expenditures.**

**Compiler's Comments**

*1989 Amendment:* In (1) substituted "state" for "other"; and made minor changes in grammar. Amendment effective July 1, 1989.

*1987 Amendment:* In (1) and (3) changed name of account to wheat and barley account from wheat research and marketing account.

*1983 Amendment:* Substituted "other special revenue funds" for "federal and private revenue fund".

**Attorney General's Opinions**

*Appropriations — Legislative Control Over Marketing Assessment Funds:* Although the control of the Legislature over appropriations to state agencies is based upon broad constitutional provisions, certain money may either be exempt from the appropriation process or the purposes for which that money may be appropriated may be limited by statute. Thus, the Legislature may control appropriations from the Wheat Marketing and Research Account (now Wheat and Barley Account), but those appropriations are subject to the statutorily stated purposes of the Account. Any attempt by the Legislature in an appropriation bill to alter the purposes for which appropriations from the Account are made is subject to the constitutional restriction that the purpose of legislation must be clearly stated in the title of the bill. 39 A.G. Op. 3 (1981).

**80-11-211. Violation — penalty.**

**Compiler's Comments**

*2019 Amendment:* Chapter 64 in (1) at end substituted "is subject to an administrative civil penalty of not more than $5,000 for each monthly report not filed but required by administrative rule" for "shall be guilty of a misdemeanor and shall upon conviction be fined not less than $25 or more than $500"; inserted (2) relating to a penalty matrix established by the department and penalty enforcement; inserted (3) relating to deposits of civil penalties; and made minor changes in style. Amendment effective July 1, 2019.

**Administrative Rules**

ARM 4.9.404 Penalty matrix.

**80-11-224. Determination of amount and allocation of assessment.**

**Compiler's Comments**

*2009 Amendment:* Chapter 10 in (2) after "80-11-210 is" substituted "available for appropriation" for "appropriated". Amendment effective October 1, 2009.

*1987 Amendment:* In (2) changed name of account to wheat and barley account from wheat research and marketing account and substituted "carrying out research" for "wheat research".

**80-11-225. Committee procurement — rulemaking.**

**Compiler's Comments**

*Effective Date:* Section 3, Ch. 732, L. 2023, provided: "[This act] is effective on passage and approval." Approved May 22, 2023.

## Part 3
## Alfalfa Seed Industry

**Part Administrative Rules**

Title 4, chapter 8, ARM Alfalfa Seed Committee.

**80-11-304. Powers of the committee.**

**Compiler's Comments**

*2015 Amendment:* Chapter 102 in (5) near end inserted "financially support the alfalfa leaf-cutting bee program provided for in Title 80, chapter 6, part 11"; in (10) inserted "Title 80, chapter 6, part 11" and substituted "including a purpose" for "which may be"; and made minor changes in style. Amendment effective July 1, 2015.

**Administrative Rules**

Title 4, chapter 8, subchapter 2, ARM Alfalfa seed grants.

### 80-11-305. Compensation — per diem.

**Compiler's Comments**

*2015 Amendment:* Chapter 30 substituted "compensation as provided in 2-15-122" for "$25 compensation"; substituted "and must be reimbursed for travel expenses" for "together with actual and necessary travel expenses"; and made minor changes in style. Amendment effective February 18, 2015.

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 80-11-308. Payment of assessment.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

**Administrative Rules**

Title 4, chapter 8, subchapter 4, ARM Alfalfa seed reports.

### 80-11-309. Refund of assessment.

**Administrative Rules**

ARM 4.8.301 Alfalfa seed assessment and refunds.

### 80-11-310. Deposit and disbursement of funds — investment.

**Compiler's Comments**

*2015 Amendment:* Chapter 102 in (1) inserted "alfalfa seed account in the"; in (2)(a), (3), and (4) inserted "Title 80, chapter 6, part 11, and"; inserted (2)(b) concerning transfers of money to the alfalfa leaf-cutting bee account; and made minor changes in style. Amendment effective July 1, 2015.

*1995 Amendments:* Chapter 220 in (3) inserted second sentence concerning deposit of income; and made minor changes in style. Amendment effective March 24, 1995.

Chapter 509 in (2), after "(1)", substituted "may be appropriated" for "is statutorily appropriated, as provided in 17-7-502"; and made minor changes in style. Amendment effective July 1, 1995.

*1991 Amendment:* In (2), near beginning of first sentence after "subsection (1)", deleted "of this section" and inserted language making a statutory appropriation to Committee. Amendment effective July 1, 1991.

*1989 Amendment:* Near end of (1) substituted "state" for "other"; and made minor changes in grammar. Amendment effective July 1, 1989.

*1983 Amendment:* Substituted "other special revenue funds" for "federal and private revenue fund".

### 80-11-311. Records required.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

**Administrative Rules**

ARM 4.12.1019 Reports to Department.

### 80-11-313. Penalty.

**Compiler's Comments**

*1987 Amendment:* In last sentence, after "collected", inserted "except fines collected by a justice's court".

## Part 5

## Agricultural Commodity Research and Market Development

**Part Compiler's Comments**

*Effective Date:* Section 16, Ch. 83, L. 1999, provided: "[This act] is effective on passage and approval." Approved March 16, 1999.

### 80-11-510. Creation of commodity advisory committees.

**Compiler's Comments**

*2015 Amendment:* Chapter 151 in (1) at end inserted "subject to the following"; inserted (1)(a) regarding petition to create a commodity advisory committee and rulemaking requirements;

inserted (1)(b) regarding public hearing requirements for proposed commodity advisory committee; and made minor changes in style. Amendment effective March 31, 2015.

**Administrative Rules**

Title 4, chapter 6, ARM Commodity research and market development program.

### 80-11-512. Adoption of commodity research and market development program — referendum — hearing.

**Compiler's Comments**

*2015 Amendment — Code Commissioner Correction:* Chapter 151 substituted (1) concerning commodity advisory committee for "The department shall adopt commodity research and market development programs subject to the following:

(1) Twenty-five or more producers of a commodity may petition the department to adopt a research and market development program. The format, information required, and criteria of valid petitions must be established by department rule.

(2) Within 60 days of receipt and verification of a qualified petition, the department shall hold a hearing to receive relevant input from growers, producers, and first purchasers regarding the proposed commodity research and market development program"; in (2)(a) substituted "the commodity advisory committee shall vote on whether to" for "the department may"; substituted (2)(d), (2)(e), and (3) concerning voting, dissolution of committee, and adoption of program for "To be eligible to vote on a referendum, an individual must be a producer who is 18 years of age or older and a Montana resident"; deleted former (4) that read: "(4) Based on the facts and information from the hearing and an affirmative majority referendum vote, the department shall adopt a commodity research and market development program. In doing so, the department shall appoint an advisory committee in accordance with 80-11-510"; and made minor changes in style. Amendment effective March 31, 2015.

Pursuant to 1-11-101(2), in (3) the code commissioner changed "research and market development program" to "commodity research and market development program" to correct an obvious error.

## Part 6
## Organic Certification

**Part Administrative Rules**

Title 4, chapter 17, ARM Organic certification.

### 80-11-601. Plan for establishment of state organic certification program — submission by governor to U.S. secretary of agriculture — administration by department.

**Compiler's Comments**

*Effective Date:* Section 7(1), Ch. 172, L. 1999, provided: "Except as provided in subsection (2), [this act] [enacting 80-11-601] is effective on passage and approval." Approved March 24, 1999.

**Administrative Rules**

Title 4, chapter 17, ARM Organic certification.

### 80-11-602. Account established — sources — use — expenditures.

**Compiler's Comments**

*Effective Date:* Section 7(1), Ch. 172, L. 1999, provided: "Except as provided in subsection (2), [this act] [enacting 80-11-602] is effective on passage and approval." Approved March 24, 1999.

## Part 9
## Food and Agricultural Development Program

### 80-11-901. Montana food and agricultural development program — definition.

**Compiler's Comments**

*2019 Amendment:* Chapter 343 in (1) in middle of first sentence substituted "agriculture development council provided for in Title 90, chapter 9" for "department" and in last sentence near beginning substituted "must provide grant funding for" for "must fund four" and after "centers" deleted "that were established before January 1, 2009, and"; in (1)(a) after "renewable energy" inserted "commodity processing infrastructure, and emerging technologies intended to diversify, add value, or enhance economic growth opportunities for Montana's agricultural economy"; in (1)(b) after "agriculture" inserted "technology"; in (3) substituted "must be a nonprofit organization and shall coordinate with other state-funded programs in order to not duplicate state assistance" for "must be a certified regional development corporation or a nonprofit organization that serves at least a four-county region"; and made minor changes in style. Amendment effective July 1, 2019.

*Preamble:* The preamble attached to Ch. 386, L. 2009, provided: "WHEREAS, the lack of infrastructure in Montana for adding value to the state's agricultural products is a primary barrier to our state capturing a significant portion of the $3 billion that Montanans spend each year on food; and

WHEREAS, this lack of infrastructure is inhibiting the ability of farmers and ranchers and other agricultural entrepreneurs to serve markets for food, farm-based renewable energy, and other value-added agricultural markets, both within the state and outside the state; and

WHEREAS, producing for local markets on a family or community scale can reconnect Montana's rural and urban economies and enhance stewardship of Montana's natural and human resources; and

WHEREAS, consumer demand for Montana-based, sustainably grown, nutritious, and affordable food in Montana exceeds supply; and

WHEREAS, farm-derived renewable energy and biofuels hold promise to increase the profitability of family farm and ranch operations, promote domestic energy production, and lessen our dependence on foreign sources of energy; and

WHEREAS, previous investment and capacity built in the state for supporting value-added agricultural development needs to be maintained; and

WHEREAS, increasing technical assistance to Montana's food and agricultural entrepreneurs can help keep more of the state's food, agricultural, and energy dollars circulating in Montana communities."

*Effective Date:* Section 6, Ch. 386, L. 2009, provided: "[This act] is effective July 1, 2009."

## Part 10

## Pulse Crop Research and Marketing

### Part Compiler's Comments

*Effective Date:* Section 14, Ch. 312, L. 2017, provided: "[This act] is effective July 1, 2017."

*Transition — Direction to Governor and Department:* Section 12, Ch. 312, L. 2017, provided: "(1) Members who were serving on the pulse crop advisory committee created pursuant to ARM 4.6.401 on February 8, 2017, shall serve as the voting members of the Montana pulse crop committee provided for in [section 1] [2-15-3007] for fiscal year 2018. The term of the ex officio member appointed by the governor begins as of the date of appointment.

(2) Ex officio members not appointed by the governor shall begin serving as of July 1, 2017.

(3) The governor shall appoint the members as required by [section 1] [2-15-3007] for terms beginning in fiscal year 2019.

(4) The department shall transfer on July 1, 2017, money collected through the pulse crop commodity assessment provided for in ARM 4.6.403, as well as money earned on the assessment or any gifts, grants, or other funds raised for pulse crop promotion and marketing, to the pulse crop account in the state special revenue fund provided for in [section 7] [80-11-1006]."

### Part Administrative Rules

Title 4, chapter 21, ARM Montana Pulse Crop Committee.

### 80-11-1004. Pulse crop commodity assessment — collection.

### Compiler's Comments

*2019 Amendment:* Chapter 64 in (1) after "an assessment on pulse crops" inserted "grown, delivered, and stored"; and in (2) after "net receipts of pulse crops" substituted "grown, delivered, and stored" for "produced". Amendment effective July 1, 2019.

### 80-11-1008. Violation — penalty.

### Compiler's Comments

*2019 Amendment:* Chapter 64 in (1) at end substituted "subject to an administrative civil penalty of not more than $5,000 for each monthly statement not filed but required by administrative rule" for "guilty of a misdemeanor and upon conviction shall be fined not less than $25 or more than $500"; inserted (2) relating to a penalty matrix established by the department and penalty enforcement; inserted (3) relating to deposits of civil penalties; and made minor changes in style. Amendment effective July 1, 2019.

## Part 11
## Montana Hemp

**80-11-1101. Hemp certification program—plan—department authority—rulemaking.**

**Compiler's Comments**

*Effective Date:* Section 3, Ch. 288, L. 2019, provided: "[This act] is effective on passage and approval." Approved May 3, 2019.

# CHAPTER 12
# MONTANA AGRICULTURAL LOAN AUTHORITY ACT

**Chapter Compiler's Comments**

*Preamble:* The preamble to SB 316 (Ch. 580, L. 1983) provided:

"WHEREAS, obtaining sufficient financing to begin a farm or ranch operation in Montana is increasingly difficult; and

WHEREAS, beginning farmers experience great difficulty in repaying loans under high interest rates and with low market prices for agricultural products; and

WHEREAS, the agricultural loan programs administered by the Montana Department of Agriculture are inadequate to meet the real needs of the state; and

WHEREAS, the federal Farmers Home Administration's farm ownership loan program is also inadequate to the real needs of the state; and

WHEREAS, low interest rate financing for beginning farmers is not available in the private sector; and

WHEREAS, the value of family farms to the economic, social, and political well-being of the state is worthy of legislative action and support.

THEREFORE, it is the purpose of this act to assist beginning farmers with financial support and encouragement by making low interest rate loans available to eligible farmers and by providing incentives to retiring farmers who sell their land to eligible beginning farmers."

**Chapter Administrative Rules**

Title 4, chapter 14, ARM Agricultural loan authority rules.

## Part 1
## General

**80-12-102. Definitions.**

**Compiler's Comments**

*1991 Amendment:* In definition of authority substituted "department of agriculture provided for in 2-15-3001" for "agricultural loan authority provided for in 2-15-3011". Amendment effective March 26, 1991.

*Preamble:* The preamble attached to Ch. 168, L. 1991, provided: "WHEREAS, the Montana Agricultural Loan Authority Act and beginning farm loan program have been inactive since adoption of the federal Tax Reform Act of 1986 because of the loss of an effective funding source."

**Administrative Rules**

ARM 4.14.301 Definitions.

**80-12-103. Agricultural loan authority — general powers.**

**Compiler's Comments**

*1985 Amendment:* Inserted (6) allowing the loan authority to procure insurance or guaranties from any party against any loss in connection with its loan agreements.

*Statement of Intent:* The statement of intent attached to SB 316 (Ch. 580, L. 1983) provided: "Section 1. It is the specific intent of the Legislature that the Montana Agricultural Loan Authority should operate in the same manner that the Iowa Loan Authority has operated for the last 13 months in the state of Iowa. Each loan is processed individually by a bank or other financial institution. The loans can be for farmland acquisition or for purchase or construction of depreciable property (farm equipment or farm buildings). The bank or other financial institution initially approves the loan and agrees to accept the credit risk. It then sends an application to the Montana Agricultural Loan Authority in the exact amount and the money is made available to fund the loan.

Thus, the entire transaction is treated identically with any other bank loan to a farmer except that the bank or other financial institution is able to obtain municipal bond tax exemption for the interest income. The bank or other financial institution loan is, in effect, converted to a municipal bond and held in the bank's municipal bond tax-exempt portfolio.

Section 2. It is the intent of the Legislature that the Montana Agricultural Loan Authority created by this bill will not make direct loans. It will acquire existing loans already made and approved by a local financial institution only. It is also the specific intent of the Legislature that the state of Montana would have no financial risk on any of these loans. Whoever purchases the bonds will take the full risk that the loan that secures payment of each bond will be repaid.

Section 3. It is the specific intent of the Legislature that the Montana Agricultural Loan Authority would charge a one-time fee for issuing the bonds which fee shall not exceed the maximum amount authorized by the federal internal revenue code with regard to tax-exempt bond issues. It is the intent of the Legislature that the fee would be sufficient to pay the cost of bond counsel to review and approve each bond issue and all other administrative costs of the Montana Agricultural Loan Authority.

Section 4. This Statement of Intent is required by the rulemaking authority granted to the Montana Agricultural Loan Authority in section 4 [80-12-103] and section 8 [80-12-204]. Further, rules are contemplated for determining the procedure for granting approval by the Montana Agricultural Loan Authority and the procedure for verification by the Department of Revenue under section 23 [80-12-211].

Section 5. It is the intent of the Legislature that the Montana Agricultural Loan Authority adopt rules for the orderly handling and processing of applications under the authority granted in this Act to issue bonds secured by farm loans. The rules under section 8 [80-12-204] are intended to be sufficiently specific to allow for an objective determination by the Montana Agricultural Loan Authority of which applicants should receive approval of farm acquisition bonds from the authority. The same criteria should be established by rule for depreciable property loans with special emphasis on the need of the applicant and the applicant's possible prospects for success.

Section 6. The criteria for determining a bona fide beginning farmer in connection with the approval of the tax credit application by retiring farmers as provided in section 23 [80-12-211] shall be established by rule. The same requirements for establishing eligibility under section 8 [80-12-204] should be used under section 23 [80-12-211]."

**Administrative Rules**

Title 4, chapter 14, ARM Agricultural loan authority rules.

Title 4, chapter 20, ARM Mediation services.

## Part 2
## Loans

### 80-12-201. Loan agreements — general provisions.

**Compiler's Comments**

*2003 Amendment:* Chapter 405 in (4)(d) at end substituted "15-6-225" for "90-4-102". Amendment effective October 1, 2003.

*2001 Amendment:* Chapter 591 inserted (4)(d) concerning alternative renewable energy source production; and made minor changes in style. Amendment effective July 1, 2001.

*Severability:* Section 28, Ch. 591, L. 2001, was a severability clause.

**Administrative Rules**

ARM 4.14.302 Loan powers and eligible loan activities.

ARM 4.14.307 Loans to beginning farmers/ranchers and security arrangements.

ARM 4.14.308 Use of financial and security documents.

ARM 4.14.311 Fees and terms of loan.

ARM 4.14.314 Assumption of loans, substitution of collateral, and transfer of property.

### 80-12-202. Immediate repayment.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

### 80-12-203. Qualifications of applicants.

**Compiler's Comments**

*2019 Amendment:* Chapter 271 in (2) in last sentence after "Corporations" deleted "as defined in 35-1-113"; and made minor changes in style. Amendment effective June 1, 2020.

*2009 Amendments — Composite Section:* Chapter 18 in (1)(c) substituted "$450,000" for "$250,000"; and made minor changes in style. Amendment effective March 17, 2009.

Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

*1991 Amendment:* Near end of (2) substituted "35-1-113" for "35-1-102". Amendment effective January 1, 1992.

*1985 Amendment:* Inserted (1)(c) limiting an applicant's net worth for loan eligibility purposes.

**Administrative Rules**

ARM 4.14.305 Applicant eligibility.

**80-12-204. Evaluation of applicants.**

**Compiler's Comments**

*1985 Amendment:* In (1)(b)(i) after "net worth", deleted "which may not exceed $250,000"; and deleted former (1)(b)(iii) that read: "the applicant's inability to secure adequate financing for purchase of agricultural land from other sources at an interest rate that will allow a reasonable prospect for repayment".

*Statement of Intent:* The statement of intent attached to SB 316 (Ch. 580, L. 1983) provided: "Section 1. It is the specific intent of the Legislature that the Montana Agricultural Loan Authority should operate in the same manner that the Iowa Loan Authority has operated for the last 13 months in the state of Iowa. Each loan is processed individually by a bank or other financial institution. The loans can be for farmland acquisition or for purchase or construction of depreciable property (farm equipment or farm buildings). The bank or other financial institution initially approves the loan and agrees to accept the credit risk. It then sends an application to the Montana Agricultural Loan Authority in the exact amount and the money is made available to fund the loan.

Thus, the entire transaction is treated identically with any other bank loan to a farmer except that the bank or other financial institution is able to obtain municipal bond tax exemption for the interest income. The bank or other financial institution loan is, in effect, converted to a municipal bond and held in the bank's municipal bond tax-exempt portfolio.

Section 2. It is the intent of the Legislature that the Montana Agricultural Loan Authority created by this bill will not make direct loans. It will acquire existing loans already made and approved by a local financial institution only. It is also the specific intent of the Legislature that the state of Montana would have no financial risk on any of these loans. Whoever purchases the bonds will take the full risk that the loan that secures payment of each bond will be repaid.

Section 3. It is the specific intent of the Legislature that the Montana Agricultural Loan Authority would charge a one-time fee for issuing the bonds which fee shall not exceed the maximum amount authorized by the federal internal revenue code with regard to tax-exempt bond issues. It is the intent of the Legislature that the fee would be sufficient to pay the cost of bond counsel to review and approve each bond issue and all other administrative costs of the Montana Agricultural Loan Authority.

Section 4. This Statement of Intent is required by the rulemaking authority granted to the Montana Agricultural Loan Authority in section 4 [80-12-103] and section 8 [80-12-204]. Further, rules are contemplated for determining the procedure for granting approval by the Montana Agricultural Loan Authority and the procedure for verification by the Department of Revenue under section 23 [80-12-211].

Section 5. It is the intent of the Legislature that the Montana Agricultural Loan Authority adopt rules for the orderly handling and processing of applications under the authority granted in this Act to issue bonds secured by farm loans. The rules under section 8 [80-12-204] are intended to be sufficiently specific to allow for an objective determination by the Montana Agricultural Loan Authority of which applicants should receive approval of farm acquisition bonds from the authority. The same criteria should be established by rule for depreciable property loans with special emphasis on the need of the applicant and the applicant's possible prospects for success.

Section 6. The criteria for determining a bona fide beginning farmer in connection with the approval of the tax credit application by retiring farmers as provided in section 23 [80-12-211] shall be established by rule. The same requirements for establishing eligibility under section 8 [80-12-204] should be used under section 23 [80-12-211]."

**Administrative Rules**

ARM 4.14.305 Applicant eligibility.

### 80-12-211. Income tax deduction for land sale to beginning farmers.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

*1985 Amendment:* Near end of section, before "approved", deleted "first".

**Administrative Rules**

ARM 4.14.601 Tax deduction.
ARM 42.15.415 Deductions for sale of land to a beginning farmer.
ARM 42.23.424 Sale of land to a beginning farmer — corporate income tax deduction.

### 80-12-215. Loan guaranty program.

**Compiler's Comments**

*Statement of Intent:* The statement of intent attached to Ch. 448, L. 1985, provided:

"Section 1. A statement of intent is required for this bill because it delegates authority to the agricultural loan authority to adopt rules concerning loan guaranties. The legislature intends that in adopting rules the authority look to existing rules established by the Montana economic development board [abolished and functions transferred to the Board of Investments by Ch. 581, L. 1987], on which the authority contained in this bill is patterned.

Section 2. It is the intent of the legislature that the agricultural loan authority prepare rules to establish the loan guaranty program authorized in Senate Bill 208 by addressing and providing for the following terms and conditions:

(1) Banks and other financial institutions should be required to participate in any guaranty program. It is suggested that the normal participation would be a minimum of 20% by the bank or other financial institution and 80% affected by the state guaranty authorized under Senate Bill 208.

(2) A program for guaranteeing existing operating loans made by existing banks and other financial institutions should be considered, provided all other conditions are met, including: (a) an equity in real estate or other comparable property is obtained; (b) the guaranty does not extend beyond 10 years; and (c) the bank or other financial institution agrees to reduce the interest rate to at least no higher than the rate on federal obligations for comparable maturities.

(3) Any loan guaranteed under the provisions of Senate Bill 208 should be supported by a mortgage on real estate or a lien on other comparable property.

(4) An appraisal by a qualified appraiser should be required. The loan or guaranty secured by mortgage on real estate or other comparable property should not exceed, when taken in conjunction with any prior mortgages or obligations on the real estate, 65% of the appraised value of the property pledged as security.

(5) Before any loan can be guaranteed pursuant to Senate Bill 208, the applicant should provide the agricultural loan authority with sufficient information to show that he can reasonably expect a positive cash flow from the normal operation of the agriculture enterprise. The agricultural loan authority may require a surplus cash flow by rules properly adopted.

(6) The agricultural loan authority should not guarantee loans that exist for more than 10 years.

(7) The guaranties provided in Senate Bill 208 should be targeted primarily for existing farmers and ranchers who own agricultural land on which their farming and ranching is located and whose total debt from that agricultural operation equals between 40% and 60% of their total farm and ranch assets.

(8) The department of agriculture and the agricultural loan authority should retain persons with sufficient experience in agricultural credit to adequately review all applications made for guaranty under Senate Bill 208. They shall take such time in implementing this program as may be necessary to guarantee that it will operate smoothly and properly without undue exposure or risk of loss. Experienced lenders who know and understand the Montana agricultural situation are absolutely critical to the success of this program.

(9) The bank or financial institution that originated the guaranteed loan must initiate the appropriate action to liquidate the property pledged as security. The costs of liquidation should be shared pro rata at the same rate as participation in the guaranty program."

## Part 3
## Bonds

**80-12-301. Issuance of bonds — credit of the state not pledged.**

**Compiler's Comments**

*1985 Amendment:* In (5) reduced amount of bonds which may be outstanding from $200 million to $40 million.

**80-12-302. Provisions of bond resolutions or trust indentures.**

**Administrative Rules**

ARM 4.14.313 Procedures following bond issuance.

**80-12-305. Tax exemption of bonds.**

**Compiler's Comments**

*2000 Amendment by Referendum:* Chapter 9 at end of first sentence deleted references to inheritance taxes and gift taxes; and made minor changes in style. Amendment effective November 7, 2000.

*Applicability:* Section 38, Ch. 9, Sp. L. May 2000, provided: "This act applies to deaths occurring after December 31, 2000."

**80-12-310. Continuing validity of authority members' signatures.**

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

**80-12-311. Accounts of the authority.**

**Compiler's Comments**

*1983 Amendment:* Substituted three references to the agricultural loan authority enterprise fund in the enterprise fund type for three references to the agricultural loan authority account in the bond proceeds and insurance clearance fund.

# CHAPTER 15
# MONTANA AGRICULTURAL CHEMICAL GROUND WATER PROTECTION ACT

**Chapter Compiler's Comments**

*1989 Statement of Intent:* The statement of intent attached to Ch. 668, L. 1989, provided: "A statement of intent is required for this bill in order to provide guidance to the department of agriculture and the department of health and environmental sciences [now department of environmental quality] concerning the administration of the provisions of the bill and the adoption of rules.

Because the departments share responsibility for certain duties established by the bill, the departments shall coordinate their rulemaking efforts and whenever possible adopt identical rules for the areas of shared responsibility, including:

(1) ground water monitoring as authorized by [sections 10 and 11] [80-15-202 and 80-15-203];

(2) field and laboratory operational quality assurance, quality control, and confirmatory procedures as authorized by [sections 7, 10, and 11] [80-15-107, 80-15-202, and 80-15-203];

(3) maintenance of confidentiality of certain data as required by [section 8] [80-15-108]; and

(4) administrative civil penalties as authorized by [section 22] [80-15-412].

The board of health and environmental sciences [now board of environmental review] is responsible for adoption of certain ground water quality standards for agricultural chemicals as required by [section 9] [80-15-201]. The board shall adopt appropriate rules as necessary to comply with the special requirements and considerations that apply to the adoption of these standards as specified in [section 9] [80-15-201], including acquisition of current and scientifically valid data from the United States environmental protection agency (EPA) and other sources and communications with EPA concerning the content and status of promulgated federal standards, nonpromulgated federal standards, and other relevant EPA regulations and materials.

The department of agriculture is responsible for the development of agricultural chemical ground water management plans. The department shall adopt appropriate rules to ensure compliance with the requirements of [section 12] [80-15-211 through 80-15-218], including procedures for the development of the plans, communication with sources of information needed for the plans, communication with citizens who may be affected by the plans, and criteria for ensuring that the content of the plans meets the objectives of preventing ground water impairment, minimizing the presence of agricultural chemicals in ground water, and protecting present and future beneficial uses of ground water as specified in [section 12] [80-15-211 through 80-15-218]. The department of agriculture shall also adopt rules specifying procedures for obtaining comments on agricultural chemical ground water management plans from the department of health and environmental sciences [now department of environmental quality], for adoption of completed plans, and for making modifications to adopted plans."

*Severability:* Section 30, Ch. 688, L. 1989, was a severability clause.

**Chapter Administrative Rules**

Title 4, chapter 11, ARM Environmental management — Chemical Ground Water Protection Act rules.

**Chapter Law Review Articles**

Ground Water Management in Montana: On the Road From Beleaguered Law to Science-Based Policy, Ziemer, Kendy, & Wilson, 27 Pub. Land & Resources L. Rev. 75 (2006).

## Part 1
## General Provisions

### 80-15-102. Definitions.

**Compiler's Comments**

*2021 Code Commissioner Correction:* In definitions of interim numerical standard and standard, the Code Commissioner substituted "department of environmental quality" for "board" to reflect the amendments made to 80-15-201 by Ch. 324, L. 2021.

*1995 Amendments — Composite Section:* Chapter 418 in definition of best management plans, after "department", deleted "of agriculture"; in definition of Board substituted "board of environmental review provided for in 2-15-3502" for "board of health and environmental sciences provided for in 2-15-2104"; in definition of point of standards application, substituted "department of environmental quality" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 546 deleted definition of Board that read: ""Board" means the board of health and environmental sciences provided for in 2-15-2104"; pursuant to sec. 568, Ch. 546, L. 1995, a coordination section, in definition of point of standards application, the Code Commissioner substituted "department of environmental quality" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 546 deleted the Board of Health and Environmental Sciences. Chapter 418 replaced that Board with the Board of Environmental Review. Pursuant to sec. 569, Ch. 546, the Code Commissioner has codified the definition of the Board of Environmental Review.

*Name Change — Directions to Code Commissioner:* Pursuant to sec. 36, Ch. 308, L. 1995, in this section the Code Commissioner changed "Montana state university" to "Montana state university-Bozeman".

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clauses:* Section 503, Ch. 418, L. 1995, was a saving clause.

Section 571, Ch. 546, L. 1995, was a saving clause.

**Administrative Rules**

ARM 4.11.101 Environmental management — definitions.

### 80-15-104. Administration.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 in (1) and (2) substituted "department of environmental quality" for "department of health and environmental sciences". Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

## 80-15-105. Rulemaking.

### Compiler's Comments

*2021 Amendment:* Chapter 324 in (1) in first sentence near beginning substituted "department of environmental quality" for "board" and near end before "department" deleted "board and the"; and made minor changes in style. Amendment effective July 1, 2021.

*1995 Amendments:* Chapter 418 in (1) and (2)(b) substituted "department of environmental quality" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 471 in (1), near beginning, inserted "subject to the provisions of 80-15-110". Amendment effective April 14, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*Applicability:* Section 22(3), Ch. 471, L. 1995, provided: "(3) [This act] does not apply to the establishment of fees or public participation requirements."

### Administrative Rules

Title 4, chapter 11, ARM Environmental management — Chemical Ground Water Protection Act rules.

ARM 4.11.101 Environmental management — definitions.

ARM 4.11.205 General management plan evaluations.

ARM 4.11.901 Ensure compliance.

## 80-15-106. Educational programs.

### Compiler's Comments

*Name Change — Directions to Code Commissioner:* Pursuant to sec. 36, Ch. 308, L. 1995, in this section the Code Commissioner changed "Montana state university" to "Montana state university-Bozeman".

### Administrative Rules

ARM 4.11.204 General management plan education.

ARM 4.11.305 Specific management plan education.

## 80-15-107. Research.

### Compiler's Comments

*1995 Amendment:* Chapter 418 near beginning substituted "department of environmental quality" for "department of health and environmental sciences". Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

## 80-15-108. Confidentiality.

### Compiler's Comments

*1995 Amendment:* Chapter 418 in (1) and (2) substituted "department of environmental quality" for "department of health and environmental sciences". Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

### Administrative Rules

Title 4, chapter 11, subchapter 11, ARM Confidentiality of business information.

## 80-15-110. State regulations no more stringent than federal regulations or guidelines.

### Compiler's Comments

*2021 Amendment — Code Commissioner Correction:* Chapter 324 in (1) in two places and in (2) at beginning of introductory clause substituted "department of environmental quality" for "board"; in (2) in middle of introductory clause before "makes" substituted "it" for "the board"; in (3) at end of first sentence before "conclusion" deleted "board's"; in (4)(a) in middle of second sentence substituted "the department" for "the board"; in (4)(b) after "1990" inserted "and before July 1, 2021"; and made minor changes in style. Amendment effective July 1, 2021.

In (4)(a) in second sentence, the Code Commissioner substituted "department of environmental quality" for "department", which is defined for Title 80 as the department of agriculture, because the apparent intent of the amendment to this section by Ch. 324 was to provide the department of environmental quality rulemaking authority to implement Title 80, chapter 15.

*Preamble:* The preamble attached to Ch. 471, L. 1995, provided: "WHEREAS, the federal government frequently regulates areas that are also subject to state regulation; and

WHEREAS, differing state and federal policy goals and unique state prerogatives frequently result in different levels of regulation, different standards, and different requirements being imposed by state and federal programs covering the same subject matter; and

WHEREAS, Montana must simultaneously move toward reducing redundant and unnecessary regulation that dulls the state's competitive advantage while being ever vigilant in the protection of the public's health, safety, and welfare; and

WHEREAS, Montana's administrative agencies should consider applicable federal standards when adopting, readopting, or amending rules with analogous federal counterparts; and

WHEREAS, Montana's administrative agencies should analyze whether analogous federal standards sufficiently protect the health, safety, and welfare of Montana's citizens; and

WHEREAS, as part of the formal rulemaking process, the public should be advised of the agencies' conclusions about whether analogous federal standards sufficiently protect the health, safety, and welfare of Montana citizens."

*1995 Statement of Intent:* The statement of intent attached to Ch. 471, L. 1995, provided: "A statement of intent is required for this bill in order to provide guidance to the board of health and environmental sciences [now board of environmental review], the department of health and environmental sciences [now department of environmental quality], and local units of government in complying with [this act].

The legislature intends that in addition to all requirements imposed by existing law and rules, the board or the department include as part of the initial publication and all subsequent publications of a rule a written finding if the rule in question contains any standards or requirements that exceed the standards or requirements imposed by comparable federal law.

If the rules are more stringent than comparable federal law, the written finding must include but is not limited to a discussion of the policy reasons and an analysis that supports the board's or department's decision that the proposed state standards or requirements protect public health or the environment of the state and that the state standards or requirements to be imposed can mitigate harm to the public health or the environment and are achievable under current technology. The department is not required to show that the federal regulation is inadequate to protect public health. The written finding must also include information from the hearing record regarding the costs to the regulated community directly attributable to the proposed state standard or requirement."

*Effective Date:* Section 23, Ch. 471, L. 1995, provided that this section is effective on passage and approval. Approved April 14, 1995.

*Applicability:* Section 22(1) and (3), Ch. 471, L. 1995, provided: "(1) [Sections 1 through 3] are intended to apply to any rule that is in effect, adopted, or amended, and that regulates those resources or activities for which the state has been given primary authority to regulate by federal authority pursuant to Title 75, chapter 2; Title 75, chapter 3 [except for part 6, renumbered Title 50, chapter 79]; Title 75, chapter 5; Title 75, chapter 6; or Title 75, chapter 10, as of [the effective date of this act] [April 14, 1995].

(3) [This act] does not apply to the establishment of fees or public participation requirements."

## Part 2
## Control

### 80-15-201. Ground water standards.

**Compiler's Comments**

*2021 Amendment:* Chapter 324 in (1) in three places, in (2) in first sentence of introductory clause, in (3) in middle of first sentence before "is required" and in last sentence before "shall adopt" and before "shall review", in (4) in two places, in (5) in introductory clause, and in (6) substituted references to department of environmental quality for references to board. Amendment effective July 1, 2021.

*1995 Amendment:* Chapter 418 in (2)(c) and in two places in (3) substituted "department of environmental quality" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

## 80-15-202. Monitoring programs.

**Compiler's Comments**

*1995 Amendments — Composite Section:* Chapter 189 deleted former (2) requiring person receiving analysis indicating presence of agricultural chemical in ground water to notify the Department; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 418 in (1), (2), and (3) substituted "department of environmental quality" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995. The amendment in (2) was rendered void by Ch. 189.

*Severability:* Section 8, Ch. 189, L. 1995, was a severability clause.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

**Administrative Rules**

Title 4, chapter 11, subchapter 6, ARM Monitoring procedures.

## 80-15-203. Evaluation and use of monitoring results.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 in (1) substituted "department and the department of environmental quality" for "departments"; and in (2)(a), (3), (4), and (5) substituted "department of environmental quality" for "department of health and environmental sciences". Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

**Administrative Rules**

Title 4, chapter 11, subchapter 6, ARM Monitoring procedures.

## 80-15-211. General agricultural chemical ground water management plan.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 near end substituted "department of environmental quality" for "department of health and environmental sciences". Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

**Administrative Rules**

Title 4, chapter 11, subchapter 2, ARM General management plan.
ARM 4.11.403 Sources of information.

## 80-15-212. Specific agricultural chemical ground water management plans.

**Compiler's Comments**

*2005 Amendment:* Chapter 561 in (1) near end after "50%" inserted "or greater"; inserted (2) allowing the department to develop and implement an agricultural chemical ground water management plan specific to particular agricultural chemicals; inserted (3) allowing the department to initiate educational programs about agricultural chemical management to provide information and management techniques to protect ground water in an effort to preclude the need for development of specific agricultural chemical ground water management plans in the future; and made minor changes in style. Amendment effective May 2, 2005.

**Administrative Rules**

ARM 4.11.301 Specific management plan.
ARM 4.11.307 Prioritizing preparation of specific management plans.
ARM 4.11.401 General or specific management plan advisory committees.
ARM 4.11.403 Sources of information.

### 80-15-213. Beneficial use to be considered in developing management plans — water classification.

**Compiler's Comments**

*2005 Amendment:* Chapter 561 in (1)(b)(ii) at end after "as" substituted "provided in 80-15-212(1) and (2)" for "required by 80-15-212(1)". Amendment effective May 2, 2005.

*1995 Amendment:* Chapter 418 in (1)(b)(i) and in four places in (2) substituted "department of environmental quality" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

### 80-15-214. Contents of specific agricultural chemical ground water management plan.

**Administrative Rules**

ARM 4.11.302 Specific management plan content.
ARM 4.11.303 Best management plan or practices for specific management plan.
ARM 4.11.403 Sources of information.

### 80-15-215. Benefits of appropriate agricultural chemical use to be considered.

**Compiler's Comments**

*Name Change — Directions to Code Commissioner:* Pursuant to sec. 36, Ch. 308, L. 1995, in this section the Code Commissioner changed "Montana state university" to "Montana state university-Bozeman".

**Administrative Rules**

ARM 4.11.304 Specific management plan — public participation.
ARM 4.11.305 Specific management plan education.
ARM 4.11.401 General or specific management plan advisory committees.
ARM 4.11.403 Sources of information.

### 80-15-216. Commercial fertilizer ground water management plan.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 substituted "department of environmental quality" for "department of health and environmental sciences". Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

### 80-15-217. Management plans — rulemaking — review.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 in (1), in two places, substituted "department of environmental quality" for "department of health and environmental sciences". Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

**Administrative Rules**

Title 4, chapter 11, subchapter 3, ARM Specific management plan.
ARM 4.11.402 Department review and comment.
ARM 4.11.403 Sources of information.
ARM 4.11.904 General and specific management plan evaluations.

### 80-15-218. Notice to buyer.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

## Part 3
## Funding

**80-15-301. Agricultural chemical ground water protection accounts — acceptance and expenditure of gifts, grants, and funds.**

**Compiler's Comments**

*1995 Amendment:* Chapter 418 in (1) and (3) substituted "department of environmental quality" for "department of health and environmental sciences". Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

**80-15-302. Special funding.**

**Compiler's Comments**

*2017 Amendment:* Chapter 244 in (1) at end substituted "80-8-201" for "80-8-201(4)". Amendment effective May 3, 2017.

*Saving Clause:* Section 15, Ch. 244, L. 2017, was a saving clause.

*Severability:* Section 16, Ch. 244, L. 2017, was a severability clause.

*2009 Amendment:* Chapter 395 in (3) at end of first sentence substituted "80-10-201(1)(a)(i) and (1)(a)(ii)" for "80-10-201(1)"; and made minor changes in style. Amendment effective July 1, 2009.

*2001 Amendment:* Chapter 141 in (1) increased pesticide registration fee from $80 to $95. Amendment effective October 1, 2001.

*Saving Clause:* Section 3, Ch. 141, L. 2001, was a saving clause.

*1995 Amendment:* Chapter 418 in (2)(a)(i) substituted "department of environmental quality" for "department of health and environmental sciences". Amendment effective July 1, 1995.

*Name Change — Directions to Code Commissioner:* Pursuant to sec. 36, Ch. 308, L. 1995, in this section the Code Commissioner changed "Montana state university" to "Montana state university-Bozeman".

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1991 Amendment:* At beginning of (1) increased pesticide registration fee from $15 to $80; inserted (2) concerning deposit of fees into state special revenue account, with $15,000 credited to Department of Health and Environmental Sciences, $15,000 to Montana State University Extension Service, and remainder to Department; in (3), near middle of third sentence after "fertilizer", inserted "agricultural chemical ground water"; and inserted (4) concerning investment by Board of Investments of fees collected and crediting investment income to Department. Amendment effective January 1, 1992.

*Severability:* Section 9, Ch. 588, L. 1991, was a severability clause.

## Part 4
## Enforcement

**Part Administrative Rules**

Title 4, chapter 11, subchapter 9, ARM Compliance penalties and violations.

**80-15-401. Authority to investigate and inspect.**

**Administrative Rules**

ARM 4.11.902 Compliance inspections.
ARM 4.11.903 Compliance evaluations.

**80-15-403. Compliance orders.**

**Compiler's Comments**

*1995 Amendments:* Chapter 189 at end of (2)(a) substituted "who violates any requirement established pursuant to this chapter" for former language authorizing Department to issue cleanup orders to person's employees, agents, and subcontractors; inserted (2)(b) providing that subsection does not affect indemnity or liability agreements between owner, lessee, possessor, or person controlling the site and seller, lessor, or person relinquishing possession or control of the site; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 192 at end of (2)(a) inserted "This subsection does not apply"; inserted (2)(a)(i) exempting commercial wood treatment facilities; and inserted (2)(a)(ii) concerning agricultural chemical spills that threaten public water supply.

Chapter 418 in (1), in second sentence, substituted "department of environmental quality" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

*Severability:* Section 8, Ch. 189, L. 1995, was a severability clause.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

**Administrative Rules**

ARM 4.11.903 Compliance evaluations.
ARM 4.11.905 Coordinating proposed orders.
ARM 4.11.906 Determining significant probability.
ARM 4.11.907 Contents of orders.
ARM 4.11.908 Corrective actions.
ARM 4.11.909 Duration of monitoring.

### 80-15-404. Injunctions authorized.

**Administrative Rules**

ARM 4.11.903 Compliance evaluations.
ARM 4.11.913 Other penalties.

### 80-15-405. Emergencies.

**Administrative Rules**

ARM 4.11.903 Compliance evaluations.
ARM 4.11.905 Coordinating proposed orders.
ARM 4.11.906 Determining significant probability.
ARM 4.11.907 Contents of orders.
ARM 4.11.908 Corrective actions.
ARM 4.11.909 Duration of monitoring.

### 80-15-411. Violators subject to penalties.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 in (5) substituted "department of environmental quality" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

**Administrative Rules**

ARM 4.11.903 Compliance evaluations.
ARM 4.11.913 Other penalties.

### 80-15-412. Administrative civil penalty.

**Compiler's Comments**

*1995 Amendments — Composite Section:* Chapter 189 in (1) and (5) deleted specific reference to Department of Health and Environmental Sciences; in (3) and in two places in (4), before "department", deleted "responsible"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 418 in (1), in two places, and in (5) substituted "department of environmental quality" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995. The amendment by Ch. 189 rendered the first amendment in (1) and the amendment in (5) void.

*Severability:* Section 8, Ch. 189, L. 1995, was a severability clause.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

**Administrative Rules**

ARM 4.11.903 Compliance evaluations.
ARM 4.11.911 Enforcement.

ARM 4.11.912 Ability to stay in business.
ARM 4.11.913 Other penalties.
ARM 4.11.914 Penalty determination.
ARM 4.11.915 Gravity of violations.
ARM 4.11.916 Degree of care.
ARM 4.11.917 Significance of harm.

### 80-15-413. Judicial civil penalty.

**Administrative Rules**

ARM 4.11.903 Compliance evaluations.

### 80-15-414. Criminal penalties.

**Administrative Rules**

ARM 4.11.903 Compliance evaluations.

# CHAPTER 18
# ALTERNATIVE AGRICULTURAL CROPS

## Part 1
## Hemp

**Part Compiler's Comments**

*Request for Federal Change or Waiver:* Section 9, Ch. 360, L. 2001, provided: "The department shall send a copy of [this act], along with a request for a change in federal law or a waiver that will allow [this act] to be effective without federal preemption, to the Montana congressional delegation and the director of the drug enforcement administration." The Department of Agriculture complied with this directive on June 19, 2001. The Drug Enforcement Administration sought additional information on August 2, 2001. The Department sent a second letter on September 20, 2001. On November 16, 2001, the Drug Enforcement Administration responded that a petition was required for a change in the scheduling of a controlled substance under 21 U.S.C. 811(a). On February 19, 2002, the Department sent a letter as a petition to remove industrial hemp from the list of scheduled substances. On May 13, 2002, the Drug Enforcement Administration denied the petition. The referenced documents are on file with the Department of Agriculture.

*Effective Date:* This part is effective October 1, 2001.

**Part Administrative Rules**

Title 4, chapter 19, ARM Industrial hemp program.

### 80-18-101. Definitions.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 12, Ch. 746, L. 2023. Amendment effective May 22, 2023.

*Severability:* Section 15, Ch. 746, L. 2023, was a severability clause.

*2021 Amendment:* Chapter 59 in definition of hemp after "Cannabis" deleted "sativa L. containing no greater than 0.3% tetrahydrocannabinol" and inserted "consistent with the United States department of agriculture's definition of hemp and rules established by the department"; inserted definitions of hemp crude and hemp derivatives; and made minor changes in style. Amendment effective March 8, 2021.

*2019 Amendment:* Chapter 289 changed defined term from industrial hemp to hemp. Amendment effective May 3, 2019.

### 80-18-102. Hemp authorized as agricultural crop.

**Compiler's Comments**

*2021 Amendment:* Chapter 59 at beginning of first sentence after "Hemp" deleted "that has no more than 0.3% tetrahydrocannabinol"; at end of last sentence after "hemp" deleted "if the hemp does not contain more than 0.3% tetrahydrocannabinol" and inserted "including cultivatable seeds or plants"; and made minor changes in style. Amendment effective March 8, 2021.

*2019 Amendment:* Chapter 289 in three places substituted "hemp" for "industrial hemp". Amendment effective May 3, 2019.

**Administrative Rules**

ARM 4.19.109 Prohibition on growing both hemp and medical marijuana.

### 80-18-103. Hemp — licensing.

**Compiler's Comments**

*2021 Amendment:* Chapter 59 in (1) substituted "growing hemp or selling propagatable hemp or hemp seeds" for "growing hemp for commercial purposes"; and in (2) at end after "hemp" inserted "and any additional information required by rule". Amendment effective March 8, 2021.

*2019 Amendment:* Chapter 289 in (1) and (2) substituted "hemp" for "industrial hemp"; deleted former (3) that read: "(3) The department shall require each first-time applicant for a license to file a set of the applicant's fingerprints, taken by a law enforcement officer, and any other information necessary to complete a statewide and nationwide criminal history check with the criminal investigation bureau of the department of justice for state processing and with the federal bureau of investigation for federal processing. All costs associated with the criminal history check are the responsibility of the applicant. Criminal history records provided to the department under this section are confidential. The department may use the records only to determine if an applicant is eligible to receive a license for the production of industrial hemp. If the applicant has completed the application process to the satisfaction of the department, the department shall issue the license, which is valid until December of that year. An individual licensed under this section is presumed to be growing industrial hemp for commercial purposes"; and made minor changes in style. Amendment effective May 3, 2019.

**Administrative Rules**

ARM 4.19.111 Research program.
ARM 4.19.202 Hemp processing for a commodity dealer.
ARM 4.19.203 Processing with a grower's license.

### 80-18-106. Hemp production — notification requirements.

**Compiler's Comments**

*2021 Amendment:* Chapter 59 in (1) after "showing" substituted "the type and variety of seeds" for "that the seeds planted are of a type and variety certified to have no more than 0.3% tetrahydrocannabinol"; deleted former (2) that read: "(2) Each licensee shall notify the department of the sale or distribution of any hemp grown by the licensee, including the name and address of the person receiving the hemp"; and made minor changes in style. Amendment effective March 8, 2021.

*2019 Amendment:* Chapter 289 in (1)(b) and in (2) in two places substituted "hemp" for "industrial hemp". Amendment effective May 3, 2019.

**Administrative Rules**

ARM 4.19.107 Hemp variety.
ARM 4.19.108 Hemp variety categories.

### 80-18-107. Rulemaking authority.

**Compiler's Comments**

*2021 Amendment:* Chapter 59 inserted (4) regarding a hemp definition; inserted (5) regarding regulations for hemp derivatives and hemp crude; inserted (6) regarding necessary licensing requirements; and made minor changes in style. Amendment effective March 8, 2021.

*2019 Amendment:* Chapter 289 throughout section substituted "hemp" for "industrial hemp". Amendment effective May 3, 2019.

**Administrative Rules**

ARM 4.19.113 Inspection and laboratory fees.

### 80-18-111. Affirmative defense for possession or cultivation of marijuana.

**Compiler's Comments**

*2021 Amendment:* Chapter 59 in middle after "marijuana" deleted "under 45-9-102, 45-9-103, and 45-9-110" and at end substituted "growing or processing hemp in compliance with this part or a tribal plan approved by the United States department of agriculture" for "growing hemp pursuant to this part"; deleted former (1)(b) and (1)(c) that read: "(b) the defendant had valid applicable controlled substances registrations from the United States department of justice, drug enforcement administration; and

(c) the defendant fully complied with all of the conditions of the controlled substances registration"; deleted former (2) that read: "(2) This section is not an affirmative defense to a charge of criminal sale or distribution of marijuana"; and made minor changes in style. Amendment effective March 8, 2021.

*2019 Amendment:* Chapter 289 in (1)(a) substituted "hemp" for "industrial hemp". Amendment effective May 3, 2019.

## CHAPTER 20
## AGRICULTURAL RESEARCH

### Part 1
### Crop Research Facilities Protection Act

**Part Compiler's Comments**

*Effective Date:* Section 6, Ch. 441, L. 2001, provided: "[This act] is effective on passage and approval." Approved April 30, 2001.

**Part Law Review Articles**

Progress Without Patents: Public Maintenance of Agricultural Knowledge, Jones, 19 J. Envtl. L. & Litigation 463 (2004).

**80-20-102. Definitions.**

**Compiler's Comments**

*2015 Amendment:* Chapter 161 in definition of effective consent in (c) substituted "mental disease or disorder" for "mental disease or defect". Amendment effective April 1, 2015.

# TITLE 81
# LIVESTOCK

**Title Administrative Rules**
Title 32, ARM Livestock.

**Title Law Review Articles**
Searching for the Montana Open Range: A Judicial and Legislative Struggle to Balance Tradition and Modernization in an Evolving West, Archer, 63 Mont. L. Rev. 197 (Winter 2002).

Cutting the Mussel's Threads: A Legal Perspective on Invasive Species, Frandsen, 46 Pub. Land & Resources L. Rev. 40 (2024), https://scholarworks.umt.edu/plrlr/vol46/iss1/5/.

## CHAPTER 1
## DEPARTMENT OF LIVESTOCK

**Chapter Law Review Articles**
Cutting the Mussel's Threads: A Legal Perspective on Invasive Species, Frandsen, 46 Pub. Land & Resources L. Rev. 40 (2024), https://scholarworks.umt.edu/plrlr/vol46/iss1/5/.

### Part 1
### General Provisions

**Part Compiler's Comments**
*Preamble:* The preamble attached to Ch. 153, L. 1999, provided: "WHEREAS, the pilot program to clarify and standardize regulations regarding the brucellosis vaccination of cattle imported into Montana has been successful; and

WHEREAS, requirements for the brucellosis vaccination of imported cattle may be more appropriately addressed through the rulemaking authority in 81-2-102 through 81-2-104, rather than by statute."

### 81-1-101. Definitions.

**Compiler's Comments**
*2021 Amendment:* Chapter 507 in definition of domestic bison substituted "that is not a wild buffalo or wild bison" for "owned by a person"; in definition of wild buffalo or wild bison after "means a bison that" deleted "has not been reduced to captivity and is not owned by a person" and inserted current language in (6)(a) through (6)(d); and made minor changes in style. Amendment effective May 14, 2021.

*2011 Amendment:* Chapter 403 inserted definitions of bison, domestic bison, feral bison, and wild buffalo or wild bison; and made minor changes in style. Amendment effective May 13, 2011.

*Termination Provision Repealed:* Section 1, Ch. 188, L. 2011, repealed sec. 20, Ch. 361, L. 2009, which terminated the 2009 amendments to this section June 30, 2011. Effective April 15, 2011.

*2009 Amendment:* Chapter 361 in definition of board inserted exception clause; and made minor changes in style. Amendment effective July 1, 2009, and terminates June 30, 2011.

*Preamble:* The preamble to Ch. 444, L. 1983, provided: "WHEREAS, the sunset law, sections 2-8-103 [now repealed] and 2-8-112, MCA, terminates the Board of Livestock and requires a performance evaluation of the Board by the Legislative Audit Committee; and

WHEREAS, as a result of the performance evaluation, the Legislative Audit Committee recommends that the Board of Livestock be reestablished under existing statutory authority."

*Reestablishment:* Section 1, Ch. 444, L. 1983, provided: "The Board of Livestock created pursuant to 2-15-3102 is reestablished with its existing statutory authority and rules." The audit report relating to the reestablishment of the Board of Livestock may be obtained from the Legislative Auditor. The report number is 81-554.

## 81-1-102. Duties and powers of department — fees based on costs — notice of rules and orders.

**Compiler's Comments**

*2015 Amendments — Composite Section:* Chapter 187 in (2) at end after "costs" deleted "as provided in 37-1-134". Amendment effective July 1, 2015.

Chapter 439 inserted (5) concerning hiring and removal of executive officer. Amendment effective May 6, 2015.

*2013 Amendment:* Chapter 90 inserted (3) concerning providing notice of administrative rules and orders; and made minor changes in style. Amendment effective March 27, 2013.

*Preamble:* The preamble attached to Ch. 300, L. 2013, provided: "WHEREAS, current Montana law contains a complex food code with jurisdiction spread between multiple departments and levels of government; and

WHEREAS, there is a growing movement to support locally sourced and community-based food production, sometimes referred to as "cottage food", which benefits local communities, small businesses, public health, and environmental sustainability; and

WHEREAS, numerous states have passed laws that allow small business entrepreneurs to use their home kitchens to prepare for sale foods that are not potentially hazardous, while Montana has not; and

WHEREAS, new federal rules and regulations under the Food Safety Modernization Act will require updates to Montana food safety laws."

*Montana Food Policy Modernization Project — Guidelines:* Section 1, Ch. 300, L. 2013, required the departments of public health and human services, agriculture, and livestock to coordinate and conduct a project to assess Montana's food laws and develop a report for the economic affairs interim committee, including any proposed legislation for the 2015 legislature. Chapter 300 was effective April 25, 2013, and terminates June 30, 2014, or upon completion of the duties described in the chapter, whichever occurs first.

*2011 Amendment:* Chapter 417 in (1) after "fosters" substituted "the livestock" for "this"; in (2) inserted exception clause; and made minor changes in style. Amendment effective July 1, 2011.

*1999 Amendment:* Chapter 574 in (3) at end substituted "alternative livestock ranches" for "game farms as described in Title 87, chapter 4, part 4"; and made minor changes in style. Amendment effective October 1, 1999.

*1995 Amendment:* Chapter 503 inserted (3) concerning the Department performing duties assigned to it relating to game farms. Amendment effective July 1, 1995.

*1983 Amendment:* Inserted (2) requiring establishment of fees based on costs.

*Statement of Intent:* The statement of intent attached to Ch. 444, L. 1983, provided: "A statement of intent is required for Senate Bill 259 because section 4 [amending this section] grants the Department of Livestock authority to charge fees commensurate with costs and section 12 [amending 81-4-605] grants authority to establish rules for handling estrays.

The Legislature intends that the fees be set in an amount sufficient to provide funds to administer the function for which the fee is charged. Fees shall not be set so high as to generate revenue in excess of expenses. The Legislature intends that a penalty be established by rule for failure to apply for renewal of a license required by 81-22-208. The penalty should be sufficient to encourage renewal of licenses.

The Department is required by law to process estrays at livestock markets. Section 12 [amending 81-4-605] specifically grants the Department authority to establish rules for the handling of estrays. It is the intent of the Legislature that the rules provide for collecting, holding, advertising, and selling of estrays in an expeditious manner while facilitating the movement of livestock and also protecting the property interests of the owner of the livestock."

**Administrative Rules**

Title 32, chapter 2, ARM Overall department rules.

**Case Notes**

*Livestock Markets — Necessity and Convenience:* In the regulation of livestock markets under section 46-907, R.C.M. 1947 (now repealed), the Livestock Commission (now Board of Livestock) had the power to determine whether or not a showing of convenience and necessity had been made. Baker Sales Barn, Inc. v. Mont. Livestock Comm'n, 140 M 1, 367 P2d 775 (1962).

*Power of Representing Attorney:* An attorney who represented the State Board of Stock Commissioners (now Board of Livestock) had the right to appear in aid of the prosecution of one accused of grand larceny in having stolen livestock. St. v. Biggs, 45 M 400, 123 P 410 (1912).

**Attorney General's Opinions**

*Change of Policy:* A gratuitous service by a state agency, not required by statute, provided for 40 years, did not create a legal duty to continue to provide the service, absent the applicability of estoppel principles to specific cases. There was no statutory or constitutional impediment to the adoption of a new policy, provided the policy adopted conformed to the statute to be implemented and was adopted in compliance with the Montana Administrative Procedure Act. 38 A.G. Op. 69 (1980).

*Authority of Department Legal Counsel in Issuing Opinions:* Although certain agencies such as the Department of Livestock have been given authority by the Legislature to employ legal counsel to assist in the accomplishment of the agency's statutory duties, only the Attorney General has the specific authority to issue legal opinions to County Attorneys or other agencies of state and county government, and conflicting opinions on the same subject issued by other state officers and agencies should be disregarded. 35 A.G. Op. 68 (1974).

**Collateral References**

Fee-Financed Government: Issues Raised by Licensing Boards and Other Agencies Before the 2013-2014 Economic Affairs Interim Committee, Interim Report, Mont. Leg. Serv. Div. (2014).

### 81-1-103. Audit of bills — payment of expenses.

**Compiler's Comments**

*1983 Amendment:* Substituted reference to state special revenue fund for reference to earmarked revenue fund.

### 81-1-104. Investment of state special revenue account funds — crediting of investment income.

**Compiler's Comments**

*1983 Amendment:* Substituted reference to state special revenue account for earmarked revenue account in two places.

**Attorney General's Opinions**

*Cost Deductions From Investment Earnings Allowed:* Subsection (8) of 17-6-201 allows for deduction of allocated program costs from investment earnings of the state special revenue accounts referred to in this section. 42 A.G. Op. 108 (1988).

### 81-1-106. Board meetings — recording required.

**Compiler's Comments**

*Effective Date:* Section 3, Ch. 242, L. 2015, provided that this section is effective on passage and approval. Approved April 15, 2015.

### 81-1-110. Livestock loss reduction and mitigation accounts.

**Compiler's Comments**

*Repeal of Termination Dates:* Section 2, Ch. 181, L. 2021, repealed sec. 8, Ch. 349, L. 2015, and sec. 6, Ch. 284, L. 2017, which terminated the 2015 amendments to this section June 30, 2023. Effective July 1, 2021.

*2017 Amendment:* Chapter 76 in (2)(c) inserted reference to mountain lion. Amendment effective October 1, 2017.

*Extension of Termination Date:* Section 6, Ch. 284, L. 2017, amended sec. 8, Ch. 349, L. 2015, by extending the termination date imposed by that section to June 30, 2023. Effective May 4, 2017.

*2015 Amendment:* Chapter 349 in (2)(a) inserted "or 81-1-113". Amendment effective July 1, 2015, and terminates June 30, 2021.

*2013 Amendment:* Chapter 172 in (2)(c) after "wolf" inserted "or grizzly bear". Amendment effective October 1, 2013.

*Saving Clause:* Section 6, Ch. 172, L. 2013, was a saving clause.

*2011 Amendments — Composite Section:* Chapter 229 near beginning of (3) before "board" deleted "reduction and mitigation". Amendment effective April 20, 2011.

Chapter 339 in (2)(a) near middle inserted "transferred to the account provided for in 81-1-112 or". Amendment effective July 1, 2011.

*Preamble:* The preamble attached to Ch. 229, L. 2011, provided: "WHEREAS, the Legislature has been made aware that the name of the Livestock Loss Reduction and Mitigation Board is too long, too confusing, and does not adequately communicate the mission of the Board to the public; and

WHEREAS, the Legislature has been asked by Montana citizens to change the name of the Montana Livestock Loss Reduction and Mitigation Board to something simpler and better representative of the Board's public purpose; and

WHEREAS, the Legislature finds that it would be beneficial to the Board's mission and duties as that mission and duties are set forth in state law to change the name of the Livestock Loss Reduction and Mitigation Board to something simpler."

*Preamble:* The preamble attached to Ch. 261, L. 2007, provided: "WHEREAS, wolves are firmly established in Montana, and the long-term presence of wolves depends on implementing a comprehensive program that balances the complex biological, social, economic, and political aspects of wolf management; and

WHEREAS, wolf depredation on livestock has the potential to negatively impact some individual livestock producers; and

WHEREAS, the Montana Wolf Management Plan and Final EIS adopted by the Department of Fish, Wildlife, and Parks called for creation of a program to reduce the risk of losses of livestock to wolves and to reimburse livestock producers for losses; and

WHEREAS, a working group of more than 30 Montana citizens, state and federal agency personnel, and tribal representatives developed a comprehensive proposal for the "Montana Livestock Loss Reduction and Mitigation Program"."

*Effective Date:* Section 11(1), Ch. 261, L. 2007, provided that this section is effective July 1, 2007.

## 81-1-111. Livestock loss reduction and mitigation trust fund.

**Compiler's Comments**

*Preamble:* The preamble attached to Ch. 261, L. 2007, provided: "WHEREAS, wolves are firmly established in Montana, and the long-term presence of wolves depends on implementing a comprehensive program that balances the complex biological, social, economic, and political aspects of wolf management; and

WHEREAS, wolf depredation on livestock has the potential to negatively impact some individual livestock producers; and

WHEREAS, the Montana Wolf Management Plan and Final EIS adopted by the Department of Fish, Wildlife, and Parks called for creation of a program to reduce the risk of losses of livestock to wolves and to reimburse livestock producers for losses; and

WHEREAS, a working group of more than 30 Montana citizens, state and federal agency personnel, and tribal representatives developed a comprehensive proposal for the "Montana Livestock Loss Reduction and Mitigation Program"."

*Effective Date:* Section 11(1), Ch. 261, L. 2007, provided that this section is effective July 1, 2007.

## 81-1-112. Livestock loss mitigation restricted account.

**Compiler's Comments**

*Extension of Termination Date:* Section 1, Ch. 20, L. 2023, and sec. 2, Ch. 20, L. 2023, amended sec. 13, Ch. 339, L. 2011, and sec. 5, Ch. 284, L. 2017, by extending the termination dates imposed by those sections to June 30, 2029. Effective February 28, 2023.

*Repeal of Termination Dates:* Section 2, Ch. 181, L. 2021, repealed sec. 8, Ch. 349, L. 2015, and sec. 6, Ch. 284, L. 2017, which terminated the 2015 amendments to this section June 30, 2023. Effective July 1, 2021.

*2019 Amendment:* (Temporary version) Chapter 343 in (2) substituted "15-1-122(3)" for "15-1-122(4)". Amendment effective July 1, 2019.

*Extension of Termination Date:* Sections 5 and 6, Ch. 284, L. 2017, amended sec. 13, Ch. 339, L. 2011, and sec. 8, Ch. 349, L. 2015, by extending the termination dates imposed by those sections to June 30, 2023. Effective May 4, 2017.

*2015 Amendment:* Chapter 349 in (1) and (3) substituted "livestock loss mitigation" for "livestock loss reduction and mitigation"; in (2) at beginning substituted "Each fiscal year, the amount provided in 15-1-122(4)" for "Money" and after "state general fund" deleted "pursuant to 15-1-122"; in (3) after "restricted" inserted "special revenue"; and inserted (4) regarding livestock loss reduction restricted special revenue account. Amendment effective July 1, 2015, and terminates June 30, 2021.

*Effective Date:* Section 12, Ch. 339, L. 2011, provided that this section is effective July 1, 2011.

*Termination:* Section 13, Ch. 339, L. 2011, provided that subsection (3) of this section terminates June 30, 2017.

### 81-1-113. Livestock loss reduction restricted account.

**Compiler's Comments**

*Extension of Termination Date:* Section 3, Ch. 20, L. 2023, amended sec. 8, Ch. 284, L. 2017, by extending the termination date imposed by Ch. 284 to June 30, 2029. Effective February 28, 2023.

*Repeal of Termination Dates:* Section 2, Ch. 181, L. 2021, repealed sec. 8, Ch. 349, L. 2015, and sec. 6, Ch. 284, L. 2017, which terminated this section June 30, 2023. Effective July 1, 2021.

*2017 Amendment:* Chapter 284 inserted (4) providing for statutory appropriation; and made minor changes in style. Amendment effective May 4, 2017, and terminates June 30, 2023.

*Extension of Termination Date:* Section 6, Ch. 284, L. 2017, amended sec. 8, Ch. 349, L. 2015, by extending the termination date imposed by that section to June 30, 2023. Effective May 4, 2017.

*Effective Date:* Section 7, Ch. 349, L. 2015, provided: "[This act] is effective July 1, 2015."

*Termination:* Section 8, Ch. 349, L. 2015, provided: "[This act] terminates June 30, 2021."

## Part 2
## Inspectors and Detectives

### 81-1-201. Appointment and powers.

**Compiler's Comments**

*1983 Amendment:* In second sentence, inserted provision allowing department to designate which inspectors and detectives are law enforcement officers; in fourth sentence, after "detectives" inserted "designated as law enforcement officers".

**Administrative Rules**

Title 32, chapter 2, subchapter 5, ARM Inspector examination and certification.

### 81-1-202. Duties.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

## Part 3
## Administration of Animal Health Laws

### 81-1-301. Administrator — appointment and qualifications.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 81-1-302. Duties of administrator.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

**Administrative Rules**

ARM 32.3.116 Regulations and orders for exotic and other extremely dangerous diseases.

# CHAPTER 2
# DISEASE CONTROL

**Chapter Administrative Rules**

Title 32, chapter 3, ARM Disease control.

Title 32, chapter 8, subchapter 2, ARM Milk freshness dating.

**Chapter Collateral References**

Tracking the Spread: SJ 9 Keeps Tabs on CWD Fight, Final Report to the 66th Legislature, Montana Environmental Quality Council (September 2018).

Brucellosis Management in the State of Montana, Performance Audit, Mont. Leg. Audit Div. (January 2017).

## Part 1
## General Administration

**81-2-101. Authority of department agents.**

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

**81-2-102. Powers of department.**

**Compiler's Comments**

*2021 Amendment:* Chapter 320 in (1)(f) inserted last sentence exempting producers selling homemade food or homemade food products from rules and orders adopted under subsection (1)(f). Amendment effective April 30, 2021.

*2019 Amendment:* Chapter 87 deleted former (1)(h) that read: "(h) install an adequate system of meat inspection in accordance with 81-9-216 through 81-9-220 and 81-9-226 through 81-9-236 that must provide ways and means for shipping home-grown and home-killed meats into any city in this state. As far as practicable, the rules must conform with the meat-inspection requirements of the United States department of agriculture"; and made minor changes in style. Amendment effective March 21, 2019.

*Preamble:* The preamble attached to Ch. 87, L. 2019, provided: "WHEREAS, federal law exempts from inspection meat and meat products from personal slaughtering and processing that is limited to non-paying household members, guests, and employee uses; and

WHEREAS, federal law also exempts from regulation the transportation of personally slaughtered meat and meat products; and

WHEREAS, 81-2-102 allows the department of livestock to regulate personally slaughtered meat and meat products, which would be in violation of federal law."

*2017 Amendment:* Chapter 351 in (1)(c) near end substituted "deposited in the enterprise fund account established in 81-2-116 for the use of the animal laboratory functions" for "deposited in the state special revenue fund for the use of the animal health functions". Amendment effective July 1, 2017.

*Severability:* Section 19, Ch. 351, L. 2017, was a severability clause.

*2011 Amendment:* Chapter 5 in (1)(d) inserted "subject to subsection (2)" and at end deleted "and to this end may adopt rules and orders necessary or proper governing inspections and tests of livestock and alternative livestock intended for importation into this state before it may be imported into this state"; inserted (1)(e)(ii) relating to adoption of rules and orders to prevent diseases; inserted (2) defining order, limiting duration of orders, and defining program; and made minor changes in style. Amendment effective March 11, 2011.

*1999 Amendment:* Chapter 574 in (1)(d) in two places after "livestock" inserted "and alternative livestock"; in (1)(e) after "livestock" inserted "and alternative livestock"; and made minor changes in style. Amendment effective October 1, 1999.

*1987 Amendment:* In (1)(f), near end after "81-9-201", deleted "through 81-9-207"; in (1)(h) substituted "in accordance with 81-9-216 through 81-9-220 and 81-9-226 through 81-9-236" for "at any time and in such places as public welfare may demand, under the rules which may provide fees for the maintenance of such inspection and"; and near end of (1)(j) deleted "81-9-201 through 81-9-207".

*1983 Amendment:* Substituted reference to state special revenue fund for reference to earmarked revenue fund.

**Administrative Rules**

Title 12, chapter 6, subchapter 15, ARM Game farms.

ARM 32.2.403 Diagnostic laboratory fees.

Title 32, chapter 3, subchapter 1, ARM General disease control provisions.

ARM 32.3.125 Disposal of carcasses.

ARM 32.3.130 through 32.3.132 Vehicles used for transportation of livestock — cleaning and disinfection.

ARM 32.3.137 Authority to seize and destroy articles, products, and commodities.

ARM 32.3.138 Deputy state veterinarian definition.

ARM 32.3.139 Appointment as deputy state veterinarian.

ARM 32.3.140 Duties of deputy state veterinarian.

Title 32, chapter 3, subchapter 2, ARM Importation of animals and semen into Montana.

Title 32, chapter 3, subchapter 3, ARM Pseudorabies.

Title 32, chapter 3, subchapter 4, ARM Brucellosis.
Title 32, chapter 3, subchapter 5, ARM Trichomoniasis.
Title 32, chapter 3, subchapter 6, ARM Tuberculosis.
Title 32, chapter 3, subchapter 10, ARM Anthrax.
Title 32, chapter 3, subchapter 12, ARM Rabies.
Title 32, chapter 3, subchapter 13, ARM Scrapie.
Title 32, chapter 3, subchapter 14, ARM Equine infectious anemia.
Title 32, chapter 3, subchapter 20, ARM Animal identifications.
Title 32, chapter 3, subchapter 23, ARM Control of biologics.
Title 32, chapter 5, ARM Laboratory activities.
Title 32, chapter 6, subchapter 1, ARM Animal foods.
Title 32, chapter 6, subchapter 7, ARM Slaughterhouses, meat packing houses, meat depots, and mobile slaughter facilities.
Title 32, chapter 6, subchapter 9, ARM Horse meat and horse meat food products.
Title 32, chapter 8, subchapter 1, ARM Fluid milk and grade A milk products — general rules.
Title 32, chapter 8, subchapter 2, ARM Milk freshness dating.
Title 32, chapter 9, subchapter 2 through 8, ARM Milk quality requirements — processing of dairy products.
Title 32, chapter 10, ARM Tester licensing.
Title 32, chapter 15, subchapter 2, ARM Animal health requirements for livestock markets.

**Case Notes**

*Purpose of Alternative Livestock Transfer Regulations — Quarantine Exception to Commerce Clause Applicable:* The Wallaces, licensed alternative livestock ranchers, sought to reduce the size of their elk herd by transferring about 500 elk to the Crow Indian Reservation for release into the wild. The Department of Fish, Wildlife, and Parks requested and received an injunction prohibiting any transfer of elk to tribal lands, and the Wallaces appealed, asserting that the injunction violated Art. I, sec. 8, clause 3, of the U.S. Constitution, known as the commerce clause. The Wallaces contended that prohibiting the transfer of alternative livestock to a recipient that is not licensed by the state constituted extraterritorial application of Montana's regulatory scheme to foreign nations, other states, and Indian nations in violation of federal law. The Supreme Court found that this case falls within the quarantine exception to the traditional commerce clause analysis. The quarantine exception recognizes that states may have a local interest in protecting public safety as a competing value when reviewing state burdens on interstate commerce. With the alarming spread of serious wildlife diseases throughout the country, the state has a compelling interest to enact regulations to ensure that alternative livestock cannot simply roam into Montana and threaten native populations. Because elk released on the Crow Indian Reservation could migrate back into Montana, the restrictions regarding transfer of alternative livestock in 87-4-414 fall squarely within the quarantine exception to the commerce clause. Thus, the permanent injunction was affirmed. Hagener v. Wallace, 2002 MT 109, 309 M 473, 47 P3d 847 (2002). See also Bowman v. Chicago & NW. Ry. Co., 125 US 465 (1888).

*Transfer of Alternative Livestock to Unlicensed Tribal Lands Illegal:* The Wallaces, licensed alternative livestock ranchers, sought to reduce the size of their elk herd by transferring about 500 elk to the Crow Indian Reservation for subsequent release into the wild. The elk had been certified as free of tuberculosis, brucellosis, and elk-red deer hybridization by the Department of Livestock (DOL). Despite notification by the Department of Fish, Wildlife, and Parks (DFWP) that such an act violated state law, the Wallaces transferred 68 elk to the tribe. DFWP requested and received a permanent injunction prohibiting any further transfer of elk to the tribe, and the Wallaces appealed, questioning DFWP jurisdiction. The Supreme Court noted that DFWP has a statutory basis for its jurisdiction over the Wallaces as licensees. Based on DFWP jurisdiction over exterior fencing, and the Department's knowledge that the elk would not be contained behind a game-proof fence upon delivery to the tribe, DFWP had statutory authority to seek the permanent injunction to prevent the transfer. Also, the introduction or transplantation of any wildlife into the wild, including game farm elk, requires the approval of DFWP. Further, 87-4-414 provides that alternative livestock may be kept only on a licensed alternative livestock ranch, and because the tribe is not a licensed facility under Montana law, neither DFWP nor DOL had authority to permit the transfer. The Wallaces knew that the elk were destined for an unlicensed location where they would be released into the wild and could migrate back into Montana, so the transfer violated the Wallaces' duty as licensees to act in accordance with law, and the District Court correctly enjoined the transportation of the elk. Hagener v. Wallace, 2002 MT 109, 309 M 473, 47 P3d 847 (2002).

## 81-2-103. Adoption of rules.

**Compiler's Comments**

*1981 Amendment:* Changed "test" to "testing" throughout the section; added "or other animals" after "disposition of livestock" in the middle of the section.

*Statement of Intent:* The statement of intent attached to HB 107 (Ch. 110, L. 1981) provided: "A Statement of Intent is required for this bill because it grants rulemaking authority to the Department of Livestock.

Under the present law, the Department of Livestock may adopt rules for the inspection, testing, and treatment of certain diseases in livestock. The diseases in question can sometimes affect animals which are not normally categorized as livestock and can spread from those animals to livestock. The intent of this legislation is to allow the Department to adopt rules for the inspection, testing, and treatment of these other animals to prevent spreading of the disease."

**Administrative Rules**

Title 32, chapter 3, ARM Disease control.

## 81-2-105. Authority of municipal corporations.

**Compiler's Comments**

*2021 Amendment:* Chapter 320 inserted (2) prohibiting regulation of producers selling homemade food or homemade food products. Amendment effective April 30, 2021.

## 81-2-106. Cooperation by public officers.

**Compiler's Comments**

*1995 Amendments:* Chapter 418 at beginning substituted "department of public health" for "department of health and environmental sciences", substituted "board of public health" for "board of health and environmental sciences", and in two places, after "department", deleted "of livestock"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 546 at beginning substituted "department of public health and human services" for "department of health and environmental sciences, the board of health and environmental sciences". Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clauses:* Section 503, Ch. 418, L. 1995, was a saving clause.

Section 571, Ch. 546, L. 1995, was a saving clause.

## 81-2-108. Diseased animals not to run at large — burial of carcasses.

**Administrative Rules**

ARM 32.3.125 Disposal of carcasses.

ARM 32.3.310 Disposal of dead animals.

## 81-2-109. Expenses, how paid — lien and foreclosure.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

*1983 Amendment:* In (1), at beginning inserted "If there is no violation of law or department rule", and near end inserted "designated" before "supervising officer" and "law or" before "rules"; inserted (2) delineating expenses for which an owner, agent, or person in charge is liable; inserted (3) requiring notice of expenses to be served on the violator and outlining the violator's liability for expenses absent response; and inserted (4) allowing absence of a response to constitute prima facie evidence of the reasonableness of expenses and of the violator's responsibility for those expenses.

**Case Notes**

*Only One Employee to Be Considered "Supervising Officer":* The 1974 amendment to this section changed "supervising officer or officers" to "supervising officer", indicating a legislative intent to preclude only one employee of the Department from recovering his salary from the rule violator. St. v. Sand Hills Beef, Inc., 196 M 77, 639 P2d 480, 38 St. Rep. 2140 (1981).

*Penal Nature of Statute as Requiring Strict Construction:* As this statute seeks to redress a wrong to the public, it is penal in nature and is to be construed strictly. The phrase "all expenses" in the second sentence of this section must (prior to the 1983 amendments) be limited to those expenses directly related to one or more of the activities listed in the first sentence of this section. St. v. Sand Hills Beef, Inc., 196 M 77, 639 P2d 480, 38 St. Rep. 2140 (1981).

*"All Expenses" Construed and Applied:* The phrase "all expenses" in the second sentence of this section must (prior to the 1983 amendments) be limited to those expenses directly related to one or more of the activities listed in the first sentence of this section. The Department may not recover for expenses resulting from an investigation of a possible import violation. The Department may recover for travel and per diem expenses but must show that these expenses were reasonably related to the activities listed in the first sentence of this section. The Department may recover for the rental of a private airplane used to supervise a quarantine if it was the only effective method available. St. v. Sand Hills Beef, Inc., 196 M 77, 639 P2d 480, 38 St. Rep. 2140 (1981).

*Recovery of Expenses Denied:* Although a portion of the salaries of two Department officers was properly recoverable from the rule violator, the carelessness and overreaching of the Department in computing the amounts made recovery impossible, resulting in the denial of all expenses. St. v. Sand Hills Beef, Inc., 196 M 77, 639 P2d 480, 38 St. Rep. 2140 (1981).

## 81-2-112. Prohibition by governor on importation of animals from localities where disease exists — penalty.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

## 81-2-115. Confidentiality of information collected — exceptions.

**Compiler's Comments**

*2015 Amendment:* Chapter 348 in (1)(b) substituted "public record or public information as defined in 2-6-1002 and is exempt from disclosure" for "public writing as described in 2-6-101 and is exempt from the public disclosure provisions of Title 2, chapter 6". Amendment effective October 1, 2015.

*Severability:* Section 72, Ch. 348, L. 2015, was a severability clause.

*Effective Date:* This section is effective October 1, 2011.

## 81-2-116. Animal health account — enterprise fund account for laboratory services.

**Compiler's Comments**

*Effective Date:* Section 20(1), Ch. 351, L. 2017, provided: "(1) Except as provided in subsection (2), [this act] is effective July 1, 2017."

*Severability:* Section 19, Ch. 351, L. 2017, was a severability clause.

## 81-2-120. Management of wild buffalo or wild bison for disease control.

**Compiler's Comments**

*2021 Amendment:* Chapter 354 inserted (1)(a) concerning transfer to a qualified tribal entity or sale of a wild buffalo or wild bison that is certified as brucellosis-free by the state veterinarian; deleted former (1)(d) through (1)(f) (see 2021 Session Law for former text); inserted (5) concerning transplantation or relocation into any county pursuant to 7-21-3214; and made minor changes in style. Amendment effective April 30, 2021.

*Applicability:* Section 9, Ch. 354, L. 2021, provided: "[This act] applies to releases, transplantation, relocations, or transfers of wild buffalo or wild bison on or after [the effective date of this act]." Effective April 30, 2021.

*Severability:* Section 7, Ch. 354, L. 2021, was a severability clause.

*2011 Amendment:* Chapter 403 throughout section substituted "wild buffalo or wild bison" for "wild buffalo or bison". Amendment effective May 13, 2011.

*2003 Amendment:* Chapter 604 inserted (1)(c) concerning taking wild buffalo or bison through limited public hunts; and made minor changes in style. Amendment effective May 9, 2003.

*1997 Amendment:* Chapter 523 in (1), near end of introductory clause after "compliance with", inserted "other state-administered or"; in (1)(a), after "transportation", inserted "quarantine"; inserted (1)(c) allowing the sale or transfer of brucellosis-free bison; inserted (1)(d) regarding disposition of sale proceeds; inserted (1)(e) providing for deposit of excess revenue in the state special revenue fund; and in (4), near end after "compliance with", inserted "other state-administered or".

*1995 Statement of Intent:* The statement of intent attached to Ch. 346, L. 1995, provided: "A statement of intent is required for this bill because the department of livestock is authorized in [section 1] [81-2-120] to adopt rules with regard to management of publicly owned wild buffalo or bison that enter Montana on private or public land and that are from a herd that is infected with a contagious disease that may spread to persons or livestock and may jeopardize compliance with federally administered livestock disease control programs. The department may determine that rulemaking is necessary with regard to feasible methods of taking wild buffalo or bison allowed within [section 1(1)] [81-2-120(1)] or with regard to disposal of the carcasses of wild buffalo or bison as provided for in [section 1(2) and (3)] [81-2-120(2) and (3)] .

A statement of intent is also required because [section 2] [87-1-216] authorizes the department of fish, wildlife, and parks to adopt rules with regard to wild buffalo or bison that have not been exposed to or infected with a contagious disease but are in need of management because of potential damage to person or property. The department may determine that rulemaking is necessary if management of wild buffalo or bison under the provisions of [section 2] [87-1-216] includes public hunting.

*Effective Date:* Section 5, Ch. 346, L. 1995, provided: "[This act] is effective on passage and approval." Approved April 10, 1995.

**Administrative Rules**

ARM 32.3.224A Unlawfully estrayed and public-owned migratory wild bison from herds affected with a dangerous disease.

## 81-2-121. Taking of publicly owned wild buffalo or wild bison that are present on private property — notice — supplemental feeding — penalty.

**Compiler's Comments**

*2011 Amendments — Composite Section:* Chapter 258 in (2)(a) in second sentence near beginning after "this subsection" substituted remainder of subsection for "is guilty of a misdemeanor and is subject to the penalty provided in 87-1-102(1)"; and made minor changes in style. Amendment effective October 1, 2011.

Chapter 403 in (1) and (1)(a) before "bison" inserted "wild". Amendment effective May 13, 2011.

*Preamble:* The preamble attached to Ch. 258, L. 2011, provided: "WHEREAS, the 2007 Legislature passed House Joint Resolution No. 16, urging that revision of the criminal codes within Title 87 of the Montana Code Annotated be given priority; and

WHEREAS, House Joint Resolution No. 16 noted that practitioners, judges, and citizens find that the criminal codes intertwined within the fish and game laws in Title 87 are difficult to read, understand, and prosecute; and

WHEREAS, House Joint Resolution No. 16 directed that revision of the Title 87 criminal code should not include policy changes to current laws and should adhere to the intent of the legislatures that crafted the laws; and

WHEREAS, in 2008, the Director of Fish, Wildlife, and Parks appointed a Title 87 criminal code revision working group, consisting of Justices of the Peace, County Attorneys, an Assistant Attorney General, legal counsel and the enforcement administrator of the Department of Fish, Wildlife, and Parks, and legislative staff; and

WHEREAS, the working group met numerous times and spent countless hours crafting a revision that makes the Title 87 criminal code more understandable without making substantive or policy changes to present law; and

WHEREAS, revision of the fish and game criminal statutes will benefit the hunting and fishing public, magistrates, and prosecutors by codifying crimes and penalties in a separate chapter of Montana law, rather than being intertwined throughout Title 87."

*Saving Clause:* Section 131, Ch. 258, L. 2011, was a saving clause.

*Severability:* Section 132, Ch. 258, L. 2011, was a severability clause.

*Effective Date:* Section 4, Ch. 540, L. 1995, provided: "[This act] is effective on passage and approval." Approved April 27, 1995.

*Coordination Instruction:* Section 3(2)(b), Ch. 540, L. 1995, provided: "If Senate Bill No. 312 is passed and approved and if it transfers to the department of livestock primary management of publicly owned wild buffalo or bison that enter Montana on private or public land, then . . . a new section is enacted to read" (see 1995 Session Law for text). Senate Bill No. 312 was approved April 10, 1995, as Ch. 346, L. 1995; therefore, the coordinated version of 81-2-121 in sec. 3(2)(b), Ch. 540, L. 1995, has been appropriately codified.

## 81-2-122. Containment required for inspection.

**Compiler's Comments**

*Effective Date:* Section 3, Ch. 130, L. 2023, provided: "[This act] is effective on passage and approval." Approved April 18, 2023.

## Part 2
## Indemnity

**Part Administrative Rules**

ARM 32.3.418 Brucellosis — indemnity paid for reactors.

### 81-2-201. Classification of animals as to compensation for slaughter.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 2, Ch. 75, L. 2023. Amendment effective July 1, 2023.

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 81-2-203. Indemnity special revenue account — purpose — uses.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 3, Ch. 75, L. 2023. Amendment effective July 1, 2023.

### 81-2-204. Presentation of claims for indemnity.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 4, Ch. 75, L. 2023. Amendment effective July 1, 2023.

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 81-2-208. Sale of condemned carcasses — disposition of proceeds.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 5, Ch. 75, L. 2023. Amendment effective July 1, 2023.

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 81-2-209. When no indemnity.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 6, Ch. 75, L. 2023. Amendment effective July 1, 2023.

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 81-2-210. Compensation from federal government or other agency.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 7, Ch. 75, L. 2023. Amendment effective July 1, 2023.

## Part 3
## Disease Control Area

### 81-2-301. Establishment of livestock disease control area — entry into area — compulsory inspection.

**Case Notes**

*Petition Required:* Jurisdiction of the state Livestock Sanitary Board (now Board of Livestock) depended upon the receipt of a proper petition. State ex rel. Lee v. St. Livestock Sanitary Bd., 138 M 536, 357 P2d 685 (1960).

*Prohibition Against Inspection Order:*

Sufficiency of petition presented to the state Livestock Sanitary Board (now Board of Livestock) could be tested by Prohibition. State ex rel. Lee v. St. Livestock Sanitary Bd., 138 M 536, 357 P2d 685 (1960).

A Writ of Prohibition did not lie to arrest the ministerial action of the state Livestock Sanitary Board (now Board of Livestock) in ordering an inspection of cattle in a diseased area pursuant to the provisions of this section. State ex rel. Lee v. Mont. Livestock Sanitary Bd., 135 M 202, 339 P2d 487 (1959).

*Writ of Review:* A proceeding under 27-25-102 seeking a Writ of Review of the action of the state Livestock Sanitary Board (now Board of Livestock) was a proper remedy to review the action of the Board. State ex rel. Lee v. St. Livestock Sanitary Bd., 138 M 536, 357 P2d 685 (1960).

### 81-2-302. Duty of department of revenue.

**Compiler's Comments**

*1993 Special Session Amendment:* Chapter 27 in first sentence substituted "property tax record" for "assessment roll"; and in second sentence substituted "department of revenue" for "county assessor". Amendment effective January 1, 1994.

*Applicability:* Section 171(2), Ch. 27, Sp. L. November 1993, provided that the amendments to this section apply to tax years after December 31, 1993.

### 81-2-303. Owner guilty of misdemeanor, when.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

## Part 5
## Treatment of Garbage Fed to Swine

**Part Attorney General's Opinions**

*Prohibition of Feeding Uncooked Garbage to Apply to Chickens and Other Fowls:* The prohibition of feeding uncooked garbage to swine and other animals, as contained in this part, applies to chickens and other fowls. 26 A.G. Op. 37 (1955).

### 81-2-501. Definitions.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 1, Ch. 126, L. 2023. Amendment effective October 1, 2023.

*2013 Amendment:* Chapter 47 in definition of garbage after "means" deleted "putrescible animal and vegetable", substituted "consumption of animal products" for "consumption of foods", and at end inserted "or other refuse of any character that has been associated with any animal products, including animal carcasses or parts of animal carcasses"; and made minor changes in style. Amendment effective October 1, 2013.

### 81-2-502. Illegal to feed garbage to swine.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 2, Ch. 126, L. 2023. Amendment effective October 1, 2023.

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

*1983 Amendments:* Chapter 444, at end of (1), substituted a fee to be established by department for a $5 fee; changed disposition of fee from general fund to earmarked fund for departmental use.

Chapter 281, near end of (1), substituted "state special revenue fund" for "earmarked revenue fund".

**Administrative Rules**

ARM 32.2.401 Department of Livestock license fees.

### 81-2-504. Power to adopt rules.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 3, Ch. 126, L. 2023. Amendment effective October 1, 2023.

**Administrative Rules**

Title 32, chapter 6, subchapter 2, ARM Garbage feeding.

### 81-2-510. Garbage originating on or removed from airplanes not to be fed.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 4, Ch. 126, L. 2023. Amendment effective October 1, 2023.

## Part 6
## Tuberculin Regulation

**Part Administrative Rules**

Title 32, chapter 3, subchapter 6, ARM Tuberculosis.

### 81-2-602. Report of sales or distribution.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

## Part 7
## Importation Permits and Health Certificates

**Part Compiler's Comments**

*Statement of Intent:* The statement of intent attached to SB 158 (Ch. 65, L. 1981) provided: "A Statement of Intent is required for this bill because it delegates rulemaking authority to the Department of Livestock in Section 7 [81-2-707].

It is the intent of this bill that the Department maintain its present rules, and update them when necessary, regarding the importation of animals, animal semen, and animal biologics. However, these rules should be reviewed to ensure that they are in compliance with this bill and to eliminate any redundancy created by passage of this bill."

**Part Administrative Rules**

Title 32, chapter 3, subchapter 2, ARM Importation of animals and semen into Montana.

### 81-2-702. Definitions.

**Compiler's Comments**

*1999 Amendment:* Chapter 574 in definition of animals after "game animals" deleted "game farm animals"; in definition of livestock after "goats" inserted "alternative livestock as defined in 87-4-406, and other animals for purposes of disease prevention, control, and eradication"; and made minor changes in style. Amendment effective October 1, 1999.

*1995 Amendment:* Chapter 206 in definition of livestock inserted "ostriches, rheas, emus"; and made minor changes in style.

*Applicability:* Section 14, Ch. 206, L. 1995, provided: "[This act] applies to tax years beginning after December 31, 1995."

*1993 Amendment:* Chapter 417 in definition of livestock inserted "alpacas"; and made minor changes in style.

*1991 Amendment:* Included game farm animals in definition of animals.

*1989 Amendment:* Added llamas and bison to definition of livestock. Amendment effective March 20, 1989.

### 81-2-703. Documents required for importation — exemptions.

**Compiler's Comments**

*2019 Amendment:* Chapter 125 inserted (1) relating to importation of animals, animal semen, and animal biologics that pose a significant danger; in (2) after "animal, or animal semen" substituted "may not be brought into the state without a health certificate or other documentation of animal movement approved by the department" for "or animal biologic may not be brought into the state without a permit and a health certificate"; deleted former (2) that read: "(2) The department shall issue a permit if no significant danger to the public health will ensue upon importation of the animal, animal semen, or animal biologic into the state. A permit may not be issued for livestock infected with or exposed to brucellosis, tuberculosis, or any other infectious, contagious, or communicable animal disease, except that cattle with a positive reaction to a recognized test for brucellosis may be permitted entry when destined directly for slaughter at a slaughterhouse under the supervision of the United States department of agriculture"; inserted (3) relating to department permitting; in (4) after "permit" inserted "or documentation of animal movement"; deleted former (4) that read: "The requirements of subsection (1) apply regardless of species, breed, sex, class, age, point of origin, place of destination, or purpose of movement"; in (7) after "permit" inserted "or documentation of animal movement" and after "to the public" inserted "or animal"; and made minor changes in style. Amendment effective October 1, 2019.

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

*1983 Amendment:* Inserted second sentence of (2) permitting an exception for importation of cattle destined directly for slaughter.

**Administrative Rules**

Title 32, chapter 3, ARM Disease control.

Title 32, chapter 4, subchapter 4, ARM Alternative livestock regulations — testing requirements.

**81-2-707. Department rulemaking power.**

**Administrative Rules**

Title 32, chapter 3, subchapter 2, ARM Importation of animals and semen into Montana.

ARM 32.4.601 Importation of alternative livestock.

**81-2-708. Penalty.**

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 1, Ch. 194, L. 2023. Amendment effective October 1, 2023.

# CHAPTER 3
# MARKS AND BRANDS

**Chapter Administrative Rules**

Title 32, chapter 18, ARM Branding and inspection.

## Part 1
## Recording of Marks and Brands

**81-3-101. Recorder of marks and brands.**

**Case Notes**

*Prior Legislation:* For history of earlier recording acts, see Cuerth v. Arbogast, 48 M 209, 136 P 383 (1913).

**81-3-102. Recording of brands required — alternative livestock to be marked — limit.**

**Compiler's Comments**

*1999 Amendment:* Chapter 574 in (2) at beginning substituted "Alternative livestock" for "Game farm animals" and after "87-4-406" deleted "exclusive of carnivores and omnivores"; and made minor changes in style. Amendment effective October 1, 1999.

*1993 Amendment:* Chapter 30 inserted (2) requiring game farm animals to be identified by a recorded mark or brand.

*1991 Amendment:* Near beginning and near end of (1), after "person", deleted "firm, or corporation"; inserted (2) limiting number of brands to five; and made minor change in style. Amendment effective January 1, 1992.

**Administrative Rules**

ARM 32.18.105 Brand ownership and transfer.

ARM 32.18.106 Sale of branded livestock.

ARM 32.18.107 Change in brand recording.

**81-3-103. Application for recording — record of brands.**

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 1, Ch. 217, L. 2023. Amendment effective October 1, 2023.

*1991 Amendment:* Near beginning of (1) and near middle of (2), after "person", deleted "firm, or corporation"; and made minor changes in style. Amendment effective January 1, 1992.

*1989 Amendment:* Inserted third sentence of (1) that read: "An applicant may apply for a seasonal mark or brand that is designated for use only for a specific period of time and that is subject to renewal upon termination of that period." Amendment effective March 20, 1989.

**Administrative Rules**

ARM 32.18.105 Brand ownership and transfer.

**81-3-104. Designation of years for rerecording brands.**

**Compiler's Comments**

*1995 Amendment:* Chapter 14 at beginning of (1) deleted reference to subsection (2); deleted (2) that read: "(2) The department shall develop a system for the staggered recording and rerecording of marks and brands"; and made minor changes in style.

*1993 Amendment:* Chapter 30 in (1), in second sentence, substituted "81-3-102(3)" for "81-3-102(2)"; and made minor changes in style.

*1991 Amendment:* In five places throughout section, after "person", deleted "firm, or corporation"; in (1) inserted introductory clause of first sentence and at beginning of second sentence inserted "Subject to the provisions of 81-3-102(2)"; inserted (2) requiring development of a system for staggered recording of marks and brands; and made minor changes in style. Amendment effective January 1, 1992.

**81-3-105. Right of owner of recorded brand.**

**Compiler's Comments**

*1991 Amendment:* Near beginning of first sentence and near middle of second sentence, after "person", deleted "firm, or corporation". Amendment effective January 1, 1992.

*Current Practice:* Currently, determination of the right of ownership is by means of brands and bills of sale. "Venting" of brands is no longer practiced.

**Administrative Rules**

ARM 32.18.106 Sale of branded livestock.

**Case Notes**

*Placing Person's Name on Brand Certificate Not Evidence of Joint Tenancy:* Ron Shaw claimed that cattle owned by his deceased parents were his property as a joint tenant because his name was on the brand certificate. The Supreme Court held that although a person's name on the certificate was prima facie evidence of ownership, it did not address the nature of that ownership and that a joint tenancy could only be created by an express declaration that the parties are creating a joint tenancy. In re Estate of Shaw, 259 M 117, 855 P2d 105, 50 St. Rep. 709 (1993) 259 M 117.

*Death of Partner — Disposition of Property Held Jointly by Partners:* Robert and William, brothers, opened a joint checking account in 1947, paid all ranch expenses through the account, put all ranch income in the account, and equally split net profits. All cattle were branded with either of two brands, each of which was registered in the name of "William Palmer or Robert Palmer". The brothers were also joint tenants in a commodity brokerage account. The Supreme Court held that the cattle and both accounts were partnership property not held in joint tenancy and remained so upon Robert's death. Thus, they did not pass to William as the surviving joint tenant; rather, they remained in the partnership for the purpose of winding up the partnership and paying its liabilities, after which William must account to Robert's survivor, his widow, for Robert's share of the partnership. By its very nature, partnership property must be treated differently than property of individuals, including property held by individuals as joint tenants but who are not in partnership. This rule applies regardless of the formal legal manner in which the property is held. This is a rule of equity developed over hundreds of years and codified in the Uniform Partnership Act. In re Estate of Palmer, 218 M 285, 708 P2d 242, 42 St. Rep. 1585 (1985), followed in Fiedler v. Fiedler, 266 M 133, 879 P2d 675, 51 St. Rep. 691 (1994).

*Improper to Include in Marital Estate Cattle Whose Brand Not Registered to Either Husband or Wife:* In determining the size of the marital estate for the purpose of a division of property in a dissolution of marriage proceeding, the District Court included within the estate cattle whose brand was registered to the parties' adult children. The Supreme Court reversed because no evidence had been produced at trial to rebut the presumption that the person whose brand appeared on cattle was the owner of those cattle. Therefore, the court held that the cattle should not have been included in the marital estate since they were not owned by the husband or wife. In re Marriage of Schultz, 199 M 332, 649 P2d 1268, 39 St. Rep. 1435 (1982).

*Ownership of Cattle:*

Although under this section and 70-1-307, prima facie owners of the recorded brand have the same interest in the cattle bearing their brand as shown in brand record, joint ownership of the cattle may be contradicted and overcome by other evidence under 26-1-102. Marshall v. Minlschmidt, 148 M 263, 419 P2d 486 (1966).

In action by administrator of estate of deceased partner against surviving partners to recover assets transferred by deceased during his last illness, evidence that deceased had a half interest in partnership cattle and failure of defendants to produce any of the partnership records at the trial in the lower court overcame the prima facie showing of one-third interest in the partnership cattle arising from the recording of the brand in name of three persons. Marshall v. Minlschmidt, 148 M 263, 419 P2d 486 (1966).

A transfer of a herd of cattle, at the time in the possession of a lessee, after they were segregated from other cattle, identified and counted out in the presence of seller and buyer, the lessee at the time agreeing to the substitution of owners, was sufficient to transfer possession, even though the brand of the transferor was not vented, there being uncontroverted evidence to overcome the prima facie presumption flowing from the fact that they still bore the brand of the seller. Costello v. Shields, 99 M 335, 43 P2d 879 (1935).

It was prima facie evidence that one was the owner of cattle bearing his recorded brand. Klind v. Valley County Bank of Hinsdale, 69 M 386, 222 P 439 (1924).

*Vented Brand Prima Facie Evidence of Sale or Transfer:* The recorded brand on livestock was prima facie proof of ownership of livestock bearing it. The presumption was rebuttable. One of the best methods of rebutting it was prescribed by section 3300, R.C.M. 1935 (since repealed), which provided that the venting of brands was prima facie evidence of sale or transfer of animals. Bohart v. Songer, 110 M 405, 101 P2d 64 (1940).

*Evidence of Ownership of Brand:* The best evidence of ownership of a livestock brand is the certificate of ownership executed by the recorder of marks and brands provided for by this section; therefore admission of the oral testimony of the secretary of the state Livestock Commission (now Board of Livestock) as to the owners of various brands found on horses shown by an inspector's reports with regard to shipments made by one charged with having received stolen animals was technical error. St. v. Keays, 97 M 404, 34 P2d 855 (1934).

## 81-3-106. Publication of notice of rerecording brands.

### Compiler's Comments

*2009 Amendment:* Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

*1991 Amendment:* In two places in second sentence, after "person", deleted "firm, or corporation"; and made minor changes in style. Amendment effective January 1, 1992.

## 81-3-107. Fees for department — deposit requirements.

### Compiler's Comments

*2007 Amendment:* Chapter 420 in (2) near beginning before "subject" deleted "not" and after "requirements of" substituted "17-6-105(6) unless the department has submitted and received approval for a modified deposit schedule pursuant to 17-6-105(8)" for "17-6-105 but must be deposited by the department within a reasonable time after receipt". Amendment effective October 1, 2007.

*1995 Amendment:* Chapter 14 at end of (1), after "governor", inserted "or the board"; inserted (2) exempting fees from deposit requirements of 17-6-105; and made minor changes in style.

*1983 Amendments:* Chapter 34 inserted the third sentence relating to research of mark or brand histories.

Chapter 277 substituted reference to state special revenue fund for reference to earmarked revenue fund.

Chapter 444 substituted fees established by department for $25 for recording a brand and $2.50 for copy of a record.

### Administrative Rules

Title 32, chapter 2, subchapter 4, ARM Department of Livestock license fees, permit fees, and miscellaneous fees.

ARM 32.18.107 Change in brand recording.

## 81-3-108. Penalty.

### Compiler's Comments

*1991 Amendment:* Near beginning, after "person", deleted "firm, or corporation"; and made minor changes in style. Amendment effective January 1, 1992.

## Part 2
## Inspection of Marks and Brands

### 81-3-201. Definitions.

**Compiler's Comments**

*2011 Amendment:* Chapter 403 in definition of livestock inserted "domestic bison". Amendment effective May 13, 2011.

*1997 Amendment:* Chapter 376 in definition of livestock, at end, deleted "and includes bison, sheep, elk, and game farm animals, as defined in 87-4-406, exclusive of carnivores and omnivores"; inserted definition of specially qualified deputy stock inspector; and made minor changes in style. Amendment effective April 24, 1997.

*1993 Amendments:* Chapter 30 in definition of livestock, after "elk", inserted "and game farm animals, as defined in 87-4-406, exclusive of carnivores and omnivores"; and made minor changes in style.

Chapter 417 in definition of livestock, after "includes", deleted "llama".

*1991 Amendment:* In introductory clause substituted "chapter" for "part"; in definition of livestock, after "sex", inserted "and includes llama, bison, sheep, and elk"; in definition of person, after "association", inserted "firm"; and made minor changes in style. Amendment effective January 1, 1992.

### 81-3-202. Rules.

**Administrative Rules**

Title 32, chapter 4, ARM Alternative livestock regulations.

ARM 32.18.108 Equine breed registry mark.

Title 32, chapter 18, subchapter 2, ARM, Issuance of inspection certificates and transportation permits.

### 81-3-203. Duties of state stock inspectors and deputy stock inspectors.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 1, Ch. 3, L. 2023. Amendment effective July 1, 2023.

*2017 Amendment:* Chapter 120 in (4) near end of first sentence after "allow the movement of the livestock" deleted "into an adjoining county to land owned or controlled by the owner or the owner's agent" and in third sentence after "is valid as provided in" inserted "and subject to". Amendment effective October 1, 2017.

*2009 Amendments — Composite Section:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Chapter 290 in (4) at end of third sentence substituted "81-3-211(6)(e)" for "81-3-211(6)(d)"; and made minor changes in style. Amendment effective April 17, 2009.

*1989 Amendment:* Near beginning of (3), before "upon application", deleted "or any sheriff or deputy sheriff" and in three places in last sentence, after "the inspector", deleted "or sheriff's office"; near end of first sentence of (4), before "adjoining", deleted "immediately" and at end of third sentence substituted "as provided in 81-3-211(6)(d)" for "for 6 months"; and made minor change in phraseology. Amendment effective March 20, 1989.

**Administrative Rules**

ARM 32.2.502 Certification of specially qualified deputy stock inspectors.

ARM 32.18.201 Presentation of livestock for brand inspection — length of time inspection effective.

ARM 32.18.206 Restriction on inspection by state stock inspector or deputy state stock inspector.

ARM 32.18.208 Deeded land grazing permits.

**Case Notes**

*Ownership of Livestock — Inspection Certificate Controlling:* The term "rightful owner" in 81-8-233 refers to the owner as determined by the Department of Livestock under this section. Any duty of a livestock market to go beyond the directions of the state inspector in ascertaining the name of the true owner of cattle would conflict with the statutory scheme. Eberl v. Scofield, 244 M 515, 798 P2d 536, 47 St. Rep. 1780 (1990).

*Report — Admission in Evidence:* One of the copies of the report of the inspector made under section 3324, Revised Codes of 1935 (now repealed), was admissible in an action for conversion, although the report was not made until the day after the sale. Smith v. Armstrong, 121 M 377, 198 P2d 795 (1948).

## 81-3-204. Seizure of livestock — retention of livestock — sale — disposal of proceeds.

### Compiler's Comments

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### Case Notes

*Liability of Inspectors:* Employees of the state Livestock Commission (now Board of Livestock) who, with probable cause, seized and killed animals to establish whether brand had been altered or defaced were simply following their duty under this section and could not be sued for wrongful conversion. Johnson v. Furgeson, 158 M 170, 489 P2d 1032 (1971).

## 81-3-205. Fees for inspection and livestock transportation permits.

### Compiler's Comments

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

*1989 Amendment:* In (1), in second sentence and in two places in fourth sentence, deleted reference to Sheriff or Deputy Sheriff. Amendment effective March 20, 1989.

*1983 Amendments:* Chapter 277 substituted references to state special revenue fund for references to earmarked revenue fund.

Chapter 444, in (1), substituted fee established by department for schedule of 25 cents per head for 12 head or less, $3 for 12 to 20 head, and 20 cents per head for each head over 20 as inspection fees; substituted fee established by department for schedule of 25 cents for 12 head or less, 50 cents for 12 to 30 head, and $1 for over 30 head for movement permits; substituted fee established by the department for $5 permanent horse transportation permit; in (2) substituted "a fee established by department for each head inspected" for "20 cents per head for an animal originating within the county in the state in which the market or slaughterhouse is maintained or transported under a market consignment permit or transportation permit and 10 cents per head for an animal previously inspected before removal from a county as herein provided"; substituted a fee established by the department for 20 cents per head for release from a licensed livestock market; in (3)(a) substituted a fee established by the department for $1 a head for the first 10 head, and 50 cents for each additional head for inspecting horses, mules, or asses before removal from a county; in (3)(b) substituted a fee established by the department for $1 a head for inspecting horses, mules, or asses at a licensed livestock market.

### Administrative Rules

Title 32, chapter 2, subchapter 4, ARM Department of Livestock license fees, permit fees, and miscellaneous fees.

### Case Notes

*Fees of Inspector:* As formerly written this section did not permit the inspector to retain as additional compensation the fees received for inspections made at other than a public market occasioned by the removal of livestock from one county to another. State ex rel. Erwin v. Warren, 124 M 378, 224 P2d 142 (1950).

### Collateral References

Fee-Financed Government: Issues Raised by Licensing Boards and Other Agencies Before the 2013-2014 Economic Affairs Interim Committee, Interim Report, Mont. Leg. Serv. Div. (2014).

## 81-3-210. Bill of sale required to prove ownership.

### Compiler's Comments

*1983 Amendments:* Chapter 277 substituted reference to state special revenue fund for reference to earmarked revenue fund.

Chapter 444, in (1), after "inspection for livestock" deleted "exempt from the change of ownership inspection when purchased in lots of 5 head or less"; after "department" deleted "of livestock"; in (2) substituted fee established by department for $2.50 for each copy of a bill of sale.

*Incorporation Into Existing Law:* This section was enacted without any codification instructions. The apparent intent of the Legislature was that it become part of Title 81, chapter 3, part 2, and the Code Commissioner has codified it accordingly. This arrangement may affect other sections in part 2, especially 81-3-231(5). See 1-11-103(4).

## 81-3-211. Inspection of livestock before change of ownership or removal from county — transportation permits.

### Compiler's Comments

*2017 Amendment:* Chapter 120 in (6)(e)(i) after "allowing the movement of the livestock" deleted "into an adjoining county"; inserted (6)(e)(i)(A) and (6)(e)(i)(B) regarding movement into an adjoining county or across multiple county lines; in (6)(e)(iii) at end inserted "unless the animal is classified as a virgin breeding female or a nursing calf"; and made minor changes in style. Amendment effective October 1, 2017.

*2009 Amendment:* Chapter 290 inserted (6)(d) establishing a permanent transportation permit for rodeo bulls; and made minor changes in style. Amendment effective April 17, 2009.

*1997 Amendment:* Chapter 376 in (6)(a), near beginning of first sentence after "business or", substituted "if cattle are" for "where a purebred cow is"; in (6)(b), near end of second sentence and near middle of third sentence, after "state", inserted "stock inspector or a specially qualified deputy"; and made minor changes in style. Amendment effective April 24, 1997.

*1995 Amendment:* Chapter 380 in (6)(d), in first sentence after "permit", inserted "in a 12-month period" and in second sentence substituted "period of 8 months from the date of issuance" for "period from March 31 through November 30 of the calendar year in which it is issued"; and made minor changes in style. Amendment effective April 12, 1995.

*1989 Amendments:* Chapter 166 in (1) inserted definition of rodeo producer; and in first sentence of (6)(d), before "adjoining", deleted "immediately", in second sentence, after "valid for", substituted "the period from March 31 through November 30 of the calendar year in which it is issued" for "6 months", and inserted third sentence that read: "The permit may be issued only if the livestock is branded with the permittee's brand, which must be registered in Montana." Amendment effective March 20, 1989.

Chapter 217 in (5) changed "patrolman" to "patrol officer".

*1983 Amendments:* Chapter 17, in second to last sentence of (6)(c) before "year", substituted "for the calendar" for "only between April 1 and October 31 of the".

Chapter 277, in (6)(d), substituted reference to state special revenue fund for reference to earmarked revenue fund.

Chapter 444 deleted former (2)(a), which read: "such sale or change of ownership transaction involves five or fewer animals"; in (6)(b) substituted a fee established by the department for a $5 permit fee; in (6)(d) substituted a fee established by the department for a $5 permit fee for moving for grazing.

*1981 Amendments:* Chapter 10 inserted (7) requiring the livestock seller to request required inspections and pay required fees prior to removal or change of ownership.

Chapter 364 amended this section by moving the exempt transaction language formerly in (2)(b)(i), (ii), and (iii) to (2)(a), (b), and (c) for clarity.

### Administrative Rules

Title 32, chapter 2, subchapter 4, ARM Department of Livestock license fees, permit fees, and miscellaneous fees.

ARM 32.18.201 Presentation of livestock for brand inspection — length of time inspection effective.

ARM 32.18.202 Requirements for obtaining county line grazing permits.

ARM 32.18.204 Livestock market releases — duration and circumstances under which diversion allowed.

ARM 32.18.208 Deeded land grazing permits.

### Attorney General's Opinions

*Removal of Cattle — Misdemeanor:* The removal of cattle from a county without first having had any of the removed animals inspected, or without first have obtained a market consignment permit listing the animals, is a misdemeanor and a violation of 81-3-231 and this section. 29 A.G. Op. 69 (1956).

## 81-3-212. Exceptions.

### Compiler's Comments

*1989 Amendment:* Deleted former (2) that read: "(2) transported by railroad consigned to and which, without leaving the custody of the carrier, does reach a market at which the department regularly maintains a stock inspector and a loading tally has been filed by the shipper with the carrier as provided in 81-4-607"; near beginning of (2) and (3), after "horse-drawn vehicle", deleted "railroad car"; in (4), after "purpose of", deleted "shipment by railroad or"; in (5), after "reaches", deleted "by means other than railroad"; deleted former (7) that read: "(7) when hauled by truck or trailer from one county to an adjoining county within the state for the purpose of shipment by railroad at which shipping point the department maintains a stock inspector or where a deputy state stock inspector is available and for which a transportation permit has been obtained in the manner provided by law"; inserted (6) relating to transportation of livestock to a veterinarian; and made minor changes in phraseology. Amendment effective March 20, 1989.

## 81-3-213. Inspection of livestock removed from state.

### Compiler's Comments

*1989 Amendment:* Near beginning deleted reference to 81-3-212(2); and made minor changes in punctuation and style. Amendment effective March 20, 1989.

### Administrative Rules

ARM 32.18.201 Presentation of livestock for brand inspection — length of time inspection effective.

## 81-3-221. Brands fraudulently changed.

### Case Notes

*Immunity From Liability:* Employees of the state Livestock Commission (now Board of Livestock) who, with probable cause, seized and killed animals to establish whether brand had been altered or defaced were not liable for wrongful conversion. Johnson v. Furgeson, 158 M 170, 489 P2d 1032 (1971).

## 81-3-222. Compensation for animals killed.

### Compiler's Comments

*1983 Amendment:* Substituted reference to state special revenue fund for reference to earmarked revenue fund.

## 81-3-223. Action by dissatisfied owner — costs.

### Compiler's Comments

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

## 81-3-231. Penalties.

### Compiler's Comments

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

*1989 Amendments:* Chapter 166 at end of (1)(d) deleted "or does not file a loading tally with the carrier as provided in 81-4-607"; deleted former (3) that read: "(3) A person who ships by railroad carrier and the railroad carrier transporting livestock for which a loading tally has been filed as provided by 81-4-607 and for which shipment of livestock an inspection has not been made which after shipment causes or permits the livestock to leave the custody of the railroad carrier at a place other than where this state regularly maintains a stock inspector is guilty of a misdemeanor and is punishable as provided in subsection (6) of this section"; in three places in (3) inserted "transportation permit" and near end, after "constable", deleted "gross vehicle weight enforcement officer"; and corrected internal references. Amendment effective March 20, 1989.

Chapter 217 in (3) changed "patrolman" to "patrol officer".

*1987 Amendment:* In second sentence of (6), after "section", inserted "except those assessed and collected in a justice's court".

*1985 Amendment:* Near end of (4) after "constable", inserted "gross vehicle weight enforcement officer".

*1983 Amendment:* Substituted reference to state special revenue fund for reference to earmarked revenue fund.

### Attorney General's Opinions

*Removal of Cattle — Misdemeanor:* The removal of cattle from a county without first having had any of the removed animals inspected, or without first having obtained a market consignment permit listing the animals, is a misdemeanor and a violation of 81-3-211 and this section. 29 A.G. Op. 69 (1956).

## 81-3-233. Penalty for removal of livestock from state without inspection — exception.

### Compiler's Comments

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

# CHAPTER 4
# CONTAINMENT OF LIVESTOCK

**Chapter Law Review Articles**

Searching for the Montana Open Range: A Judicial and Legislative Struggle to Balance Tradition and Modernization in an Evolving West, Archer, 63 Mont. L. Rev. 197 (2002).

## Part 1
## Fences

**Part Case Notes**

*Allowing Disrepair of Fence Violation of Public Policy:* It was against the public policy of Montana to allow sagged or fallen fencing wire to clutter the range and become a menace to persons riding or walking over it. Van Voast v. Blaine County, 118 M 375, 167 P2d 563 (1946).

*Damages Granted for Trespassing Cattle — Sufficient Fence:* A landowner who had a fence that was not a legal fence but that was sufficient to turn away cattle was entitled to damages for injury caused by defendant's trespassing cattle. Davis v. Desch, 118 M 252, 164 P2d 1015 (1946).

### 81-4-101. Legal fences defined.

**Compiler's Comments**

*2017 Amendment:* Chapter 135 in (6) substituted current text concerning electric fences for former text that read: "electric fences consisting of three or more wires"; inserted (8) concerning certain fences that also include at least one strand of electrified wire; and made minor changes in style. Amendment effective October 1, 2017.

*2015 Amendment:* Chapter 249 in introduction substituted current text for "Any one of the following, if not less than 44 inches or more than 48 inches in height, shall be a legal fence in the state of Montana"; in (2)(b) following "corral fence" substituted "as the type described in subsection (2)(a)" for "may be made in lieu thereof"; in (3) near beginning after "standard woven wire" deleted "not less than 28 inches in height" and at end substituted "placed above the woven wire" for "placed above the same at a height of not less than 48 inches from the ground"; in (4) at end substituted "in subsections (1) through (3)" for "above described"; inserted (6) concerning electric fences; and made minor changes in style. Amendment effective April 17, 2015.

**Case Notes**

*Recovery for Damages for Trespassing Livestock — Livestock Owner Strict Liability:* Madrid was injured while recovering defendant's bull that had trespassed onto the ranch where Madrid was employed. Madrid sued defendant for damages under a theory of strict liability in trespass, but the District Court held that 81-4-215 did not provide for strict liability and granted summary judgment for defendant. On appeal, the Supreme Court held that, in addition to the history and policy behind 81-4-215, the plain language of the statute indicates a strict liability standard because it states that the livestock owner is liable. Here, it was undisputed that defendant's bull broke through a legal fence into an enclosure and injured Madrid, who was a proper occupant of the enclosure. Thus, Madrid met all the requirements necessary to recover under 81-4-215 because defendant was strictly liable for the actions of the trespassing bull. Summary judgment was reversed, and the case was remanded for a determination of damages. Madrid v. Zenchiku Land & Livestock, 2002 MT 172, 310 M 491, 51 P3d 1137 (2002). On remand for determination of damages, defendant sought to pursue its previously raised defense of assumption of risk. The District Court concluded that defendant should be allowed to raise that defense. Plaintiff asked the Supreme Court to exercise supervisory control, which was accepted on grounds that the District Court proceeded under a mistake of law. Under Stroop v. Day, 271 M 314, 896 P2d 439 (1995), and Madrid, supra, it was held that if a strict liability statute does not expressly provide for a particular defense, that defense may not be raised. Section 81-4-215 is a strict liability statute, and the only defense supplied by the statute arises if the enclosure breached by the animal is not legal (but see 2003 amendments). Because the statute does not allow for an assumption of risk defense, the District Court committed reversible error in allowing that defense to be raised at trial. The case was remanded again for a determination of damages. Madrid v. District Court, 2002 MT 291, 312 M 517, 60 P3d 438 (2002). See also Larson-Murphy v. Steiner, 2000 MT 334, 303 M 96, 15 P3d 1205 (2000).

*Cause of Action for Erection of Spite Fence Solely Intended to Injure Neighbor — Availability of Injunctive Relief or Nuisance Claim — Bordeaux Overruled:* Kottas built a 200-foot long, 7 feet 3 inches to 7 feet 9 inches high wooden fence that obstructed Haugen's view. Haugen sought injunctive relief for removal of the fence, alleging that it was a spite fence. The District Court concluded that it was indeed a spite fence, but declined to issue an injunction or recognize any remedy under Montana law, citing Bordeaux v. Greene, 22 M 254, 56 P 218 (1899), in holding that a person with a legal right can enforce the enjoyment of that right without inquiry into motive. The Supreme Court noted the many changes in property law since 1899 and overruled Bordeaux, adopting instead the rationale in Sundowner, Inc. v. King, 509 P2d 785 (Idaho 1973). Sundowner rejected the older rule that erection of a spite fence is not an actionable wrong and held that a property owner cannot erect a structure for the sole purpose of injuring a neighbor, such as a spite fence, which is of no beneficial use to the owner but is erected and maintained for the purpose of annoying a neighbor. A spite fence gives rise to an action for both injunctive relief and damages and may also be addressed through a nuisance claim. The Supreme Court reversed for a determination of the proper remedy. Haugen v. Kottas, 2001 MT 274, 307 M 301, 37 P3d 672 (2001).

*Purpose of Legal Fence Statutes Is to Prevent Trespass by Livestock, Not Create Cause of Action for Motorists:* Larson-Murphy struck a bull while driving at night and suffered extensive injuries. The lower court dismissed her case with no accompanying legal memorandum providing a legal basis for its decision. However, the bull's owners had argued that they could not be held liable based on the no duty rule of open-range law. Larson-Murphy argued that the defendants were negligent per se for failing to maintain a legal fence as required by law. The Supreme Court held that its past decision in Indendi v. Workman, 272 M 64, 899 P2d 1085 (1995), was incorrect in substituting the court's judgment for the Legislature's by creating a statutory duty on livestock owners for maintaining legal fences for the protection of motorists. The Supreme Court stated that the purpose of legal fence statutes is to prevent livestock from trespassing on the land of others and that the statutes apply strictly to the relationship between the livestock owners and landowners. The Supreme Court held that the statutes requiring a legal fence do not create any statutory duty on the part of livestock owners with respect to motorists; therefore, a violation of the statutes cannot serve as the basis for a finding of negligence per se in the case of an injured motorist. The Supreme Court went on to state that whether or not a livestock owner has violated common-law duty of care with respect to fencing livestock in areas where injuries to motorists may be foreseeable is for the finder of fact and depends on the individual circumstances involved in each case. Larson-Murphy v. Steiner, 2000 MT 334, 303 M 96, 15 P3d 1205, 57 St. Rep. 1411 (2000).

*Failure to Maintain Legal Fence as Basis for Finding of Negligence Per Se:* Nothing in this section limits the civil liability of the owner of a defective fence to injury to livestock or precludes liability for other types of injuries to persons or property resulting from the livestock owner's failure to properly contain animals by means of a legal fence. Therefore, a violation of this section can be the basis for a finding of negligence per se when that violation results in injury to a motorist or passenger traveling on the highways. Indendi v. Workman, 272 M 64, 899 P2d 1085, 52 St. Rep. 644 (1995), overruled, to the extent that Indendi holds that a violation of this section may serve as a basis for a finding of negligence per se with regard to an injury to a motorist on a public highway, in Larson-Murphy v. Steiner, 2000 MT 334, 303 M 96, 15 P3d 1205, 57 St. Rep. 1411 (2000). See also VanLuchene v. St., 244 M 397, 797 P2d 932 (1990).

*Trespass on Unfenced Lands:*

One turning his cattle out to graze unrestrained on lands where he had a right to do so was under no obligation to prevent them from entering on another's uninclosed premises and was not responsible for damage occasioned by their entry thereon through following their natural instincts, but absence of lawful fence did not justify willful trespass. Dunbar v. Emigh, 117 M 287, 158 P2d 311 (1945).

A lawful fence entirely surrounding his lands was a condition precedent to the right of a landowner to recover damages from owners of livestock trespassing thereon unless the latter, with knowledge of the private ownership of unfenced land, willfully herded them thereon or drove them to a point so near the boundaries that they were certain to go upon and feed thereon. Schreiner v. Deep Creek Stock Ass'n, 68 M 104, 217 P 663 (1923).

Where a livestock owner, claiming a strip of land 30 feet wide and one-half mile in length within plaintiff's inclosure, turned his cattle loose under circumstances which showed that it was intended that they should go into plaintiff's inclosure and graze upon his lands, he was liable for the damage done by them to plaintiff's pasture, the fact that plaintiff did not maintain any fence between the strip and defendant's land being no defense. Dorman v. Erie, 63 M 579, 208 P 908 (1922).

*Right to Build Fence:* The provisions prescribing what are legal fences and defining the duty to maintain and repair partition fences did not affect the right of an adjoining owner to build a division fence partly on the other's land. Hoar v. Hennessy, 29 M 253, 74 P 452 (1903).

## 81-4-102. Construction of auto pass not to deprive legal fence of character.

### Case Notes

*Purpose of Legal Fence Statutes Is to Prevent Trespass by Livestock, Not Create Cause of Action for Motorists:* Larson-Murphy struck a bull while driving at night and suffered extensive injuries. The lower court dismissed her case with no accompanying legal memorandum providing a legal basis for its decision. However, the bull's owners had argued that they could not be held liable based on the no duty rule of open-range law. Larson-Murphy argued that the defendants were negligent per se for failing to maintain a legal fence as required by law. The Supreme Court held that its past decision in Indendi v. Workman, 272 M 64, 899 P2d 1085 (1995), was incorrect in substituting the court's judgment for the Legislature's by creating a statutory duty on livestock owners for maintaining legal fences for the protection of motorists. The Supreme Court stated that the purpose of legal fence statutes is to prevent livestock from trespassing on the land of others and that the statutes apply strictly to the relationship between the livestock owners and landowners. The Supreme Court held that the statutes requiring a legal fence do not create any statutory duty on the part of livestock owners with respect to motorists; therefore, a violation of the statutes cannot serve as the basis for a finding of negligence per se in the case of an injured motorist. The Supreme Court went on to state that whether or not a livestock owner has violated common-law duty of care with respect to fencing livestock in areas where injuries to motorists may be foreseeable is for the finder of fact and depends on the individual circumstances involved in each case. Larson-Murphy v. Steiner, 2000 MT 334, 303 M 96, 15 P3d 1205, 57 St. Rep. 1411 (2000).

*Failure to Maintain Legal Fence as Basis for Finding of Negligence Per Se:* Nothing in 81-4-101 limits the civil liability of the owner of a defective fence to injury to livestock or precludes liability for other types of injuries to persons or property resulting from the livestock owner's failure to properly contain animals by means of a legal fence. Therefore, a violation of 81-4-101 can be the basis for a finding of negligence per se when that violation results in injury to a motorist or passenger traveling on the highways. Indendi v. Workman, 272 M 64, 899 P2d 1085, 52 St. Rep. 644 (1995), overruled, to the extent that Indendi holds that a violation of 81-4-101 may serve as a basis for a finding of negligence per se with regard to an injury to a motorist on a public highway, in Larson-Murphy v. Steiner, 2000 MT 334, 303 M 96, 15 P3d 1205, 57 St. Rep. 1411 (2000). See also VanLuchene v. St., 244 M 397, 797 P2d 932 (1990).

*Failure to Provide Auto Pass — No Illegal Fence:* Where appellant contended that under this section the Department of Highways' (now Department of Transportation's) failure to provide an auto pass resulted in an illegal fence, the court held that this section merely allows auto passes without making an otherwise legal fence illegal and that failure to provide an auto pass did not invoke liability under 81-4-103. Ambrogini v. Todd, 197 M 111, 642 P2d 1013, 39 St. Rep. 400 (1982).

## 81-4-103. Civil liability.

### Case Notes

*Purpose of Legal Fence Statutes Is to Prevent Trespass by Livestock, Not Create Cause of Action for Motorists:* Larson-Murphy struck a bull while driving at night and suffered extensive injuries. The lower court dismissed her case with no accompanying legal memorandum providing a legal basis for its decision. However, the bull's owners had argued that they could not be held liable based on the no duty rule of open-range law. Larson-Murphy argued that the defendants were negligent per se for failing to maintain a legal fence as required by law. The Supreme Court held that its past decision in Indendi v. Workman, 272 M 64, 899 P2d 1085 (1995), was incorrect in substituting the court's judgment for the Legislature's by creating a statutory duty on livestock owners for maintaining legal fences for the protection of motorists. The Supreme Court stated that the purpose of legal fence statutes is to prevent livestock from trespassing on the land of others and that the statutes apply strictly to the relationship between the livestock owners and landowners. The Supreme Court held that the statutes requiring a legal fence do not create any statutory duty on the part of livestock owners with respect to motorists; therefore, a violation of the statutes cannot serve as the basis for a finding of negligence per se in the case of an injured motorist. The Supreme Court went on to state that whether or not a livestock owner has violated common-law duty of care with respect to fencing livestock in areas where injuries to motorists may be foreseeable is for the finder of fact and depends on the individual circumstances involved in each case. Larson-Murphy v. Steiner, 2000 MT 334, 303 M 96, 15 P3d 1205, 57 St. Rep. 1411 (2000).

*Failure to Maintain Legal Fence as Basis for Finding of Negligence Per Se:* Nothing in 81-4-101 limits the civil liability of the owner of a defective fence to injury to livestock or precludes liability for other types of injuries to persons or property resulting from the livestock owner's failure to properly contain animals by means of a legal fence. Therefore, a violation of 81-4-101 can be the basis for a finding of negligence per se when that violation results in injury to a motorist or passenger traveling on the highways. Indendi v. Workman, 272 M 64, 899 P2d 1085, 52 St. Rep. 644 (1995), overruled, to the extent that Indendi holds that a violation of 81-4-101 may serve as a basis for a finding of negligence per se with regard to an injury to a motorist on a public highway, in Larson-Murphy v. Steiner, 2000 MT 334, 303 M 96, 15 P3d 1205, 57 St. Rep. 1411 (2000). See also VanLuchene v. St., 244 M 397, 797 P2d 932 (1990).

## 81-4-104. Barbed wire fences to be kept in repair.

### Compiler's Comments

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

## 81-4-105. Fallen wire fencing declared nuisance — abatement.

### Case Notes

*Duty of City to Inspect City Property for Hazards:* Plaintiff was injured after tripping on a fence wire while walking her dog at night in an unmaintained grassy area on city right-of-way next to a city street. Plaintiff contended that the city was negligent in allowing a dangerous and hazardous condition to exist on a public right-of-way and guilty of negligence per se under this section for allowing a public nuisance. The District Court granted summary judgment, determining as a matter of law that the city owed plaintiff no duty of care because: (1) she was not walking on a sidewalk, street, or path of any kind; (2) the city did not invite her to travel in that area; and (3) there were no city lights or signs in the vicinity. On appeal, plaintiff cited Richardson v. Corvallis Pub. School District No. 1, 286 M 309, 950 P2d 748 (1997), contending that the city ignored its duty to maintain the public streets, sidewalks, and rights-of-way within corporate limits in a reasonably safe condition for public travel by never going onto the premises, mowing it, raking it, or removing debris and that if routine maintenance had been done, the wire would have been found and removed. The Supreme Court agreed. The city's contention that it did not owe a duty of care in this case, because there was nothing in the area suggesting that it was a walkway or inviting the public to use it as such, failed under the Richardson test because of the city's neglect in exercising ordinary care or skill in the management of its property. Reasonable minds could differ on whether the city should have taken some action to inspect or maintain the property, so summary judgment was improper and thus reversed for a jury determination of negligence, including possible contributory negligence. Dobrocke v. Columbia Falls, 2000 MT 179, 300 M 348, 8 P3d 71, 57 St. Rep. 718 (2000).

*Failure to Establish Negligence Per Se When City Not Owner of Fence That Caused Injury:* Plaintiff was injured after tripping on a fence wire while walking her dog at night in an unmaintained grassy area on city right-of-way next to a city street. Plaintiff contended that the city was negligent per se for creating or maintaining a public or private nuisance in violation of this section. The District Court found, and the Supreme Court agreed, that the city was not negligent per se because in order to establish negligence per se, it must be proved among other things that a defendant violated a particular statute and that the statute was intended to regulate a member of the defendant's class. This section applies to the owner of a nuisance fence, but nothing in the record indicated that the city owned a fence in the area of the accident that would make the city a member of the regulated class or that the city created or maintained a nuisance fence. The city could not be in violation of a statute that it had no duty to observe. Dobrocke v. Columbia Falls, 2000 MT 179, 300 M 348, 8 P3d 71, 57 St. Rep. 718 (2000).

## 81-4-108. Disposal of proceeds of sale of wire after payment of expense.

### Compiler's Comments

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

## Part 2
## Animals Unlawfully Running at Large

**Part Law Review Articles**

Searching for the Montana Open Range: A Judicial and Legislative Struggle to Balance Tradition and Modernization in an Evolving West, Archer, 63 Mont. L. Rev. 197 (2002).

### 81-4-201. Animals running at large.

**Compiler's Comments**

*1995 Amendment:* Chapter 206 inserted "ostriches, rheas, emus"; and made minor changes in style.

*Applicability:* Section 14, Ch. 206, L. 1995, provided: "[This act] applies to tax years beginning after December 31, 1995."

*1993 Amendment:* Chapter 417 inserted "alpacas"; and made minor changes in style.

*1989 Amendment:* Inserted reference to llamas and bison; and made minor change in phraseology. Amendment effective March 20, 1989.

**Case Notes**

*Livestock on Roadway — Coverage of Statute:* Plaintiff sued defendant alleging that injuries he sustained in a motorcycle accident were caused by the presence of defendant's goats on the road. Defendant contended that 81-4-201 and 81-4-202, enacted in 1895, were enacted to protect the property of landowners, and therefore motorists were not a protected class under the statutes. Defendant moved for summary judgment. The court found that the continuing in effect of these statutes and their amendment in 1945 was part of the historical process of conforming the open-range law to the needs of the modern world. The court held that the complaint stated a cause of action and denied the motion for summary judgment. Read v. Buckner, 514 F. Supp. 281, 38 St. Rep. 735 (D.C. Mont. 1981).

*Trespassing Stock — Fence of Landowner:* When a defendant turned his goats out without fencing them and without a herder, the court did not err in holding that the plaintiff was not precluded from recovering by reason of the condition of his fences. Doornbos v. Ihde, 124 M 570, 228 P2d 235 (1951).

### 81-4-202. Penalties.

**Compiler's Comments**

*1993 Amendment:* Chapter 8 in (1) substituted fine of not more than $500 for former fine of $10 for first offense and $20 for each subsequent offense; and made minor changes in style.

*1987 Amendment:* In (2), after "section", inserted "except those collected in a justice's court".

**Case Notes**

*Livestock on Roadway — Coverage of Statute:* Plaintiff sued defendant alleging that injuries he sustained in a motorcycle accident were caused by the presence of defendant's goats on the road. Defendant contended that 81-4-201 and 81-4-202, enacted in 1895, were enacted to protect the property of landowners, and therefore motorists were not a protected class under the statutes. Defendant moved for summary judgment. The court found that the continuing in effect of these statutes and their amendment in 1945 was part of the historical process of conforming the open-range law to the needs of the modern world. The court held that the complaint stated a cause of action and denied the motion for summary judgment. Read v. Buckner, 514 F. Supp. 281, 38 St. Rep. 735 (D.C. Mont. 1981).

### 81-4-203. Open range defined.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 1, Ch. 679, L. 2023. Amendment effective October 1, 2023.

**Case Notes**

*Open-Range No Duty Rule Not Applicable to Legal Relationship Between Livestock Owners and Motorists:* Larson-Murphy struck a bull while driving at night and suffered extensive injuries. The lower court dismissed her case with no accompanying legal memorandum providing a legal basis for its decision. However, the bull's owners had argued that they could not be held liable based on the no duty rule of open-range law. The Supreme Court held that the no duty rule under the open-range doctrine does not apply to the legal relationship between livestock owners and motorists. However, the law of the open range remains the law of the state, and the term "open range" includes all highways outside of private enclosures used by the public unless modified by the Legislature. (See 27-1-724 enacted in 2001.) Larson-Murphy v. Steiner, 2000 MT 334, 303 M 96, 15 P3d 1205, 57 St. Rep. 1411 (2000).

*Absence of Proof of Open Range or Fenced Highway — Directed Verdict Improper:* Indendi hit a horse on Highway 84, killing the animal, sustaining personal injuries, and totaling her vehicle. She alleged negligence on the part of the horse owner as well as violations of fencing and livestock herding laws and open-range exceptions. The horse owner counterclaimed for loss of the horse. The District Court directed a verdict in favor of the horse owner. A directed verdict may be granted only when it appears that the nonmoving party cannot recover on any view of the evidence, including the legitimate inferences drawn from that evidence. Absent proof that the land was open range and that Highway 84 was a fenced highway, it was improper for the court to direct a verdict premised on the horse owner's satisfaction of the duty exclusion in 60-7-202(2). Indendi v. Workman, 272 M 64, 899 P2d 1085, 52 St. Rep. 644 (1995), following Ambrogini v. Todd, 197 M 111, 642 P2d 1013 (1982).

*Livestock Wandering on Open Range — Public Nuisance Doctrine Inapplicable:* As a matter of law, the public nuisance abatement statutes should not be used to require a livestock owner to prevent stock from running free on county roads in an open range area. State ex rel. Martin v. Finley, 227 M 242, 738 P2d 497, 44 St. Rep. 1050 (1987), followed in Williams v. Selstad, 235 M 137, 766 P2d 247, 45 St. Rep. 2254 (1988).

*Overgrazing Damages Remanded — No Offset — Open Range Law:* The District Court ruled that Helehan was liable for $3,000 in overgrazing damages caused to Ueland's property by horses allowed on Helehan's land and that Ueland was not entitled to reimbursement for a $3,000 fence. The court offset these amounts. The Supreme Court remanded, finding that the costs did not offset since damages flowed from Helehan to Ueland but not from Ueland to Helehan. However, the error was harmless since under Montana's open range law Helehan could not be legally obligated to restrain the horses and could not be held liable for damages occurring prior to the time the fence was built. Helehan v. Ueland, 223 M 228, 725 P2d 1192, 43 St. Rep. 1679 (1986).

*Erosion of Open Range Law:* Generally, an open range designation implies that an owner is not liable for his wandering livestock. Prior to 1974, a rancher was liable only for willful failure to keep his livestock off a federal-aid primary highway. However, with the 1974 amendment of 60-7-201, ranchers are now liable for negligent conduct that results in the presence of their cattle on the rights-of-way of such highways. Ambrogini v. Todd, 197 M 111, 642 P2d 1013, 39 St. Rep. 400 (1982).

## 81-4-207. Castration of animals running at large — notice to owner — expense and charges.

### Compiler's Comments

*2015 Amendment:* Chapter 429 in (1) at beginning inserted exception clause; inserted (3) regarding reporting swine running at large; and made minor changes in style. Amendment effective May 5, 2015.

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### Case Notes

*Notice to Owner:* The notice requirements of this section were irrelevant to an action against the owner of a trespassing mule for personal injuries sustained in attempting to remove the mule. Ekwortzel v. Parker, 156 M 477, 482 P2d 559 (1971).

## 81-4-208. Killing of animal running at large.

### Compiler's Comments

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 2, Ch. 679, L. 2023. Amendment effective October 1, 2023.

*2015 Amendment:* Chapter 429 in (1) at beginning inserted exception clause; inserted (3) regarding reporting swine running at large; and made minor changes in style. Amendment effective May 5, 2015.

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

## 81-4-209. Penalty for violations.

### Compiler's Comments

*1995 Amendment:* Chapter 92 after "misdemeanor" substituted "punishable as provided in 46-18-212" for "and upon conviction thereof shall be fined not less than $10 or more than $25"; and made minor changes in style.

### 81-4-210. Only purebred bulls to run at large — limitation on time.

**Case Notes**

*Hold the Bull:* Livestock owners were properly required to confine their bull until they demonstrated that the animal was purebred in accordance with statutory requirements imposing procedural certification or grading requirements. State ex rel. Martin v. Finley, 227 M 242, 738 P2d 497, 44 St. Rep. 1050 (1987).

### 81-4-211. Female breeding cattle, purebred bull to accompany.

**Case Notes**

*Hold the Bull:* Livestock owners were properly required to confine their bull until they demonstrated that the animal was purebred in accordance with statutory requirements imposing procedural certification or grading requirements. State ex rel. Martin v. Finley, 227 M 242, 738 P2d 497, 44 St. Rep. 1050 (1987).

### 81-4-212. Castration of violating bulls.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

**Case Notes**

*Inquiry as to Ownership:* When defendant found a purebred dairy bull running at large in his pasture, it would not have been either unnatural or unreasonable for the defendant to have contacted his neighbor, the plaintiff, to ascertain what, if anything, he knew about the bull. By failing to do this, the defendant was liable to the plaintiff, the owner of the bull, for castrating it. Holden v. Varner, 128 M 211, 272 P2d 1008 (1954).

### 81-4-213. Penalty.

**Compiler's Comments**

*1995 Amendment:* Chapter 92 after "punishable" substituted "as provided in 46-18-212" for "by a fine of not less than $25 or more than $250"; and made minor changes in style.

### 81-4-214. Branding animals running at large — running irons prohibited.

**Compiler's Comments**

*1993 Amendment:* Chapter 417 near middle, after "llama", inserted "alpaca"; and made minor changes in style.

*1989 Amendment:* Near middle inserted "llama, bison"; and made minor changes in grammar and phraseology. Amendment effective March 20, 1989.

### 81-4-215. Liability of owners of stock for trespass.

**Compiler's Comments**

*2003 Amendment:* Chapter 431 in first sentence near middle after "liable for" deleted "all" and at end inserted "if the owner or person in control of the animals was negligent"; and inserted third sentence concerning trespassing animals in herd district. Amendment effective April 21, 2003.

*Applicability:* Section 3, Ch. 431, L. 2003, provided: "[This act] applies to actions brought on or after [the effective date of this act]." Effective April 21, 2003.

*1993 Amendment:* Chapter 417 near beginning, after "llamas", inserted "alpacas" and after "or occupant of the enclosure" deleted "which may be sustained thereby"; and made minor changes in style.

*1989 Amendment:* Near beginning inserted "llamas". Amendment effective March 20, 1989.

**Case Notes**

*Recovery for Damages for Trespassing Livestock — Livestock Owner Strict Liability:* Madrid was injured while recovering defendant's bull that had trespassed onto the ranch where Madrid was employed. Madrid sued defendant for damages under a theory of strict liability in trespass, but the District Court held that this section did not provide for strict liability and granted summary judgment for defendant. On appeal, the Supreme Court held that, in addition to the history and policy behind this section, the plain language of the statute indicates a strict liability standard because it states that the livestock owner is liable. (See 2003 amendment.) Here, it was undisputed that defendant's bull broke through a legal fence into an enclosure and injured Madrid, who was a proper occupant of the enclosure. Thus, Madrid met all the requirements necessary to recover under this section because defendant was strictly liable for the actions of the trespassing bull. Summary judgment was reversed, and the case was remanded for a determination of damages. Madrid v. Zenchiku Land & Livestock, 2002 MT 172, 310 M 491, 51 P3d 1137 (2002). On remand for determination of damages, defendant sought to pursue its previously raised defense of assumption of risk. The District Court concluded that defendant should be allowed to raise that defense. Plaintiff asked the Supreme Court to exercise supervisory control, which was accepted on grounds that the District Court proceeded under a mistake of law. Under Stroop v. Day, 271 M 314, 896 P2d 439 (1995), and Madrid, supra, it was held that if a strict liability statute does not expressly provide for a particular defense, that defense may not be raised. This section is a strict liability statute, and the only defense supplied by the statute arises if the enclosure breached by the animal is not legal (but see 2003 amendments). Because the statute does not allow for an assumption of risk defense, the District Court committed reversible error in allowing that defense to be raised at trial. The case was remanded again for a determination of damages. Madrid v. District Court, 2002 MT 291, 312 M 517, 60 P3d 438 (2002). See also Larson-Murphy v. Steiner, 2000 MT 334, 303 M 96, 15 P3d 1205 (2000).

*Purpose of Legal Fence Statutes Is to Prevent Trespass by Livestock, Not Create Cause of Action for Motorists:* Larson-Murphy struck a bull while driving at night and suffered extensive injuries. The lower court dismissed her case with no accompanying legal memorandum providing a legal basis for its decision. However, the bull's owners had argued that they could not be held liable based on the no duty rule of open-range law. Larson-Murphy argued that the defendants were negligent per se for failing to maintain a legal fence as required by law. The Supreme Court held that its past decision in Indendi v. Workman, 272 M 64, 899 P2d 1085 (1995), was incorrect in substituting the court's judgment for the Legislature's by creating a statutory duty on livestock owners for maintaining legal fences for the protection of motorists. The Supreme Court stated that the purpose of legal fence statutes is to prevent livestock from trespassing on the land of others and that the statutes apply strictly to the relationship between the livestock owners and landowners. The Supreme Court held that the statutes requiring a legal fence do not create any statutory duty on the part of livestock owners with respect to motorists; therefore, a violation of the statutes cannot serve as the basis for a finding of negligence per se in the case of an injured motorist. The Supreme Court went on to state that whether or not a livestock owner has violated common-law duty of care with respect to fencing livestock in areas where injuries to motorists may be foreseeable is for the finder of fact and depends on the individual circumstances involved in each case. Larson-Murphy v. Steiner, 2000 MT 334, 303 M 96, 15 P3d 1205, 57 St. Rep. 1411 (2000).

*Erosion of Open Range Law:* Generally, an open range designation implies that an owner is not liable for his wandering livestock. Prior to 1974, a rancher was liable only for willful failure to keep his livestock off a federal-aid primary highway. However, with the 1974 amendment of 60-7-201, ranchers are now liable for negligent conduct that results in the presence of their cattle on the rights-of-way of such highways. Ambrogini v. Todd, 197 M 111, 642 P2d 1013, 39 St. Rep. 400 (1982).

*Criminal Sanctions Not Available:* Available remedies for damage caused by trespassing cattle did not include a criminal sanction. St. v. Blakely, 181 M 118, 592 P2d 501, 36 St. Rep. 567 (1979).

*Complaint — Sufficiency:*

In action to restrain trespass by livestock and to recover for partial loss of a growing crop of barley then being trampled and grazed down by livestock after defendant had removed a long-standing section line fence bounding one side of a field that plaintiff had just planted in barley, the complaint alleging a malicious removal of the fence was sufficient to state a cause of action for trespass of cattle upon plaintiff's property, although he did not allege a secure enclosure of the barley field but did so testify. Thompson v. Mattuschek, 134 M 500, 333 P2d 1022 (1959).

In an action on an implied contract to recover the reasonable value of the pasturage of livestock, the complaint alleging ownership and right of possession in plaintiff, the ownership of the animals in defendant, that the lands were enclosed by a fence that the defendant broke down, that the defendant pastured the animals on the land, and the reasonable value of the pasturage per head a month, stated a cause of action. Dorman v. Erie, 63 M 579, 208 P 908 (1922).

*Range Law:* Under common law, livestock had to be fenced in, but under range law, they had to be fenced out. Thompson v. Mattuschek, 134 M 500, 333 P2d 1022 (1959).

*Trespass on Unfenced Land:*

Under the fence statute, one turning his livestock at large on land where he had the right to do so was not liable in damages for their invasion of private lands of another failing to maintain lawful fence, though he expected and intended such trespass to be committed. Dunbar v. Emigh, 117 M 287, 158 P2d 311 (1945).

When a plaintiff, the owner of unenclosed lands within a forest reserve in which defendants had a permit to graze their cattle, in his action for damages for depasturing his land relied upon the allegation in the answer that the defendants were running their cattle "under herd" and "in charge of herders" as an admission that the animals were placed upon his premises by the defendants' agents and did not introduce evidence that they were willfully or negligently driven or permitted to remain thereon, it appearing on the contrary that the herders endeavored to keep them off his premises and drove them therefrom when found there, a judgment in his favor was unwarranted under the above rules. Schreiner v. Deep Creek Stock Ass'n, 68 M 104, 217 P 663 (1923).

When a livestock owner, claiming a strip of land 30 feet wide and one-half mile in length within plaintiff's enclosure, turned his cattle loose under circumstances which showed that it was intended that they should go into plaintiff's enclosure and graze upon his lands, he was liable for the damage done by them to plaintiff's pasture. The fact that the plaintiff did not maintain any fence between the strip and defendant's land was no defense. Dorman v. Erie, 63 M 579, 208 P 908 (1922).

The owners of animals could not knowingly and willfully drive or herd them upon the lands of another, whether such lands were protected by an enclosure or not, and to avoid encroaching upon his neighbor, he must at his peril ascertain the line at which his rights end and his neighbor's begin. Herrin v. Sieben, 46 M 226, 127 P 323 (1912), overruled on other grounds in Simonson v. McDonald, 131 M 494, 311 P2d 986 (1957).

This section and the custom of the state making the maintenance of a legal fence by a landowner a prerequisite to recovery for trespass by domestic animals of another did not charge the landowner with the duty to keep cattle lawfully at large from coming on his land or make their entry thereupon rightful so as to make him liable for injuries to such animals caused by the existence of dangerous agencies on the land, but not wantonly or intentionally caused. Beinhorn v. Griswold, 27 M 79, 69 P 557 (1902).

There could be no recovery for damages sustained to the owner of unenclosed lands by reason of sheep straying or being driven thereupon and destroying the grass and verdure unless it appeared that they were maliciously driven upon such lands for the purpose of causing injury. Fant v. Lyman, 9 M 61, 22 P 120 (1889).

A lawful fence entirely surrounding the grounds or premises entered or some obstruction equivalent thereto was a condition precedent to the right to bring an action against the owner of trespassing animals for damages sustained by reason of such trespass. Smith v. Williams, 2 M 195 (1874).

*Herd Animals:* The provisions of this section applied to all domestic animals but had no application to animals in charge of a herder. Herrin v. Sieben, 46 M 226, 127 P 323 (1912), overruled on other grounds in Simonson v. McDonald, 131 M 494, 311 P2d 986 (1957).

*Unlawful Fencing of Public Domain:* A person who unlawfully fenced a portion of the public domain acquired only a tortious possession that did not authorize him to maintain an action against another for depasturing such land or entitle him to restrain the latter by injunction from continuing to depasture the land. Clemmons v. Gillette, 33 M 321, 83 P 879 (1905).

*Nonapplicability to Willful Appropriation of Another's Herd:* This section applied to trespasses committed by animals running at large without the knowledge of the owner and not to a case where one knowingly and willfully appropriated the use of another's land. Monroe v. Cannon, 24 M 316, 61 P 863 (1900). See also Rea Bros. Sheep Co. v. Rudi, 46 M 149, 127 P 85 (1912); Light v. U.S., 220 US 523, 55 L Ed 570, 31 S Ct 485 (1911); Musselshell Cattle Co. v. Woolfolk, 34 M 126, 85 P 874 (1906).

*Legal Fence:* A reasonable and substantial compliance with the statute is all that was required, and an immaterial variation in the height of the fence from that of a lawful fence did not defeat the action. Smith v. Williams, 2 M 195 (1874).

## 81-4-217. Retention of trespassing stock.

### Compiler's Comments

*1995 Amendment:* Chapter 92 in third sentence of (3), at beginning, substituted "owner or person in charge of the animal" for "defendant" and in two places substituted "claimant" for "plaintiff"; in (4), after "misdemeanor", substituted "punishable as provided in 46-18-212" for "and shall be fined not less than $100 or more than $500"; and made minor changes in style.

*1983 Amendment:* In (1), reduced the written notice period from 72 to 24 hours and deleted a final sentence that read: "In all cases a copy of the notice shall also be posted at a point where the animal was taken."

**Case Notes**

*Dismissal for Insufficient Evidence Not Appealable:* Where the defendants were charged with the theft of calves belonging to another and the charges were dismissed for insufficient evidence because the State did not prove the defendants' failure to give notice under 81-4-217, the dismissal of the charges could not be appealed by the State. Under the rationale of St. v. Cool, 174 M 99, 568 P2d 567 (1977) (citing U.S. v. Ball, 163 US 662 (1895), and Fong Foo v. U.S., 369 US 141 (1962)), a dismissal for insufficient evidence under the circumstances of this case operates as an acquittal and an appeal constitutes a violation of the defendants' rights against double jeopardy. St. v. Greenwalt, 204 M 196, 663 P2d 1178, 40 St. Rep. 767 (1983).

*Personal Injury in Removing Animal:* The notice requirements of this section were irrelevant to an action against the owner of a trespassing mule for personal injuries sustained in attempting to remove the mule. Ekwortzel v. Parker, 156 M 477, 482 P2d 559 (1971).

*Constitutionality:* This statute is constitutional. Doornbos v. Ihde, 124 M 570, 228 P2d 235 (1951).

*Extent of Damages — Evidence:* When evidence was conflicting as to the value of goats and as to the extent of damages and there was ample evidence to show that the value of goats was not disproportionate to damage caused, the Supreme Court could not say that trial court was not justified in retaining all the goats to satisfy his claim. Doornbos v. Ihde, 124 M 570, 228 P2d 235 (1951).

*Fence — Necessity:* Under some circumstances a person was permitted to take animals into possession regardless of whether the premises were enclosed by a legal fence. Doornbos v. Ihde, 124 M 570, 228 P2d 235 (1951).

*Injury to Animals:* When the evidence was conflicting as to whether goats were injured by failure of the taker up to milk them, the trial court did not err in not awarding damages on a cross-complaint especially when the owner could have milked them himself where confined or could have regained possession of them by giving bond. Doornbos v. Ihde, 124 M 570, 228 P2d 235 (1951).

*Notice — Waiver of Defects:* When the owner of goats was personally served with notice and went and examined the goats in the corral and also examined the field in which they were grazing to determine damage, he waived any defect in notice. Doornbos v. Ihde, 124 M 570, 228 P2d 235 (1951).

*Place of Posting Notice:* A notice, required to be posted under former law (deleted by amendment, 1983), where goats were confined was a notice where they were "taken up", although the place where they were found grazing was from one to one and one-half miles from the place where they were confined. Doornbos v. Ihde, 124 M 570, 228 P2d 235 (1951).

*Grazing District Law — Effect:*

No provision of the grazing district law (Title 76, ch. 16) gave the owner of land within a grazing district, but not owned or controlled by it, the right to impound livestock of another on such land or claim a lien for the keep thereof under this section. McKee v. Clark, 115 M 438, 144 P2d 1000 (1943).

Under law pertaining to open range, when plaintiff's land was unfenced and there was no evidence that defendant herded his horses upon the plaintiff's land or overstocked his own range so that horses would be compelled to go on plaintiff's land for food, the plaintiff was not entitled to any damages for trespass of the horses or compensation for care and feed for them while he held them impounded. McKee v. Clark, 115 M 438, 144 P2d 1000 (1943).

*Jurisdiction of Court:* When the plaintiff might have sued under this section for $350 because of the wrongful rescue of animals which had been trespassing upon his premises, but his demand was for only $286, a Justice's Court had jurisdiction of the cause. Reynolds v. Smith, 48 M 149, 135 P 1190 (1913).

## 81-4-220. Marking — right of action against trespassing stock.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

**Case Notes**

*Mining Claims:* This section was held inapplicable in its then-existing form to unpatented mining claims. Ward v. Chevallier Ranch Co., 138 M 144, 354 P2d 1031 (1960).

## Part 3
## Herd Districts

**Part Case Notes**

*Notice to Landowners Jurisdictional:* Prior to amendment by Ch. 171, L. 1931, the notice required by 81-4-301 through 81-4-304 to be given by the Board of County Commissioners of the presentation of a petition for the creation of a herd district to landowners in the proposed district was jurisdictional, substantial compliance with the requirements of the statutes being indispensable to action by the Board. State ex rel. Keane v. Bd. of County Comm'rs, 83 M 540, 273 P 290 (1929).

*Width of District at Point Where City Located:* When the record on appeal did not show that a county seat lying within the district was an incorporated city, the contention of relator that upon elimination of the area embraced within the city limits the district was less than 3 miles in width, contrary to the former provisions of 81-4-301 through 81-4-304, could not be upheld. State ex rel. Keane v. Bd. of County Comm'rs, 83 M 540, 273 P 290 (1929).

*Width of District Measured at Right Angles:* When a petition for the creation of a herd district, lying north and south, showed that its eastern boundary was a river bank and that its width, measured at right angles to the base line (a line projected as nearly parallel to the course of the river), was at all points at least 3 miles in width, this was sufficient despite the fact that at the point where the river formed a bend toward the west extending about 2 miles within the territory of the proposed district, the distance between the peak of the bend and a point on the western boundary, when measured at an acute angle northwestward, was but a mile and a half. The width of a tract of land must be measured at right angles to its length. State ex rel. Keane v. Bd. of County Comm'rs, 83 M 540, 273 P 290 (1929).

**Part Law Review Articles**

Is There a Middle Ground? One Approach to Resolution of Land Use Disputes in the Northwest, Gangle, 64 Mont. L. Rev. 493 (Summer 2003).

**81-4-301. Herd districts — creation, size, and location.**

**Compiler's Comments**

*2003 Amendment:* Chapter 40 inserted (1)(b) allowing creation of a herd district upon petition of owners or possessors of 75% of the land in the district; and made minor changes in style. Amendment effective October 1, 2003.

*1999 Amendment:* Chapter 138 in (5) at beginning deleted "Upon petition of any owner or possessor of lands lying contiguous and adjoining any herd district theretofore created and upon like hearing and notice as hereinabove provided for, such lands shall be included in said herd district and become a part thereof"; and made minor changes in style. Amendment effective October 1, 1999.

*Validation:* Sec. 5, Ch. 488, L. 1979, provided: "No herd district established prior to the effective date of this act [April 9, 1979] may be held invalid because the boundaries do not follow section lines."

**Attorney General's Opinions**

*Boundaries of Proposed District:* The boundaries of a proposed herd district cannot overlap an existing district. 28 A.G. Op. 21 (1959).

*Petition to Be Filed — Need Not Be Recorded:* The petition for the creation of a herd district must be filed with the County Clerk and Recorder but need not be recorded. 28 A.G. Op. 21 (1959).

**81-4-303. Exclusion of government land.**

**Attorney General's Opinions**

*"Government Section" Defined:* The term "government section" as used in the herd district law is land lying within lines marked by government survey. 28 A.G. Op. 21 (1959).

*Percentage of Cultivated Land for Withdrawal:* No more than 15% of the tract of land proposed for withdrawal from a herd district can be under cultivation. 28 A.G. Op. 21 (1959).

**81-4-305. Changing time when herd districts will be in effect — petition — notice — hearing.**

**Attorney General's Opinions**

*Area to Be Used As Qualifying Basis for Petition:* When a change of time for a herd district is sought, the area of the district at the time the petition for change is presented is the area to be used as the qualifying basis for the petition. 28 A.G. Op. 21 (1959).

*Withdrawal or Addition of Names to Petition:* Landowners may withdraw or add their names to the petition to organize or change a herd district up until the hour set for hearing the petition. 28 A.G. Op. 21 (1959).

## 81-4-306. Penalty for permitting animals to run at large in herd districts.

**Compiler's Comments**

*1993 Amendment:* Chapter 417 in two places in (1), after "llamas", inserted "alpacas"; and made minor changes in style.

*1989 Amendment:* In two places in (1) inserted reference to llamas and bison; and made minor changes in phraseology. Amendment effective March 20, 1989.

**Case Notes**

*Right-of-Way Applicable to Operation and Maintenance Road in Herd District Within Irrigation Project:* As part of the Huntley irrigation project, Yellowstone County constructed an operation and maintenance road along one side of an irrigation canal. A nearby property owner later used the road to move cattle, and after plaintiffs complained to the County Sheriff several times over a period of years, plaintiffs installed cattle guards. The county subsequently removed the cattle guards, claiming that the road was a county road and that the county had a 60-foot right-of-way, giving it the right to remove obstructions, including cattle guards and overgrowth from trees obstructing the road. The county then trimmed and killed several of plaintiffs' trees, and plaintiffs sued the county, contesting the county's right-of-way. The District Court examined the historical use of the road and determined that the county's right-of-way was about 20 feet. The court also held that because the property was in a herd district and because all the parties preferred cattle guards to gates, the county was required to replace the cattle guards. The county appealed, but the Supreme Court affirmed. The county road was superimposed on the operation and maintenance road and thus was not more or less extensive than the operation and maintenance road, so the easement was 20 feet as the road currently existed. Further, because the project was a federal operation, the rights of the federal government prevailed. A witness for the federal government testified that cattle guards were preferable, so ordering the replacement of the cattle guards was also not erroneous. Weatherwax v. Yellowstone County, 2003 MT 215, 317 M 119, 75 P3d 788 (2003).

*Open-Range No Duty Rule — Applies Only to Relationship Between Livestock Owner and Motorists:* Larson-Murphy struck a bull while driving at night and suffered extensive injuries. The lower court dismissed her case with no accompanying legal memorandum providing a legal basis for its decision. However, the bull's owners had argued that they could not be held liable based on the no duty rule of open-range law. The Supreme Court stated that open-range laws allow certain livestock to legally occupy a highway but that state laws also permit a motorist to legally occupy the same highway. There is no statute that provides that a livestock owner is not liable for injuries suffered by motorists colliding with the livestock owner's livestock. Therefore, the Supreme Court stated that any assertion of legal duties arising from the legal relationship between owners of livestock and motorists is beyond the scope of Montana's statutory open-range doctrine. The Supreme Court held that because both livestock and a motorist may have an equal right to lawfully occupy a highway, the livestock owner and the motorist each owe the other a legal duty to use the highway so as not to injuriously interfere with the other's right of use. Therefore, ascertaining the precise standard of care that each owes the other must be viewed in light of the circumstances under which the harm occurs. The Supreme Court reversed the directed verdict in favor of the defendants and remanded the case for a determination by the trier of fact to determine if the bull's owners had violated their duty of care to Larson-Murphy. (See 27-1-724 enacted in 2001.) Larson-Murphy v. Steiner, 2000 MT 334, 303 M 96, 15 P3d 1205, 57 St. Rep. 1411 (2000).

*Open-Range No Duty Rule Not Applicable to Legal Relationship Between Livestock Owners and Motorists:* Larson-Murphy struck a bull while driving at night and suffered extensive injuries. The lower court dismissed her case with no accompanying legal memorandum providing a legal basis for its decision. However, the bull's owners had argued that they could not be held liable based on the no duty rule of open-range law. The Supreme Court held that the no duty rule under the open-range doctrine does not apply to the legal relationship between livestock owners and motorists. However, the law of the open range remains the law of the state, and the term "open range" includes all highways outside of private enclosures used by the public unless modified by the Legislature. (See 27-1-724 enacted in 2001.) Larson-Murphy v. Steiner, 2000 MT 334, 303 M 96, 15 P3d 1205, 57 St. Rep. 1411 (2000).

*Horse on County Highway — No Duty to Motorists — Open Range Doctrine Not Changed:* Plaintiff sued for injuries she received when a horse ran onto a county highway located within a herd district. The lower court granted defendants summary judgment on the basis that the livestock owners owed no duty to the plaintiff as a matter of law. The Supreme Court affirmed. The herd district statutes were designed only to protect other landowners and thus were not exceptions to the open-range doctrine. The herd district statutes were not designed to protect motorists, but were only intended to protect landowners and owners of livestock. Williams v. Selstad, 235 M 137, 766 P2d 247, 45 St. Rep. 2254 (1988), overruled, to the extent that Selstad holds that the open-range no duty rule applies to the legal relationship between livestock owners and motorists, in Larson-Murphy v. Steiner, 2000 MT 334, 303 M 96, 15 P3d 1205, 57 St. Rep. 1411 (2000) (see 27-1-724 enacted in 2001).

*Strict Compliance Necessary:* The provisions of the herd law had to be strictly followed in order to afford protection to those responsible for the impounding and sale of animals under its authority, and where they are not so followed, the taking constitutes a taking of private property without due process of law and a conversion of the property. Jorgenson v. Story, 78 M 477, 254 P 427 (1927).

### 81-4-307. Trespassing animals in herd district — retention for damages and costs.

**Compiler's Comments**

*1999 Amendment:* Chapter 51 in throughout section substituted reference to "costs" for reference to "charges"; in (1) near middle of third sentence before "certified letter" deleted "registered or"; and made minor changes in style. Amendment effective March 15, 1999.

**Case Notes**

*Strict Compliance Necessary:* The provisions of the herd law had to be strictly followed in order to afford protection to those responsible for the impounding and sale of animals under its authority, and where they are not so followed, the taking constitutes a taking of private property without due process of law and a conversion of the property. Jorgenson v. Story, 78 M 477, 254 P 427 (1927).

### 81-4-308. Retrieval of impounded animals — misdemeanor — penalty.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 81-4-310. Annexation into existing herd district.

**Compiler's Comments**

*2001 Amendment:* Chapter 512 in (1) near middle of second sentence after "signed by" substituted "the owners or possessors of at least 55% of the affected land" for "all affected owners or possessors of land". Amendment effective May 1, 2001.

*Applicability:* Section 5, Ch. 512, L. 2001, provided: "[This act] applies to herd districts created or annexation actions that occur after [the effective date of this act]." Effective May 1, 2001.

*Effective Date:* This section is effective October 1, 1999.

### 81-4-311. Duty to build and maintain fences.

**Compiler's Comments**

*Effective Date:* Section 4, Ch. 512, L. 2001, provided: "[This act} is effective on passage and approval." Approved May 1, 2001.

*Applicability:* Section 5, Ch. 512, L. 2001, provided: "[This act] applies to herd districts created or annexation actions that occur after [the effective date of this act]." Effective May 1, 2001.

### 81-4-322. Horse herd districts — size — location — petition — notice and hearing — abolishment.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 81-4-326. Retention and sale of horses for damages and care — procedure.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 81-4-327. Sale of horses — disposition of proceeds.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

## Part 4
## Impoundment of Livestock in Municipalities

### 81-4-401. Certain livestock not to run at large in municipalities.

**Compiler's Comments**

*1993 Amendment:* Chapter 417 inserted "alpacas"; and made minor changes in style.

*1989 Amendment:* Inserted reference to llamas and bison; and made minor changes in phraseology. Amendment effective March 20, 1989.

### 81-4-402. Punishment for permitting trespass of livestock.

**Compiler's Comments**

*1993 Amendment:* Chapter 417 inserted "alpacas"; and made minor changes in style.

*1989 Amendment:* Inserted reference to llamas and bison; and made minor changes in phraseology. Amendment effective March 20, 1989.

### 81-4-405. Service upon owner.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 81-4-406. Service on department of livestock.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 81-4-410. Provisions mandatory.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

## Part 5
## Roundup of Abandoned Horses

**Part Case Notes**

*Constitutionality:* One had no right to use his property so as to injure others and no vested right to the enjoyment of property if he failed to pay taxes thereon; hence this part, designed to rid the public range of abandoned horses, i.e., such as are unbranded or escaped taxation the previous year and as such declared a public nuisance, was not objectionable as retroactive legislation as interfering with the owner's vested right in the animals. The law afforded him an opportunity to protect his right if he saw fit to do so and in effect did no more than provide a further means of enforcing his obligations not to use his property so as to injure others and to pay taxes on the animals. Durocher v. Myers, 84 M 225, 274 P 1062 (1929).

*Strict Compliance Required:* To afford protection to those in charge of a roundup of abandoned horses and their subsequent sale, the provisions of this part had to be strictly followed, and if not and the sale was held before the hour of 8 a.m. (see 81-4-510), it was illegal and constituted a conversion of the animals. Durocher v. Myers, 84 M 225, 274 P 1062 (1929).

### 81-4-505. Roundup supervisor — duties — bond.

**Compiler's Comments**

*2009 Amendments — Composite Section:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Chapter 291 in (1) in third sentence after "designated" inserted "or employed"; in (3) inserted "If the roundup supervisor is not employed by the board of county commissioners"; and made minor changes in style. Amendment effective October 1, 2009.

### 81-4-506. Sale of abandoned horses.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 81-4-507. Gathering horses in roundup district before roundup unlawful — rights of owner.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 81-4-508. Claim of owner — cost of keeping and feeding horses.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 81-4-509. Proof of ownership — payment of taxes and penalties — decision of commissioners on claim.

**Compiler's Comments**

*2009 Amendments — Composite Section:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Chapter 291 in first sentence at end increased roundup fee from $5 to $100; and made minor changes in style. Amendment effective October 1, 2009.

### 81-4-510. Notice of sale of abandoned horses — form — time of sale — title.

**Compiler's Comments**

*1999 Amendment:* Chapter 51 in (1) in notice form in two places after "day of ...." substituted "20..." for "19..."; and made minor changes in style. Amendment effective January 1, 2000.

**Case Notes**

*Strict Compliance Required:* To afford protection to those in charge of a roundup of abandoned horses and their subsequent sale, the provisions of this section had to be strictly followed, and if not and the sale was held before the hour of 8 a.m., it was illegal and constituted a conversion of the animals. Durocher v. Myers, 84 M 225, 274 P 1062 (1929).

### 81-4-511. Assessment of horses taken in roundup.

**Compiler's Comments**

*1993 Special Session Amendment:* Chapter 27 at beginning substituted "Following a roundup held pursuant to this part, the department of revenue shall" for "It shall be the duty of the county assessor"; and made minor changes in style. Amendment effective January 1, 1994.

*Applicability:* Section 171(2), Ch. 27, Sp. L. November 1993, provided that the amendments to this section apply to tax years after December 31, 1993.

### 81-4-512. Disposition of proceeds — abandoned horse fund — use of fund.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 81-4-513. Report of roundup supervisor — disposition of copies.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

*1993 Special Session Amendment:* Chapter 27 in last sentence substituted "department of revenue" for "county assessor"; and made minor changes in style. Amendment effective January 1, 1994.

*Applicability:* Section 171(2), Ch. 27, Sp. L. November 1993, provided that the amendments to this section apply to tax years after December 31, 1993.

**Case Notes**

*Failure to Make Report:* The owner of abandoned range horses seeking to recover funds in the county treasury realized from their sale could claim only the balance in the county treasury over and above the charges against the horses for taxes, penalties, and roundup fees. Therefore, when there was no balance to be claimed, the owner's property rights were not affected by failure of the roundup foreman to make the report required by this section within the proper time. His contention that this section and 81-4-512 construed together were unconstitutional if not construed in a certain way could not be considered. Durocher v. Myers, 84 M 225, 274 P 1062 (1929).

### 81-4-516. Limitation of powers or duties of officers.

**Compiler's Comments**

*1993 Special Session Amendment:* Chapter 27 near end substituted "the department of revenue" for "assessors"; and made minor changes in style. Amendment effective January 1, 1994.

*Applicability:* Section 171(2), Ch. 27, Sp. L. November 1993, provided that the amendments to this section apply to tax years after December 31, 1993.

## Part 6
## Estrays

**Part Case Notes**

*Power to Seize Livestock:* Under former section 81-4-609 (repealed, 1989), the state Livestock Commission (now Board of Livestock) could seize any Montana livestock at any market outside the state where its inspector had reason to believe that the animals were stolen or where brands upon them appeared to have been altered or obliterated, leaving their ownership in doubt, and hold the proceeds pending decision as to their ownership. Schoenborn v. Williams, 83 M 477, 272 P 992 (1928).

### 81-4-601. Estray defined.

**Compiler's Comments**

*1993 Amendment:* Chapter 417 in introductory clause inserted "alpaca".

*1989 Amendment:* Near beginning of introductory clause inserted "llama, bison". Amendment effective March 20, 1989.

### 81-4-603. Taking up and disposition of estrays — advertisement.

**Compiler's Comments**

*2011 Amendment:* Chapter 403 in (1) near end and in (3) at beginning inserted exception clause; and made minor changes in style. Amendment effective May 13, 2011.

*2009 Amendments — Composite Section:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Chapter 269 in (1)(b) in first sentence near middle after "manner for" substituted "at least 10 days and not more than 30 days after public notice is published as provided in subsection (2)" for "a period of not less than 30 days or more than 60 days"; in (2) in first sentence at end substituted language concerning publishing on the department's website and in each livestock market brand office and county sheriff's office for "in addition to that paper in a paper published in the town or city nearest the place in which the estray is held" and in second sentence near beginning substituted "must be published in the newspaper at least one time" for "shall be published at least once a week for 4 consecutive weeks"; and made minor changes in style. Amendment effective October 1, 2009.

*1989 Amendment:* At end of (4) substituted "upon payment to the department of the cost of caring for the estray as determined by the department" for "without cost or expense to the owner". Amendment effective March 20, 1989.

### 81-4-605. Expenses, how paid — disposition of proceeds of sale.

**Compiler's Comments**

*1983 Amendment:* In (1) after "selling of the estray" inserted "including but not limited to labor, feed, supplies, and veterinary services"; and inserted (2) allowing the Department to adopt rules and establish fees for handling of estrays.

*Statement of Intent:* The statement of intent attached to Ch. 444, L. 1983, provided: "A statement of intent is required for Senate Bill 259 because section 4 [amending 81-1-102] grants the Department of Livestock authority to charge fees commensurate with costs and section 12 [amending this section] grants authority to establish rules for handling estrays.

The Legislature intends that the fees be set in an amount sufficient to provide funds to administer the function for which the fee is charged. Fees shall not be set so high as to generate revenue in excess of expenses. The Legislature intends that a penalty be established by rule for failure to apply for renewal of a license required by 81-22-208. The penalty should be sufficient to encourage renewal of licenses.

The Department is required by law to process estrays at livestock markets. Section 12 [amending this section] specifically grants the Department authority to establish rules for the handling of estrays. It is the intent of the Legislature that the rules provide for collecting, holding, advertising, and selling of estrays in an expeditious manner while facilitating the movement of livestock and also protecting the property interests of the owner of the livestock."

### 81-4-606. Publication of description of estrays sold — disposition of proceeds remaining in state treasury.

**Compiler's Comments**

*1983 Amendment:* Substituted reference to state special revenue fund for reference to earmarked revenue fund.

### 81-4-621. Penalties.

**Compiler's Comments**

*1995 Amendment:* Chapter 92 after "punishable" substituted "as provided in 46-18-212" for "by a fine of not less than $25 or more than $100 or by imprisonment in the county jail not exceeding 60 days or by both such fine and imprisonment"; and made minor changes in style.

*1989 Amendment:* Deleted former (2) and (3) that read: "(2) Every person, agent, firm, or corporation violating the provisions of 81-4-607 shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not exceeding $300 or imprisoned in the county jail not to exceed 6 months or both fined and imprisoned.

(3) Any person, agent, firm, corporation, pool, or roundup association who shall ship cattle from this state and shall fail to make such inspection or tally at point of loading or who shall fail to file a true and correct tally, to the best of his knowledge and belief, of all the brands of cattle in such shipment with the railroad agent at the point of shipment or who shall fail to forward a true and correct copy, duly signed by him as party making the shipment, to the stock inspector at point of destination or any person who shall accompany a shipment of cattle as the shipper in charge from this state and shall fail to take a description of any and every animal taken out in transit and hand such description to the stock inspector at point of destination or any stock inspector at market points who shall fail to make inspection as provided in 81-4-609 shall be deemed guilty of a misdemeanor and shall be subject to a fine of not less than $50 or more than $500 for each and every offense. The fines so collected, except those collected in a justice's court, shall be turned into the general fund of the county where conviction is had, and any stock inspector, sheriff, or other police officer shall have power to make arrests to enforce the provisions of this part." Amendment effective March 20, 1989.

*1987 Amendment:* In last sentence of (3), after "collected", inserted "except those collected in a justice's court".

# CHAPTER 5
# UNLAWFUL TRANSPORTING OR DRIVING OF LIVESTOCK

## Part 1
## Unlawful Driving of Animals

### 81-5-101. Moving livestock from customary range forbidden.

**Compiler's Comments**

*2011 Amendment:* Chapter 403 in (1) and (2) before "bison" inserted "domestic". Amendment effective May 13, 2011.

*1995 Amendment:* Chapter 92 in (1), before "customary range", inserted "owner's", after "owner" substituted "shall upon conviction be punished" for "is punishable", increased imprisonment from 90 days to 6 months, and increased fine from $100 to $500; inserted (2) concerning penalty for a person who negligently moves or causes to be moved certain livestock; inserted (3) requiring complaint to the Department prior to the imposition of the penalty; and made minor changes in style.

*1993 Amendment:* Chapter 417 after "llamas" inserted "alpacas"; and made minor changes in style.

*1989 Amendment:* Inserted reference to swine, llamas, and bison. Amendment effective March 20, 1989.

*1983 Amendment:* Substituted "moves" for "drives" and "moved" for "driven".

### 81-5-102. Driving animals upon railroad track.

**Compiler's Comments**

*1981 Amendment:* Subsections (3) and (4) of sec. 7, Ch. 198, L. 1981, provided: "(3) There is added to those sections listed in subsection (4) of this section, following any language in those sections specifying the term of imprisonment for which an offender may be imprisoned but without specifying a fine that may be ordered to be paid, the words "or shall be punished by a fine of not more than $50,000 or by both such fine and imprisonment", or other similar language allowing the court to fine the offender a maximum of $50,000 in lieu of imprisonment or to punish the offender by both a fine and imprisonment. The code commissioner shall change the listed sections in accordance with this section and may make minor incidental adjustments consistent with this section as may be necessary to reflect the intent of this section without changing the meaning of the listed sections as amended by this section.

(4) 13-27-205, 13-27-206, 19-11-207 [renumbered 19-18-207, 1993], 20-9-435, 23-5-106 (repealed, 1989), 30-13-142, 32-1-236, 32-1-473, 32-1-505, 45-5-104, 45-5-204, 45-5-105, 45-5-201, 45-5-203, 45-5-204, 45-5-304, 45-5-505, 45-5-603, 45-5-613, 45-5-621, 45-6-101 through 45-6-103, 45-6-204, 45-6-301, 45-6-316, 45-6-317, 45-6-325, 45-6-327, 45-7-101, 45-7-102, 45-7-201, 45-7-206 through 45-7-208, 45-8-106, 45-8-215, 45-8-318, 45-8-334, 45-8-335, 45-9-101(4), 45-9-102(4), 45-9-103(3), 45-9-107, 46-18-213, 46-18-502, 46-31-204, 50-38-107, 61-3-604, 81-5-102, and 81-9-118." See 46-18-231, also enacted by Ch. 198, L. 1981, which is related to the amendment of this section.

### 81-5-103. Abandonment of sheep — penalty.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 81-5-104. Stolen livestock — seizure and forfeiture of vehicle and certain other property used in theft or transportation.

**Compiler's Comments**

*2011 Amendment:* Chapter 403 in (1) before "bison" inserted "domestic". Amendment effective May 13, 2011.

*1995 Amendment:* Chapter 206 in (1) inserted "ostrich, rhea, emu"; and made minor changes in style.

*Applicability:* Section 14, Ch. 206, L. 1995, provided: "[This act] applies to tax years beginning after December 31, 1995."

*1993 Amendments — Composite Section:* Chapter 108 in (1), near beginning of first sentence after "vehicle", inserted "money, equipment, or personalty", before "transportation" inserted "theft or", and at end, after "unlawful", deleted "and such vehicle shall be forfeited to the state" and near beginning of second sentence, after "vehicle", inserted "money, equipment, or personalty"; and made minor changes in style.

Chapter 417 in (1), after "llama", inserted "alpaca"; and made minor changes in style.

Chapter 417 in (1) would have used "listed animals" rather than "stolen livestock". Because "livestock" is defined as a more inclusive term, the codifier has chosen to use that term rather than "listed animals".

*1989 Amendment:* In (1) inserted reference to llama and bison. Amendment effective March 20, 1989.

*1985 Amendment:* In (1), near end of first sentence, after "forfeited to", deleted "and confiscated by", at beginning of second sentence substituted "Any vehicle" for "Any such vehicle", and at end of second sentence, after "seized and held", deleted remainder of sentence that read: "and, upon conviction in a proceeding in the name of the state of Montana against such vehicle or against such vehicle and the owner before any district court or judge thereof, shall be confiscated and sold"; inserted (2) outlining forfeiture proceedings; in (3) in introductory clause substituted "A vehicle is not subject to forfeiture under this section" for "Such vehicle shall not be confiscated or subject to forfeiture"; and at end of (3)(a), substituted "or" for "and".

*Code Commissioner Correction:* The Code Commissioner has substituted the department of justice for the division of motor vehicles in this section, because sec. 14, Ch. 503, L. 1985, repealed 2-15-2002, which had statutorily created the division, and sec. 1, Ch. 503 amended Title 61, Motor Vehicles, to substitute "department" for "division" throughout that title. The apparent intent was to eliminate the statutory status of the division, and therefore the Code Commissioner has changed statutory references accordingly (see 1-11-101(2)(g)).

### 81-5-109. Presumption — hearing — disposition of vehicle and other property.

**Compiler's Comments**

*1993 Amendment:* Chapter 108 in (1), before "transportation", inserted "theft or"; in (4), in two places after "vehicle", inserted "money, equipment, or personalty"; and made minor changes in style.

### 81-5-110. Sale at public auction — retention of property.

**Compiler's Comments**

*2001 Amendment:* Chapter 554 in (3) at end substituted "deposited in the state general fund" for "placed in the special revenue account created in 81-5-111(2) for use by the department for personnel training or enforcement purposes". Amendment effective July 1, 2001.

*1993 Amendment:* Chapter 108 in (1), at beginning after "Vehicles", inserted "equipment, and personalty" and substituted "may" for "shall"; inserted (2) allowing the Department to retain vehicles, equipment, and personalty for official use; and inserted (3) providing for placement of forfeited money in the special revenue account.

*1985 Amendment:* At beginning of sentence substituted "Vehicles forfeited under 81-5-109 shall be sold" for "Such sale shall be"; after "public auction" deleted "and otherwise"; and near end of sentence substituted "may be sold" for "may be made".

### 81-5-111. Disposition of proceeds.

**Compiler's Comments**

*2001 Amendment:* Chapter 554 in (2) deleted former first sentence that read: "There is an account in the state special revenue fund" and at end substituted "state general fund" for "account, are statutorily appropriated, as provided in 17-7-502, and must be used by the department for personnel training or enforcement purposes"; and made minor changes in style. Amendment effective July 1, 2001.

*1993 Amendment:* Chapter 108 in (1), near beginning of first sentence, substituted "retaining the vehicle, equipment, or personalty" for "keeping the property", after "cost of the sale" substituted "the officer making the sale or the department, if it retains the vehicle, equipment, or personalty" for "so far as the balance of the sale proceeds permit", and near end, after "all liens", inserted "to the extent the balance of sale proceeds permit" and in second sentence, after "vehicle", inserted "equipment, or personalty", before "illegal" inserted "theft or", and after "transportation" deleted "and shall pay the balance of the proceeds to the treasurer of this state to be credited to the department of livestock fund"; inserted (2) establishing a state special revenue fund account and statutorily appropriating account proceeds for Department use; and made minor changes in style.

### 81-5-112. Permit system for transportation of sheep — penalty.

**Compiler's Comments**

*Repeal of Termination Date:* Section 1, Ch. 211, L. 1993, repealed sec. 4, Ch. 175, L. 1989, which provided that this section terminated September 30, 1993. Repealer effective July 1, 1993.

*1989 Statement of Intent:* The statement of intent attached to Ch. 175, L. 1989, provided: "A statement of intent for this bill is necessary because it requires the department of livestock to adopt rules implementing a permit system for the transportation of sheep within or out of the state. The legislature intends that the rules be designed to provide the owner with protection against the theft of his sheep by requiring a permit for the removal of sheep:

(a) from one county to another county within the state; and
(b) out of the state.

Provision must be made for the form of the permit and for issuance of the permit by state livestock inspectors. The department shall also determine a fee for the issuance of the permit, commensurate with the cost of operating the permit system.

It is the intent of the legislature that the department of livestock monitor this permit system to determine the system's effectiveness prior to the termination date of this legislation."

**Administrative Rules**

Title 32, chapter 2, subchapter 4, ARM Department of Livestock license fees, permit fees, and miscellaneous fees.

ARM 32.18.205 Sheep permit before removal from county or state.

**Collateral References**

Fee-Financed Government: Issues Raised by Licensing Boards and Other Agencies Before the 2013-2014 Economic Affairs Interim Committee, Interim Report, Mont. Leg. Serv. Div. (2014).

**81-5-121. Permit and inspection system for transportation of bison.**

**Compiler's Comments**

*Effective Date:* Section 13, Ch. 403, L. 2011, provided: "[This act] is effective on passage and approval." Approved May 13, 2011.

# CHAPTER 6
# LIVESTOCK PROTECTIVE ASSOCIATIONS

**Chapter Administrative Rules**

Title 32, chapter 22, ARM Vertebrate pest control.

## Part 1
## Livestock Protective Committees

**81-6-101. Petition for county livestock protective committee — members — term.**

**Compiler's Comments**

*2001 Amendment:* Chapter 574 at end of (5) deleted "and provided further that the levy as provided in 81-6-104 hereof shall, in the case of sheep, not exceed 5 cents per head"; and made minor changes in style. Amendment effective July 1, 2001.

*1987 Amendment:* In (1), at end of first sentence after "to do so", inserted "set up a county livestock protective committee of three members. The petition or petitions must be", after "petitioners" changed "owning" to "must own", and after "cattle" substituted "in the county" for "as shown by the most recent completed assessment records of the county assessor, set up a county livestock protective committee of three members".

**81-6-102. Organization of committee — officers — meetings.**

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

**81-6-104. Fee — special fund.**

**Compiler's Comments**

*2015 Amendment:* Chapter 40 in first sentence substituted "$1" for "50 cents". Amendment effective July 1, 2015.

*2013 Amendment:* Chapter 27 in first sentence substituted "the regular assessment date of each year as provided in 15-24-903" for "January 1"; and made minor changes in style. Amendment effective February 18, 2013.

*2001 Amendment:* Chapter 574 near beginning substituted "imposition of a fee" for "levy of a tax"; near middle after "commissioners" substituted "shall impose the fee, to be collected and deposited" for "shall thereupon be empowered to levy such tax, to be collected as other taxes on personal property and when collected to be deposited"; before "special deputy" substituted "livestock" for "stockmen's"; and made minor changes in style. Amendment effective July 1, 2001.

*1987 Amendment:* Near beginning substituted "cattle 9 months of age or older" for "assessable cattle".

**81-6-105. Special livestock deputy — duties — compensation.**

**Compiler's Comments**

*2003 Amendment:* Chapter 114 near end of last sentence substituted "livestock special deputy fund" for "stockmen's special deputy fund"; and made minor changes in style. Amendment effective October 1, 2003.

**81-6-106. Discontinuing county livestock protective committee.**

**Compiler's Comments**

*2001 Amendment:* Chapter 574 in second sentence in two places substituted "fee imposed" for "levy made"; and made minor changes in style. Amendment effective July 1, 2001.

## Part 2
## Cattle Protective Districts

### 81-6-204. Fee — deposit of proceeds — multiple-county district.

**Compiler's Comments**

*2015 Amendment:* Chapter 40 in first sentence substituted "$1" for "50 cents". Amendment effective July 1, 2015.

*2013 Amendment:* Chapter 27 in first sentence substituted "the regular assessment date of each year as provided in 15-24-903" for "January 1"; and made minor changes in style. Amendment effective February 18, 2013.

*2001 Amendment:* Chapter 574 near beginning after "commissioners" substituted "imposition of a fee" for "levy of a tax"; near middle after "commissioners" substituted "shall impose the fee, to be collected and deposited" for "shall thereupon be empowered to levy such tax, to be collected as other taxes on personal property and when collected to be deposited"; near end before "special deputy" substituted "livestock" for "stockmen's"; and made minor changes in style. Amendment effective July 1, 2001.

*1987 Amendment:* Near beginning substituted "cattle 9 months of age or older" for "assessable cattle".

### 81-6-205. Removal of area from protective district — discontinuance of district — fee saved.

**Compiler's Comments**

*2001 Amendment:* Chapter 574 in second sentence after "affect any" substituted "fee imposed" for "levy made" and after "proceeds of any" substituted "fee imposed" for "levy made"; and made minor changes in style. Amendment effective July 1, 2001.

### 81-6-209. Fee — deposit of proceeds — single-county district.

**Compiler's Comments**

*2015 Amendment:* Chapter 40 in first sentence substituted "$1" for "50 cents". Amendment effective July 1, 2015.

*2013 Amendment:* Chapter 27 in first sentence substituted "the regular assessment date of each year as provided in 15-24-903" for "January 1"; and made minor changes in style. Amendment effective February 18, 2013.

*2001 Amendment:* Chapter 574 near beginning substituted "imposition of a fee" for "levy of a tax"; near middle after "commissioners" substituted "shall impose the fee, to be collected and deposited" for "shall thereupon be empowered to levy such tax, to be collected as other taxes on personal property and when collected to be deposited"; before "special deputy" substituted "livestock" for "stockmen's"; and made minor changes in style. Amendment effective July 1, 2001.

*1987 Amendment:* Substituted "cattle 9 months of age or older" for "assessable cattle".

### 81-6-210. Discontinuance of district — fee saved.

**Compiler's Comments**

*2001 Amendment:* Chapter 574 in second sentence in two places substituted "fee imposed" for "levy made"; and made minor changes in style. Amendment effective July 1, 2001.

## Part 3
## Livestock Crimestoppers

**Part Compiler's Comments**

*Source:* 1979 N.M. Laws, Ch. 142 (Title 29, art. 12, N.M. Stat. Ann. (1978)).

*Statement of Intent:* The statement of intent attached to HB 667 (Ch. 571, L. 1983) provided: "A statement of intent is required for this bill because it grants rulemaking authority to the Department of Livestock for the purpose of administering the Livestock Crimestoppers Program.

It is contemplated that the Department establish rules for instituting an award program, including criteria to be used in determining who will receive the rewards and the amount of the rewards in order to guarantee that the rewards be granted through a reasonable and consistent procedure.

It is also contemplated that the Department delineate rules for guaranteeing the confidentiality of persons providing crime-related information. These rules must be in accordance with the constitutional right to know and the right of privacy, so that confidentiality will be maintained only when "the demand of individual privacy clearly exceeds the merits of public disclosure".

It is further intended that, to facilitate the transmitting of crime-related information from the public to the Department, the Department establish a toll-free telephone number throughout the state. This toll-free number should be publicized statewide on the radio and in the press."

**81-6-302. Definitions.**

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 1, Ch. 99, L. 2023. Amendment effective October 1, 2023.

*1995 Amendment:* Chapter 206 inserted (3) defining livestock to include ostriches, rheas, and emus; and made minor changes in style.

*Applicability:* Section 14, Ch. 206, L. 1995, provided: "[This act] applies to tax years beginning after December 31, 1995."

**81-6-313. Powers and duties of department — rules.**

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 2, Ch. 99, L. 2023. Amendment effective October 1, 2023.

*Statement of Intent:* The statement of intent attached to HB 667 (Ch. 571, L. 1983) provided: "A statement of intent is required for this bill because it grants rulemaking authority to the Department of Livestock for the purpose of administering the Livestock Crimestoppers Program.

It is contemplated that the Department establish rules for instituting an award program, including criteria to be used in determining who will receive the rewards and the amount of the rewards in order to guarantee that the rewards be granted through a reasonable and consistent procedure.

It is also contemplated that the Department delineate rules for guaranteeing the confidentiality of persons providing crime-related information. These rules must be in accordance with the constitutional right to know and the right of privacy, so that confidentiality will be maintained only when "the demand of individual privacy clearly exceeds the merits of public disclosure".

It is further intended that, to facilitate the transmitting of crime-related information from the public to the Department, the Department establish a toll-free telephone number throughout the state. This toll-free number should be publicized statewide on the radio and in the press."

# CHAPTER 7
# PREDATORY ANIMAL CONTROL

## Part 1
## Predatory Animal Control

**81-7-101. Definition.**

**Compiler's Comments**

*2001 Amendment:* Chapter 316 deleted references to gray wolf and lynx, inserted reference to red fox, and after "other" inserted "individual". Amendment effective April 21, 2001.

*Contingent Effective Date Repealed:* Section 9, Ch. 316, L. 2001, repealed sec. 7, Ch. 244, L. 1995, which would have made the 1995 amendments to this section effective whenever the gray wolf was removed from the list of threatened or endangered species by the appropriate agency of the United States government.

*1995 Amendment:* Chapter 244 in contingent version substituted "predatory animal" for "wild animal" and inserted "gray wolf"; and made minor changes in style.

*Contingent Effective Date:* Section 7, Ch. 244, L. 1995, provided: "[This act] is effective whenever the gray wolf is removed from the list of threatened or endangered species by the appropriate agency of the United States government."

**81-7-102. Department to supervise destruction of predatory animals — cooperation with other agencies — administration of money.**

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

*2001 Amendment:* Chapter 316 in (1) near beginning of first sentence after "destruction" deleted "extermination"; and made minor changes in style. Amendment effective April 21, 2001.

*Contingent Effective Date Repealed:* Section 9, Ch. 316, L. 2001, repealed sec. 7, Ch. 244, L. 1995, which would have made the 1995 amendments to this section effective whenever the gray wolf was removed from the list of threatened or endangered species by the appropriate agency of the United States government.

*1995 Amendment:* Chapter 244 in contingent version in three places substituted "predatory animals" for "wild animals"; and made minor changes in style.

*Contingent Effective Date:* Section 7, Ch. 244, L. 1995, provided: "[This act] is effective whenever the gray wolf is removed from the list of threatened or endangered species by the appropriate agency of the United States government."

**Administrative Rules**

Title 32, chapter 22, ARM Vertebrate pest control.

**81-7-103. Administration of funds by department.**

**Compiler's Comments**

*2011 Amendment:* Chapter 339 at beginning inserted exception clause; and made minor changes in style. Amendment effective July 1, 2011.

*2001 Amendment:* Chapter 316 in first sentence near beginning after "predatory animal" deleted "extermination and"; and made minor changes in style. Amendment effective April 21, 2001.

*1987 Amendment:* In first sentence, before "under 81-7-104", substituted "allocated for this purpose" for "from the levy".

**81-7-104. Predator control money — use of proceeds**

**Compiler's Comments**

*2011 Amendment:* Chapter 339 in (1) in first sentence at beginning inserted "In addition to the transfer provided for in 15-24-925"; and made minor changes in style. Amendment effective July 1, 2011.

*2001 Amendments — Composite Section:* Chapter 316 in (1) in last sentence after "animal destruction" deleted "extermination"; in (2) in second sentence after "systematic destruction" deleted "extermination"; and made minor changes in style. Amendment effective April 21, 2001.

Chapter 574 in (1) and (2) near beginning after "department" deleted "of livestock"; in (1) in first sentence after "from the" substituted "fee" for "levy"; and made minor changes in style. Amendment effective July 1, 2001.

*Contingent Effective Date Repealed:* Section 9, Ch. 316, L. 2001, repealed sec. 7, Ch. 244, L. 1995, which would have made the 1995 amendments to this section effective whenever the gray wolf was removed from the list of threatened or endangered species by the appropriate agency of the United States government.

*1995 Amendment:* Chapter 244 in contingent version in two places substituted "predatory animals" for "wild animals"; and made minor changes in style.

*Contingent Effective Date:* Section 7, Ch. 244, L. 1995, provided: "[This act] is effective whenever the gray wolf is removed from the list of threatened or endangered species by the appropriate agency of the United States government."

*1987 Amendment:* In (1), after "department of", substituted "livestock shall allocate a portion of the money from the levy under 15-24-921" for "revenue shall annually levy an ad valorem tax on all livestock in the state of Montana", after "protecting" substituted "livestock in the state" for "them", and deleted former third sentence that read: "The tax levy may not exceed in any one year 15 mills on the taxable value of all sheep and 10 mills on the taxable value of other livestock"; at beginning of (2) deleted "The moneys received from the tax levies shall be transmitted monthly with other taxes for state purposes by the county treasurer of each county to the state treasury. The state treasurer shall place the money in the state special revenue fund with the other moneys as provided in 81-7-119" and at beginning of second sentence substituted "Money designated for predator control" for "All the moneys"; and made minor changes in phraseology.

*1983 Amendment:* Substituted reference to state special revenue fund for reference to earmarked revenue fund (see 1987 amendment).

*1981 Amendment:* Increased the maximum mill levy on sheep from 7.5 mills to 15 mills in (1); and increased the maximum mill levy on other livestock from 5 mills to 10 mills in (1) (see 1987 amendment).

*Coordination — Effectiveness Contingent:* Section 3, Ch. 445, L. 1981, provided: "This act is effective only if Senate Bill 47 is passed by the 47th legislature and approved by the governor." Senate Bill 47 (Ch. 330, L. 1981) was approved April 11, 1981.

### 81-7-105. Disposition of proceeds from sale of skins, hides, and specimens — presenting to museums.

**Compiler's Comments**

*1983 Amendment:* Substituted reference to state special revenue fund for reference to earmarked revenue fund.

### 81-7-106. Predatory animal state special revenue account.

**Compiler's Comments**

*Extension of Termination Date:* Section 1, Ch. 20, L. 2023, and sec. 2, Ch. 20, L. 2023, amended sec. 13, Ch. 339, L. 2011, and sec. 5, Ch. 284, L. 2017, by extending the termination dates imposed by those sections to June 30, 2029. Effective February 28, 2023.

*Extension of Termination Date:* Section 5, Ch. 284, L. 2017, amended sec. 13, Ch. 339, L. 2011, by extending the termination date imposed by that section to June 30, 2023. Effective May 4, 2017.

*Effective Date:* Section 12, Ch. 339, L. 2011, provided that this section is effective July 1, 2011.

*Termination:* Section 13, Ch. 339, L. 2011, provided that subsection (3) of this section terminates June 30, 2017.

### 81-7-111. Evidence of killing by bounty claimant.

**Compiler's Comments**

*1997 Amendment:* Chapter 214 in (2), after "section", deleted "for wolves and coyotes" and at end substituted "the skins of other animals subject to this section" for "scalps of wolves and coyotes herein provided"; in (3) deleted reference to 81-7-119; and made minor changes in style.

### 81-7-113. Claim for bounty.

**Compiler's Comments**

*2001 Amendment:* Chapter 574 in (2) in first sentence near beginning after "two" substituted "residents" for "resident taxpayers" and after "that they are" substituted "residents paying fees" for "resident taxpayers" and at beginning of second sentence substituted "An individual" for "A taxpayer"; and made minor changes in style. Amendment effective July 1, 2001.

### 81-7-114. Certificate and record of sheriff.

**Compiler's Comments**

*2001 Amendment:* Chapter 574 in (1) in second sentence after "affidavits" deleted "of taxpayers" and deleted former fourth sentence that read: "When a doubt exists as to the kind of skin presented, whether wolf or coyote, the certificate must be issued for the lesser bounty." Amendment effective July 1, 2001.

*1997 Amendment:* Chapter 214 in (1), in first sentence at beginning, inserted reference to receipt of affidavit required pursuant to 81-7-113 and near middle, after "person", inserted "claiming a bounty", in second sentence inserted reference to 81-7-113, and in seventh sentence, near end, deleted reference to 81-7-119; and made minor changes in style.

### 81-7-115. Duty of county clerk.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 81-7-118. Fee for purpose of paying bounty claims — limitation on fee.

**Compiler's Comments**

*2001 Amendments — Composite Section:* Chapter 257 in two places substituted reference to department of revenue for reference to state treasurer. Amendment effective July 1, 2001.

Chapter 574 in first sentence near middle substituted "fee recommended by the department to be assessed" for "levy recommended by the department to be made"; deleted former second sentence that read: "The tax in any 1 year may not exceed 7.5 mills on the taxable value of the livestock"; and in third sentence substituted "fees imposed must be sent annually to the state treasurer" for "taxes levied must be sent annually with other taxes to the state treasurer". Amendment effective July 1, 2001.

*Applicability:* Section 49, Ch. 257, L. 2001, provided: "[This act] applies to remittances of state money made to the department of revenue for fiscal years beginning after June 30, 2001."

*Contingent Effective Date Repealed:* Section 9, Ch. 316, L. 2001, repealed sec. 7, Ch. 244, L. 1995, which would have made the 1995 amendments to this section effective whenever the gray wolf was removed from the list of threatened or endangered species by the appropriate agency of the United States government.

*1997 Amendment:* Chapter 214 at end of third sentence deleted reference to 81-7-119; and made minor changes in style.

*1995 Amendment:* Chapter 244 in contingent version in two places substituted "predatory animals" for "wild animals"; and made minor changes in style.

*Contingent Effective Date:* Section 7, Ch. 244, L. 1995, provided: "[This act] is effective whenever the gray wolf is removed from the list of threatened or endangered species by the appropriate agency of the United States government."

*1983 Amendment:* Substituted reference to state special revenue fund for reference to earmarked revenue fund.

### 81-7-120. Use of funds remaining after payment of bounties — sale of furs, skins, and specimens — presentation to museums.

**Compiler's Comments**

*1997 Amendment:* Chapter 214 in (1) and in second sentence of (2) deleted reference to 81-7-119; and made minor changes in style.

*1983 Amendment:* Substituted reference to state special revenue fund for reference to earmarked revenue fund.

### 81-7-121. Falsifying certificates or affidavits — penalty.

**Compiler's Comments**

*1997 Amendment:* Chapter 214 deleted reference to 81-7-119; and made minor changes in style.

### 81-7-122. Penalty for fraudulent claims.

**Compiler's Comments**

*1997 Amendment:* Chapter 214 in second sentence substituted "person, if any, reporting the evasion or violation" for "informer" and at end deleted reference to 81-7-119; and made minor changes in style.

*1983 Amendment:* Substituted reference to state special revenue fund for reference to earmarked revenue fund.

### 81-7-123. Voluntary wolf mitigation account.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 9, Ch. 507, L. 2023. Amendment effective July 1, 2023.

*Effective Date:* Section 5, Ch. 434, L. 2019, provided: "[This act] is effective July 1, 2019."

## Part 2
## County Bounty Program

### 81-7-201. County fee for bounties on predatory animals — definition.

**Compiler's Comments**

*2017 Amendment:* Chapter 78 in (1) inserted last sentence concerning the duration of the fee; inserted (2) concerning the bounty dollar amount for each predatory animal; inserted (3) concerning appointment of bounty inspectors; inserted (4) concerning the definition of predatory animal; and made minor changes in style. Amendment effective October 1, 2017.

*2001 Amendment:* Chapter 574 near beginning after "owners" deleted "agent", before "51%" substituted "of not less than" for "representing", near middle after "asking for the" substituted "imposition of a fee" for "levy of a tax" and after "commissioners" substituted "shall impose the fee on" for "to make the levy, which may not exceed 50 mills on the dollar of the taxable value of"; deleted former last sentence that read: "The tax shall be assessed and collected in the same manner as all other state and county taxes"; and made minor changes in style. Amendment effective July 1, 2001.

### 81-7-203. County bounty fund.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 81-7-204. Presentation of skins — affidavit.

**Compiler's Comments**

*2017 Amendment:* Chapter 78 in first sentence substituted "81-7-112 or 81-7-201" for "81-7-202"; and in third sentence after "each bounty inspector" deleted "provided for in this part". Amendment effective October 1, 2017.

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

## Part 3

## County Predator Control for Protection of Sheep

### 81-7-303. County commissioners permitted to require per capita license fee on sheep.

**Compiler's Comments**

*2017 Amendment:* Chapter 78 in (3) after "predatory animal control" substituted "including bounties paid pursuant to Title 81, chapter 7, part 2" for "only". Amendment effective October 1, 2017.

*2005 Amendments — Composite Section:* Chapter 12 in (3) inserted last sentence requiring interest earned on money in the fund to be deposited in the fund. Amendment effective March 15, 2005.

Chapter 176 inserted (4) authorizing money from any source to be deposited in the predatory animal control fund to be used for county predatory animal control to protect sheep. Amendment effective April 7, 2005.

*1999 Amendment:* Chapter 285 in (1) near middle inserted reference to 15-24-903 and near end substituted "subject to the per capita levy under the provisions of Title 15, chapter 24, part 9" for "subject to taxation under the provisions of 15-24-301"; in (2) near middle of first sentence substituted "upon the assessment record" for "upon the property tax record"; and made minor changes in style. Amendment effective January 1, 2003.

*Saving Clause:* Section 29, Ch. 285, L. 1999, was a saving clause.

*Severability:* Section 30, Ch. 285, L. 1999, was a severability clause.

*1993 Special Session Amendment:* Chapter 27 in (1), at end of first sentence, deleted "for sheep so owned or possessed by him in the county"; in (2), in first sentence, substituted "tax record" for "tax rolls" and "department of revenue" for "county assessor"; in (3), after "placed", deleted "by the treasurer"; and made minor changes in style. Amendment effective January 1, 1994.

*Applicability:* Section 171(2), Ch. 27, Sp. L. November 1993, provided that the amendments to this section apply to tax years after December 31, 1993.

*1981 Amendment:* Substituted "in an amount to be determined by the board on a per head basis" for "of not exceeding 50 cents per head" in (1).

### 81-7-305. Duty of county commissioners — petition of sheep owners — license fees.

**Compiler's Comments**

*2007 Amendment:* Chapter 297 in (1) in first sentence after "program" deleted "and its incidents as", in second sentence after "assessment" deleted "which petition shall be filed with the board of county commissioners on or before the first Monday in December in any year", inserted third sentence concerning time for filing and prohibiting withdrawal of signatures, and substituted fifth sentence concerning termination of program and ceasing levy for former language that read: "in which event the program shall by order of the board of county commissioners be disestablished and the license fee shall not be further levied"; in (2) near middle substituted "effect" for "force", after "board" deleted "of county commissioners", substituted "set" for "upon receipt of any such petition fix", and at end deleted "and the program shall thereupon continue within the limits of the aggregate amount of the license fee as collected from year to year"; and made minor changes in style. Amendment effective April 26, 2007.

*1981 Amendment:* Deleted language referring to the 50 cents per head limitation in both (1) and (2).

## Part 4

## Dogs

### 81-7-401. Killing of dogs harassing, destroying, or injuring stock — notice to owner — penalty.

**Compiler's Comments**

*1995 Amendment:* Chapter 206 in (1) inserted "including ostriches, rheas, and emus".

*Applicability:* Section 14, Ch. 206, L. 1995, provided: "[This act] applies to tax years beginning after December 31, 1995."

*1993 Amendment:* Chapter 106 inserted (1) defining harasses; in (2), near middle after "its owner", substituted "and on property owned, leased, or controlled by the livestock owner, harasses, kills, wounds, or injures" for "shall kill, wound, or injure any" and substituted "owner" for "master"; in (2)(a) substituted "the owner of the livestock or an agent or employee of the owner" for "any person"; in (2)(b), after "when", inserted "reasonably", after "notified" inserted "after due process", and after "24 hours" inserted "of notification"; inserted (3) requiring that a dog not be killed in a manner that will endanger a person; in (4) substituted "herding livestock" for "acting" and in two places substituted "owner" for "master"; inserted (5) excluding a dog engaged in sport hunting or predator control; inserted (6) providing a penalty; and made minor changes in style.

### Case Notes

*Lack of Evidence of Harassment by Dog — Conviction Upheld Despite Misapplication of Statute:* Walter shot a dog on March 7, 1993, and was subsequently convicted of misdemeanor cruelty to animals under 45-8-211. Walter defended on the basis that his actions were justified under this section. The Supreme Court held that Walter, the state, and the District Court applied the version of this section effective October 1993, but should have applied the version effective in March that did not authorize the shooting of a dog that harasses livestock. However, the Supreme Court also found that the Deputy Sheriff witness testified that there was no evidence that the dog was harassing livestock, as the owner of the sheep testified. Citing St. v. Bower, 254 M 1, 833 P2d 1106 (1992), the Supreme Court noted that the credibility of witnesses and weight of evidence are for the trier of fact to determine and, citing Higham v. Red Lodge, 247 M 400, 807 P2d 195 (1991), that the Supreme Court will affirm a correct result regardless of the reasoning used by the lower court. Because there was no evidence of any action by the dog falling within either version of this section the Supreme Court affirmed the conviction. St. v. Walter, 266 M 429, 880 P2d 1346, 51 St. Rep. 903 (1994).

*Application of Section:* This section applied to any dog regardless of its value. Granier v. Chagnon, 122 M 327, 203 P2d 982 (1949).

*"Livestock" Defined:* "Livestock" as employed in this section meant domestic animals or beasts generally collected, used, or raised on a farm or ranch, such as cattle, sheep, swine, goats, horses, mules, donkeys, and similar stock. (See 1995 amendment.) Granier v. Chagnon, 122 M 327, 203 P2d 982 (1949).

*Sufficiency of Evidence:* In action for damages for killing of dog, evidence that defendant had suffered the loss of several sheep due to unidentified raiders and that on one occasion when there was a disturbance among the sheep, the defendant with others went to the place from which the sheep came and finding a dog tearing at a freshly killed sheep, killed the dog, was sufficient to sustain a verdict in favor of defendant although there was no evidence that anyone had seen the dog kill the sheep. Granier v. Chagnon, 122 M 327, 203 P2d 982 (1949).

## 81-7-402. Liability of owner of dog for damages to livestock or poultry.

### Case Notes

*Common-Law Rule Regarding Killing of Dog in Defense of Property Not Abrogated by Statute:* The defendant acted reasonably under the common law when he shot the dog that was killing his chickens. At common law, an owner of domestic fowl has a right to kill a dog attacking or menacing their safety if it is necessary for their protection, and that right was not abrogated by this section on the subject that does not limit, either expressly or impliedly, that right. Grabenstein v. Sunsted, 237 M 254, 772 P2d 865, 46 St. Rep. 780 (1989). See also St. v. Walter, 266 M 429, 880 P2d 1346, 51 St. Rep. 903 (1994).

## 81-7-403. Dogging livestock.

### Compiler's Comments

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

*1993 Amendment:* Chapter 106 at end increased penalty from $50 to $500.

## Part 5
## Aerial Hunting of Predatory Animals

### 81-7-501. Aerial hunting prohibited — exceptions.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

*Contingent Effective Date Repealed:* Section 9, Ch. 316, L. 2001, repealed sec. 7, Ch. 244, L. 1995, which would have made the 1995 amendments to this section effective whenever the gray wolf was removed from the list of threatened or endangered species by the appropriate agency of the United States government.

*1995 Amendment:* Chapter 244 in contingent version in three places substituted "predatory animals" for "wild animals"; and made minor changes in style.

*Contingent Effective Date:* Section 7, Ch. 244, L. 1995, provided: "[This act] is effective whenever the gray wolf is removed from the list of threatened or endangered species by the appropriate agency of the United States government."

*1983 Amendment:* In (1) inserted last sentence requiring the permit to specify the species to be hunted and the area over which hunting may take place.

### 81-7-502. Rulemaking authority.

**Compiler's Comments**

*Statement of Intent:* The statement of intent attached to SB 497 (Ch. 704, L. 1979) provided: "Section 4 [81-7-503, now repealed] of this bill requires the Department of Livestock to adopt rules regulating aerial hunting. It is the intent of this bill that any rules so adopted not interfere with the needs of livestock producers protecting their livestock from predation. At the same time it is the intent of this bill that such rules protect the interests of persons who do not wish aerial hunting to occur over land in their control. Finally, such rules shall reflect the purpose that aerial hunting is permitted for the purpose of reducing livestock losses due to predation." The reference in this statement of intent to section 4 is apparently in error. Section 2, codified as 81-7-502, is apparently the correct reference, because it provides for rulemaking authority.

**Administrative Rules**

Title 32, chapter 22, subchapter 1, ARM Aerial hunting.

### 81-7-504. Duration of permit — fee.

**Compiler's Comments**

*2019 Amendment:* Chapter 301 substituted current second through fourth sentences regarding deposit requirements and limits on use for administrative expenses for "All fees for permits shall be paid to the department of livestock for deposit in the state treasury to the credit of the state special revenue fund for predatory animal control." Amendment effective July 1, 2019.

*1983 Amendments:* Chapter 277 substituted reference to state special revenue fund for reference to earmarked revenue fund.

Chapter 444 substituted fee established by the department for a permit for $50 or a portion thereof if a period of less than 1 year.

**Administrative Rules**

Title 32, chapter 2, subchapter 4, ARM Department of Livestock license fees, permit fees, and miscellaneous fees.

Title 32, chapter 22, subchapter 1, ARM Department of Livestock aerial hunting permits.

ARM 32.22.102 Vertebrate pest control — aerial hunting — issuance of permits.

### 81-7-505. Resident landowners authorized to aerially hunt over their own lands without permit — conditions.

**Compiler's Comments**

*Contingent Effective Date Repealed:* Section 9, Ch. 316, L. 2001, repealed sec. 7, Ch. 244, L. 1995, which would have made the 1995 amendments to this section effective whenever the gray wolf was removed from the list of threatened or endangered species by the appropriate agency of the United States government.

*1995 Amendment:* Chapter 244 in contingent version substituted "predatory animals" for "wild animals"; and made minor changes in style.

*Contingent Effective Date:* Section 7, Ch. 244, L. 1995, provided: "[This act] is effective whenever the gray wolf is removed from the list of threatened or endangered species by the appropriate agency of the United States government."

*1983 Amendment:* Near end of first sentence substituted "aerially" for "aerial".

### 81-7-511. Penalty — revocation of permit.

**Compiler's Comments**

*1983 Amendment:* Substituted present language for: "(1) Any person violating any provision of this part who is permitted to engage in aerial hunting pursuant to this part is guilty of a misdemeanor.

(2) A conviction for a violation of subsection (1) is punishable by a fine of not more than $500.

(3) Any person who is not permitted to engage in aerial hunting pursuant to this part who violates any provisions of this part is guilty of a misdemeanor, and upon conviction is punishable by a fine of not less than $250 or more than $1,000. A subsequent conviction under this subsection is punishable by a fine of not less than $500 or more than $1,000.

(4) The justice court has jurisdiction over violations of this part.

(5) The department may revoke or suspend the permit of anyone violating its terms."

**Administrative Rules**

ARM 32.22.106 Vertebrate pest control — aerial hunting — revocation, suspension, or modification of permit.

## Part 6
## County Predator Control for Protection of Cattle

### 81-7-603. County commissioners permitted to require per capita license fee on cattle.

**Compiler's Comments**

*2017 Amendment:* Chapter 78 in (3) in second sentence substituted "for predatory animal control, including bounties paid pursuant to Title 81, chapter 7, part 2" for "only for the predatory animal control program". Amendment effective October 1, 2017.

*2015 Amendment:* Chapter 54 in (2) in second sentence after "payable to" inserted "and must be collected by"; and made minor changes in style. Amendment effective January 1, 2016.

*Applicability:* Section 7, Ch. 54, L. 2015, provided: "[This act] applies to tax years beginning after December 31, 2015."

*2005 Amendments — Composite Section:* Chapter 12 in (3) inserted last sentence requiring interest earned on money in the fund to be deposited in the fund; and made minor changes in style. Amendment effective March 15, 2005.

Chapter 176 inserted (4) authorizing money from any source to be deposited in the predatory animal control fund to be used for county predatory animal control to protect cattle. Amendment effective April 7, 2005.

*1999 Amendment:* Chapter 285 in (1) in first sentence inserted reference to 15-24-903 and near end substituted "subject to the per capita levy under the provisions of Title 15, chapter 24, part 9" for "subject to taxation under the provisions of 15-24-301"; and in (2) in first sentence substituted "upon the assessment record" for "upon the property tax record". Amendment effective January 1, 2003.

*Saving Clause:* Section 29, Ch. 285, L. 1999, was a saving clause.

*Severability:* Section 30, Ch. 285, L. 1999, was a severability clause.

### 81-7-605. Duty of county commissioners — petition of cattle owners — license fees.

**Compiler's Comments**

*2007 Amendment:* Chapter 297 in (1) in second sentence near middle after "assessment" deleted "which petition must be filed with the board of county commissioners on or before the first Monday in December in any year", inserted third sentence concerning filing of petition and prohibiting withdrawal of signatures, and in fifth sentence after "board" deleted "of county commissioners"; in (2) in two places after "board" deleted "of county commissioners" and near middle substituted "effect" for "force"; and made minor changes in style. Amendment effective April 26, 2007.

# CHAPTER 8
# MARKETING

**Chapter Administrative Rules**

Title 32, chapter 15, ARM Marketing of livestock.

## Part 2
## Livestock Markets and Dealers

**Part Compiler's Comments**

*Transition:* Section 34, Ch. 566, L. 1979, provided: "Licenses and certificates issued before and still in effect on July 1, 1979, are valid until May 1, 1980, unless suspended or revoked pursuant to this act. The actions of persons holding such existing licenses and certificates are governed by this act."

*Severability:* Section 35, Ch. 566, L. 1979, provided: "If a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications."

### 81-8-213. Definitions.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 1, Ch. 37, L. 2023. Amendment effective March 2, 2023.

*1995 Amendment:* Chapter 160 inserted definition of custodial account for shippers' proceeds or custodial account; in definition of livestock dealer inserted (a)(iii) concerning purchases on a commission or fee basis for others or for dealer or market and inserted (b) excluding a farmer or rancher; inserted definition of satellite video livestock auction market or video auction market; and made minor changes in style.

*1989 Amendment:* Inserted definition of immediate resale; substituted definition of livestock dealer for former definition that read: ""Livestock dealer" means a person engaged in the business of buying or selling livestock. It does not include a farmer or rancher who buys or sells livestock in the ordinary course of his farming or ranching operation"; and made minor changes in form. Amendment effective April 1, 1989.

*1985 Amendment:* Deleted former (4) that read: ""Livestock broker" means a business, not including facilities, conducted for the receiving, handling, and care of livestock and involving livestock purchased by it for its own account for resale, for the account of any principal for delivery to him, or for slaughter. It does not include a farmer or rancher who buys or sells livestock in the ordinary course of his farming or ranching operation"; and in definition of livestock dealer substituted "a person engaged in the business of buying or selling livestock" for "a business conducted in facilities utilized for the receiving, handling, and care of livestock purchased by it for its own account for resale, for the account of any principal for delivery to him, or for slaughter".

### 81-8-214. Regulation of certain nonmarket sales.

**Compiler's Comments**

*1995 Amendment:* Chapter 11 in (2)(e), after "bond", inserted "or its equivalent"; and made minor changes in style.

*Severability:* Section 5, Ch. 11, L. 1995, was a severability clause.

**Administrative Rules**

Title 32, chapter 15, subchapter 7, ARM Association and test station sales.

### 81-8-215. Quarantine of diseased animals.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

**Administrative Rules**

ARM 32.15.204 Animal health requirements for livestock markets — quarantine pens.
ARM 32.15.207 Handling of animals found to be diseased or condemned.

### 81-8-216. Penalties.

**Compiler's Comments**

*1993 Amendment:* Chapter 5 in (3) made separate felony offenses of the knowing failure to establish a custodial account and the improper use of a custodial account; and made minor changes in style.

*1989 Amendment:* Near beginning of (1) inserted "knowingly"; and inserted (3) setting penalty for misuse and abuse of a custodial account.

*1987 Amendments:* Chapter 370 in (1), in two places, deleted reference to 81-8-257.

Chapter 557 near beginning of (2), after "section", inserted "except those assessed and collected in a justice's court".

*1985 Amendment:* In (1) near middle of second sentence, after "rules adopted", substituted "to implement those sections" for "under 81-8-231"; and inserted (2) providing for the disposition of fines.

### 81-8-231. Duties of department.

**Compiler's Comments**

*1995 Amendment:* Chapter 11 at end of (1) inserted "and periodically audit the records of those markets and dealers".

*Severability:* Section 5, Ch. 11, L. 1995, was a severability clause.

*1985 Amendment:* In (1), (2), and (4) after "livestock markets," deleted "livestock brokers".

*Statement of Intent:* The statement of intent attached to HB 800 (Ch. 566, L. 1979) provided: "The purpose of the 'Montana Livestock Marketing Act' as stated in the bill is to simplify, clarify, and modernize the law governing livestock marketing businesses and livestock marketing transactions; to promote open, free, and competitive factors in the market place in relation to all market conditions involving the sale and purchase of livestock; and to encourage, stimulate, and stabilize the livestock economy of the state.

The Department of Livestock is given, under section 4 [81-8-231], authority to enforce and to adopt rules necessary to carry out the act. It is the legislative intent in delegating this rulemaking authority that the discretion granted the Department of Livestock is for the purpose of supervising and regulating livestock markets, livestock brokers, and livestock dealers in the state; of regulating the properties, facilities, operations, services, and practices of all livestock markets, livestock brokers, and livestock dealers; and of supervising and regulating livestock markets in all matters affecting the relationship between the livestock market and owners of livestock and between the livestock markets and purchasers of livestock.

A major concern of the act is to establish stiff penalties for unfair, deceptive, and fraudulent market practices. It is intended that by providing stricter penalties and that by giving the Department of Livestock authority to assess civil penalties for some violations, livestock marketing in Montana will be strengthened.

It is the intent of this bill that in the adoption of rules under section 4 [81-8-231] and in the general enforcement of this act that the Livestock Department's first function is to protect livestock producers consigning livestock to markets or selling livestock to or through dealers and brokers. Secondly, it is the intent of the legislature that so long as the purpose of protecting livestock producers is met, the enforcement and rules under this act not unduly interfere with the operations of the businesses of livestock markets, livestock dealers, and livestock brokers."

**Administrative Rules**

Title 32, chapter 15, ARM Marketing of livestock.

### 81-8-232. Posting of certificate or license.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 81-8-233. Title warranty of livestock sold.

**Compiler's Comments**

*1985 Amendment:* Near beginning of first sentence, after "livestock market," deleted "livestock broker".

**Case Notes**

*Duty of Livestock Market — Meaning of "Rightful Owner":* The term "rightful owner" in this section refers to the owner as determined by the Department of Livestock under 81-3-203. A livestock market has no duty to go beyond the directions of the state inspector in the certificate of inspection in ascertaining the name of the true owner of cattle. Eberl v. Scofield, 244 M 515, 798 P2d 536, 47 St. Rep. 1780 (1990).

### 81-8-234. Financial responsibility.

**Compiler's Comments**

*1985 Amendment:* Near beginning of (1) after "livestock market", deleted "livestock broker".

### 81-8-235. Penalties for financial violations.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

*1985 Amendment:* In (3) substituted present language providing a penalty for issuance of bad checks and failure to make good a check within 5 days after notice of nonpayment for "The maker of any bankable instrument who knowingly and without right fails to honor or causes another to dishonor that instrument once it is issued or delivered in payment for a livestock purchase is guilty of a felony and on conviction may be imprisoned for not more than 5 years or fined not more than $10,000, or both".

### 81-8-236. Injunctive remedy.

**Compiler's Comments**

*1985 Amendment:* In first and second sentences deleted references to "livestock broker".

### 81-8-251. Certificate to operate livestock market required — application.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 2, Ch. 37, L. 2023. Amendment effective March 2, 2023.

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

**Attorney General's Opinions**

*Applicability to National Farmers Organization:* The Livestock Dealer Act (81-8-201 through 81-8-210, since repealed) did not require the licensing of the National Farmers Organization as a livestock dealer in order to lawfully act in the sale of livestock owned by its members. 37 A.G. Op. 91 (1977).

### 81-8-252. Hearing on application for certificate — decision.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 3, Ch. 37, L. 2023. Amendment effective March 2, 2023.

*1987 Amendment:* Near end of (1) inserted language excluding financial statement; and made minor changes in phraseology.

### 81-8-256. Fee to operate livestock market.

**Compiler's Comments**

*1983 Amendments:* Chapter 277 substituted reference to state special revenue fund for reference to earmarked revenue fund.

Chapter 444 substituted a fee established by the department for a fee of $100.

**Administrative Rules**

Title 32, chapter 2, subchapter 4, ARM Department of Livestock license fees, permit fees, and miscellaneous fees.

### 81-8-261. Inspection of public markets.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 81-8-263. Duties when ownership in doubt.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 81-8-264. Livestock video auction — license to transact business — license fee — contract — renewal.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 4, Ch. 37, L. 2023. Amendment effective March 2, 2023.

### 81-8-265. Refusal to issue or renew license — suspension or revocation.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 5, Ch. 37, L. 2023. Amendment effective March 2, 2023.

### 81-8-271. License to operate as livestock dealer — application.

**Compiler's Comments**

*1995 Amendment:* Chapter 11 in (1)(d), after "bond", inserted "or its equivalent"; and made minor changes in style.

*Severability:* Section 5, Ch. 11, L. 1995, was a severability clause.

*1989 Amendment:* In (1)(d) substituted "proof of acquisition of a bond from the packers and stockyards administration of the United State department of agriculture" for "a detailed financial statement setting forth all assets and liabilities of the applicant pertinent to the business for which the license is sought"; and made minor changes in phraseology. Amendment effective April 1, 1989.

*1985 Amendment:* In (1) near beginning of first and second sentences, before "livestock dealer", deleted "livestock broker or"; deleted former (1)(e) that read: "if the applicant is a livestock dealer, a description of the facilities at which he proposes to operate"; in (2) before "livestock dealer's license", deleted "livestock broker's or"; and inserted (3) requiring an agent of a livestock dealer to possess a livestock dealer's license when engaging in the purchase or sale of livestock.

### 81-8-272. Issuance of livestock dealer's license.

**Compiler's Comments**

*1985 Amendment:* Near middle of section substituted "operate as a livestock dealer" for "engage in the business specified in his application".

### 81-8-273. Refusal to issue or renew license.

**Compiler's Comments**

*1989 Amendment:* Deleted former (1)(g) that read: "(g) has not filed a surety bond in the form and amount required under 81-8-277"; and made minor changes in form. Amendment effective April 1, 1989.

*1985 Amendment:* Inserted (1)(j) requiring nonissuance or nonrenewal of license for an applicant suspended under the Packers and Stockyards Act; and inserted (2) providing a 1-year period following license refusal prior to reapplication.

### 81-8-274. Suspension or revocation of license.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

*1985 Amendment:* Near beginning of (1) before "livestock dealer", deleted "livestock broker or".

### 81-8-275. Termination of license.

**Compiler's Comments**

*1989 Amendment:* Deleted second sentence that read: "Termination of the license will automatically occur if the bond required by 81-8-277 is terminated"; and made minor change in phraseology. Amendment effective April 1, 1989.

### 81-8-276. Annual fee and financial statement.

**Compiler's Comments**

*1989 Amendment:* Near middle of first sentence inserted "when requested by the department shall". Amendment effective April 1, 1989.

*1985 Amendment:* At beginning of section before "dealers", deleted "brokers and livestock".

*1983 Amendment:* Substituted a fee established by the department for a fee of $50.

**Administrative Rules**

Title 32, chapter 2, subchapter 4, ARM Department of Livestock license fees, permit fees, and miscellaneous fees.

### 81-8-278. Records.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

*1985 Amendment:* At beginning of first and second sentences, before "livestock dealer", deleted "livestock broker or".

### 81-8-279. Penalties.

**Compiler's Comments**

*1989 Amendment:* In (1), near beginning, deleted reference to 81-8-277; and made minor changes in phraseology. Amendment effective April 1, 1989.

*1987 Amendment:* Near beginning of (2), after "section", inserted "except those assessed and collected in a justice's court".

*1985 Amendment:* In middle of (1) after "department", substituted "to implement those sections" for "under 81-8-231"; and inserted (2) providing for disposition of fines.

## Part 3
## Security Interests Concerning Livestock

**Part Case Notes**

*Unconstitutional Application:* The Writ of Attachment statute, as applied, was violative of the notice and opportunity to be heard requirements as guaranteed by the Due Process Clause of the United States Constitution. Williams v. Matovich, 172 M 109, 560 P2d 1338 (1977).

### 81-8-301. Notices of security agreements — renewals — assignments.

**Compiler's Comments**

*1981 Amendment:* Substituted the second sentence in (1), providing for departmental transfer of copies of notices and brands to the central livestock markets, for "The department shall also list the notices in the offices of the stock inspectors employed by the department and stationed at the central livestock markets where records are kept of marks and brands."; inserted "and a copy is transferred" after "is filed" in the fourth sentence of (1); added the last sentence in (1) disallowing Department liability for proceeds of livestock sold through a livestock market by a debtor; inserted (2) relating to renewal of notices of security interests; inserted (3) relating to renewal of assignments of security interests; inserted (4) requiring termination of notices upon failure to renew; and inserted (5) requiring immediate filing of satisfactions of security agreements with the Department.

**Attorney General's Opinions**

*Title Information:* In enacting this section the Legislature did not intend to require the Department to act as an insurer of title to livestock; rather, the intent was to provide a clearinghouse at each major market where title information on branded livestock would be readily available. 38 A.G. Op. 69 (1980).

*Change of Policy — Registering Security Interest in Livestock:* By following the Montana Administrative Procedure Act, Title 2, ch. 4, part 3, the Department could adopt a new policy interpreting its responsibilities under this section. The policy did not need to provide the markets with tally sheets giving the state of title of individual animals or groups of animals. 38 A.G. Op. 69 (1980).

### 81-8-302. Contents of notices.

**Compiler's Comments**

*1995 Amendment:* Chapter 11 inserted last sentence requiring a notice of security agreement to be signed by the affected debtor or proper legal authority; and made minor changes in style.

*Severability:* Section 5, Ch. 11, L. 1995, was a severability clause.

### 81-8-303. Duty of secured parties to file satisfactions of security agreements.

**Case Notes**

*Plaintiff's Failure to Establish Actual Damages by Defendant's Conduct — Summary Judgment on Punitive Damage Claim Affirmed:* Stipe asserted that defendant intentionally and maliciously violated 81-8-303 and that because of defendant's negligence per se, punitive damages were proper. However, Stipe failed to establish that any actual damages were suffered. Actual damages are a predicate for punitive damages, and a person with no real or actual damages has no right of action for punitive damages. Thus, the District Court did not err in summarily dismissing Stipe's claim for punitive damages absent a showing of actual damages. Stipe v. First Interstate Bank-Polson, 2008 MT 239, 344 M 435, 188 P3d 1063 (2008), following Paulson v. Kustom Enterprises, Inc., 157 M 188, 483 P2d 708 (1971).

### 81-8-304. Fees.

**Compiler's Comments**

*1983 Amendments:* Chapter 277 substituted reference to state special revenue fund for reference to earmarked revenue fund.

Chapter 444, near end of section after "cost to the department", deleted "not to exceed $15".

**Administrative Rules**

Title 32, chapter 2, subchapter 4, ARM Department of Livestock license fees, permit fees, and miscellaneous fees.

Title 32, chapter 15, subchapter 6, ARM Brand-mortgage filings.

### 81-8-305. Department of livestock not responsible for collection or payment of money under security agreements.

**Case Notes**

*Seizure and Sale by Inspector:* When a livestock inspector seized and sold a cow under the provisions of section 3327.1, R.C.M. 1935 (now repealed), believing it to have been stolen, and at the time there were notices of a chattel mortgage and a renewal thereof on file in the office of the state Livestock Commission (now Board of Livestock), contention of claimant of the animal that the inspector had no reason for suspecting the animal had been stolen but acted as a collector of the mortgage contrary to the provisions of law was not meritorious. Bohart v. Songer, 110 M 405, 101 P2d 64 (1940).

### 81-8-311. Range stock — taking possession under process.

**Case Notes**

*Burden of Proof:* In an action for damages for the conversion of certain horses, alleged to have been attached as range stock, the complaint had to show that the horses referred to were range stock within the meaning of the statute. Harmon v. Comstock Horse & Cattle Co., 9 M 243, 23 P 470 (1890).

### 81-8-312. Possession under a mortgage — how acquired.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

**Case Notes**

*Sale Fraudulent as Against Creditors:* When the purchaser of a band of horses, then on the open range, did not take actual possession of them or file a copy of the bill of sale with a notice of his claim in the proper office, as required by this section, or rebrand them, he did not obtain constructive possession of them as against the claim of the vendor's creditors. As to them the transaction was fraudulent in law. Anderson v. Hoffman, 99 M 146, 43 P2d 644 (1935).

### 81-8-315. Sale of property under supplementary writ.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

## Part 4
## Sale of Baby Animals

### 81-8-401. Certain dealings in baby animals unlawful.

**Compiler's Comments**

*1985 Amendment:* In (1) at beginning inserted exception clause and at end after "corporation", deleted "other than a hatchery, feed store, or breeder of fowl or rabbits"; and near end of (2) deleted "avicultural" before "breeding".

### 81-8-402. Penalties.

**Compiler's Comments**

*1985 Amendment:* Near middle of section substituted "one excepted in 81-8-401(2)" for "a hatchery, feed store, or breeder of fowl or rabbits".

## Part 5
## Sale of Registered Livestock

### 81-8-503. Expenditures for purebred livestock shows and sales.

**Compiler's Comments**

*2001 Amendment:* Chapter 574 near middle substituted "an amount" for "not to exceed a sum equal to a levy of one-fourth mill on the taxable property of the county"; and made minor changes in style. Amendment effective July 1, 2001.

### 81-8-504. Tax levy authorized.

**Compiler's Comments**

*2005 Amendment:* Chapter 453 at end of first sentence deleted "in excess of the amount levied for county purposes"; and made minor changes in style. Amendment effective July 1, 2005.

*2001 Amendment:* Chapter 574 near middle of first sentence substituted "levy a tax on the taxable value of all taxable property" for "levy annually a tax not to exceed one-fourth mill on the taxable property"; and made minor changes in style. Amendment effective July 1, 2001.

*1999 Amendment:* Chapter 584 inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

*Severability:* Section 172, Ch. 584, L. 1999, was a severability clause.

*Retroactive Applicability:* Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

## Part 7
## Quality Label

### 81-8-702. Montana quality label.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 81-8-704. Procurement and use of labels — information concerning — disposal of moneys.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

## Part 9
## Beef Promotion and Marketing

### 81-8-901. Beef promotion and marketing — powers and duties of department — contract.

**Compiler's Comments**

*2013 Amendment:* Chapter 100 in (2)(a) near middle after "collected" inserted "by department employees and deposited in the state treasury" and at end inserted "during regularly scheduled financial compliance audits"; in (2)(b) at end inserted "by department employees and deposited in the state treasury"; and made minor changes in style. Amendment effective October 1, 2013.

*Applicability:* Section 2, Ch. 100, L. 2013, provided: "[This act] applies to contracts between the department of livestock and the Montana beef council that are effective on or after October 1, 2013."

*2011 Amendment:* Chapter 417 in (1)(a) at beginning substituted "enter into a" for "cooperate and", substituted "to collect on behalf of the beef council" for "for collecting", substituted "cattle sold" for "livestock", inserted "7 U.S.C. 2901 through 2911", and inserted "and 7 CFR, part 1260, subpart A"; in (2)(a) substituted current text for "Any contract agreed to between the department and the beef council must reimburse the department for all expenses incurred through the collection activities"; inserted (2)(b) concerning obligation of department to contract for the collection of fee; and made minor changes in style. Amendment effective July 1, 2011.

*1995 Statement of Intent:* The statement of intent attached to Ch. 102, L. 1995, provided: "A statement of intent is required for this bill because [section 1] [81-8-901] grants rulemaking authority to the department of livestock to implement the provisions of this bill. It is intended that the department adopt rules regarding the collection of the assessment on livestock in a manner that ensures reimbursement for the department's administrative costs without imposing liability on the department for collection of the assessment or linking collection with the department's regular livestock inspection duties."

**81-8-902. Department not liable for collection of assessment — inspection.**

**Compiler's Comments**

*2011 Amendment:* Chapter 417 in (1) substituted "a livestock owner's compliance with the requirement to pay the assessment" for "the collection or payment of money"; and in (1) after "pursuant to" and in (2) at end substituted "81-8-901" for "81-8-901(1)". Amendment effective July 1, 2011.

# CHAPTER 9
# SLAUGHTER

**Chapter Administrative Rules**

Title 32, chapter 6, ARM Animal feeding, slaughter, and disposal.

## Part 1
## General Provisions

**81-9-111. Hide certificates — inspection of hides before disposal — person slaughtering cattle or horses to exhibit hides.**

**Compiler's Comments**

*2009 Amendments — Composite Section:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Chapter 416 in (1) in two places, in (2) near end, and in (3) near beginning after "cattle" inserted "or horses"; and made minor changes in style. Amendment effective October 1, 2009.

**81-9-112. Inspection and marking of hides and meat of slaughtered cattle or horses — records — bill of sale — when inspection not necessary.**

**Compiler's Comments**

*2009 Amendments — Composite Section:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Chapter 416 in (2) in second sentence after "brand on the hide" inserted "if applicable"; in (3) in second and third sentences after "cattle" inserted "or horses"; in (4) near beginning after "kills" substituted "livestock" for "beef or veal"; and made minor changes in style. Amendment effective October 1, 2009.

*1987 Amendment:* In (1), at beginning, substituted "All slaughtering establishments required to be licensed under 81-9-201" for "All butchers and meat peddlers"; and in (2), near middle of second sentence, substituted "the name and address of the establishment or person" for "the butcher's or peddler's name, the place of business".

**Administrative Rules**

Title 32, chapter 2, subchapter 4, ARM Department of Livestock license fees, permit fees, and miscellaneous fees.

Title 32, chapter 18, subchapter 4, ARM Marking of beef and veal hides and carcass parts.

**81-9-113. Fees for inspection.**

**Compiler's Comments**

*1983 Amendments:* Chapter 277 substituted reference to state special revenue fund for reference to earmarked revenue fund.

Chapter 444 substituted a fee established by the department for a fee of 25 cents per head.

**Collateral References**

Fee-Financed Government: Issues Raised by Licensing Boards and Other Agencies Before the 2013-2014 Economic Affairs Interim Committee, Interim Report, Mont. Leg. Serv. Div. (2014).

### 81-9-114. Duty to report violations.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

*1989 Amendment:* Near beginning inserted "the department or"; and made minor changes in phraseology. Amendment effective March 21, 1989.

*1987 Amendment:* Substituted present section (see 1987 Session Law) for former section that read: "It is made the duty of any butcher or meat peddler licensed under the provisions of 81-9-102 to report any violation of 81-9-112 to the sheriff of the county wherein such violation shall occur and of which such butcher or meat peddler has knowledge, and for his failure so to do, such butcher or meat peddler shall suffer a revocation of his license and no license shall again be issued to such person until the expiration of 1 year from the date of such revocation."

### 81-9-115. Unlawful to purchase uninspected hide or carcass — exception.

**Compiler's Comments**

*2009 Amendment:* Chapter 416 near middle of first sentence after "any part" substituted "of livestock slaughtered in a facility licensed pursuant to 81-9-201" for "thereof of any beef or veal" and near middle of second sentence after "establishment" substituted "meat" for "beef or veal"; and made minor changes in style. Amendment effective October 1, 2009.

*1987 Amendment:* Near end of second sentence substituted "licensed meat establishment" for "licensed butcher or peddler" and made minor changes in phraseology.

### 81-9-116. Officers' authority concerning enforcement — seizure and sale of meat held in violation.

**Compiler's Comments**

*2009 Amendment:* Chapter 416 near middle of first sentence after "places where" substituted "meat" for "beef"; and made minor changes in style. Amendment effective October 1, 2009.

*1987 Amendment:* Near middle of first sentence substituted "meat establishments required to be licensed under 81-9-201" for "butcher shops, slaughterhouses, and other places of business of meat peddlers and butchers" and at end of second sentence substituted "may seize the same" for "shall have authority to seize and take the same".

### 81-9-118. Penalties for violation or falsifying records.

**Compiler's Comments**

*1981 Amendment:* Subsections (3) and (4) of sec. 7, Ch. 198, L. 1981, provided: "(3) There is added to those sections listed in subsection (4) of this section, following any language in those sections specifying the term of imprisonment for which an offender may be imprisoned but without specifying a fine that may be ordered to be paid, the words "or shall be punished by a fine of not more than $50,000 or by both such fine and imprisonment", or other similar language allowing the court to fine the offender a maximum of $50,000 in lieu of imprisonment or to punish the offender by both a fine and imprisonment. The code commissioner shall change the listed sections in accordance with this section and may make minor incidental adjustments consistent with this section as may be necessary to reflect the intent of this section without changing the meaning of the listed sections as amended by this section.

(4) 13-27-205, 13-27-206, 19-11-207 [renumbered 19-18-207, 1993], 20-9-435, 23-5-106 (repealed, 1989), 30-13-142, 32-1-236, 32-1-473, 32-1-505, 45-5-104, 45-5-204, 45-5-105, 45-5-201, 45-5-203, 45-5-204, 45-5-304, 45-5-505, 45-5-603, 45-5-613, 45-5-621, 45-6-101 through 45-6-103, 45-6-204, 45-6-301, 45-6-316, 45-6-317, 45-6-325, 45-6-327, 45-7-101, 45-7-102, 45-7-201, 45-7-206 through 45-7-208, 45-8-106, 45-8-215, 45-8-318, 45-8-334, 45-8-335, 45-9-101(4), 45-9-102(4), 45-9-103(3), 45-9-107, 46-18-213, 46-18-502, 46-31-204, 50-38-107, 61-3-604, 81-5-102, and 81-9-118." See 46-18-231, also enacted by Ch. 198, L. 1981, which is related to the amendment of this section.

## Part 2

## Slaughterhouses

## Meat and Poultry Inspection

**Part Compiler's Comments**

*Statement of Intent:* The statement of intent attached to Ch. 577, L. 1987, provided: "This bill requires a statement of intent because section 4 [81-9-220] requires the board of livestock to adopt rules implementing the state meat inspection program. Section 4 [81-9-220] indicates the scope of the rules. It is intended that the rules conform in all respects to the requirements of the Federal Meat Inspection Act and the Federal Poultry Products Inspection Act, in order to qualify the state program under those acts. It is also intended that the program be developed and administered in cooperation with the food safety and inspection service, United States department of agriculture, to ensure that it is at least "equal to" the requirements contained in the federal law."

### 81-9-201. Meat establishment license — fees and renewals.

**Compiler's Comments**

*2021 Amendment:* Chapter 320 in (1) at beginning of first sentence inserted exception clause; and made minor changes in style. Amendment effective April 30, 2021.

*2009 Amendment:* Chapter 416 inserted (3) regarding licensure of investor-owned equine slaughter or processing facilities; and made minor changes in style. Amendment effective October 1, 2009.

*2005 Amendment:* Chapter 494 in (1) in first sentence near middle inserted "including the operation of a mobile slaughter facility as defined in 81-9-217" and near end substituted "livestock or poultry products" for "the meat products of either". Amendment effective July 1, 2005.

*1997 Amendment:* Chapter 366 in (2), in first sentence after "expire", substituted "each year on the anniversary date established by rule by the board of review established in 30-16-302 and must" for "on December 31 of the year in which they are issued and shall"; and made minor changes in style.

*1997 Statement of Intent:* The statement of intent attached to Ch. 366, L. 1997, provided: "A statement of intent is required for this bill because [section 1] [30-16-104] grants rulemaking authority to the board of review established in 30-16-302 for the purpose of implementing a one-stop business licensing pilot project required by the 54th Legislature."

*1987 Amendment:* In (1) substituted first sentence concerning license requirement for "It is unlawful for a person, firm, or corporation to maintain or conduct a slaughterhouse, meat packinghouse, or meat depot in this state without having a license issued by the department"; in (2), in two places, changed "place" to "establishment"; and inserted (3) establishing a penalty.

*1983 Amendments:* Chapter 444 substituted a fee established by the department for $1 for a license and provided for deposit in the department's earmarked revenue fund instead of the state general fund.

Chapter 281, in second sentence, substituted "state special revenue fund" for "earmarked revenue fund".

**Administrative Rules**

ARM 32.2.401 Department of Livestock license fees.

**Attorney General's Opinions**

*Application to Poultry:* A person, firm, or corporation maintaining a slaughterhouse, meatpacking house, or meat depot in Montana, even though confining his activities solely to poultry, shall subject himself to inspection, regulation, and licensing by the Livestock Sanitary Board (now Department of Livestock). 29 A.G. Op. 50 (1962).

### 81-9-202. Exceptions of certain producers of meats.

**Compiler's Comments**

*1995 Amendments — Composite Section:* Chapter 418 in first sentence of (1) and near end of (2)(b) substituted "department of public health" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 546 near end of (1) substituted "department of public health and human services" for "department of health and environmental sciences"; in (2)(a), after "supervision or regulation", inserted "by the department of public health and human services" and at end, after "for sale", substituted "at those facilities" for "thereat by the department of health and environmental sciences, nor does this section limit the"; in (2)(b) substituted "department of public health and human services" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Style changes in the chapters were slightly different. In each case, the codifier chose the most appropriate.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clauses:* Section 503, Ch. 418, L. 1995, was a saving clause.

Section 571, Ch. 546, L. 1995, was a saving clause.

## 81-9-217. Definitions.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 1, Ch. 423, L. 2023. Amendment effective October 1, 2023.

*2019 Amendment:* Chapter 186 inserted definition of cell-cultured edible product; in definition of meat at end inserted "This term does not include cell-cultured edible products as defined in this section"; in definition of misbranded inserted (c) concerning cell-cultured edible products as they relate to the term; and made minor changes in style. Amendment effective October 1, 2019.

*2005 Amendment:* Chapter 494 inserted definition of mobile slaughter facility; in definition of official establishment inserted second sentence including mobile slaughter facility; and made minor changes in style. Amendment effective July 1, 2005.

*1999 Amendment:* Chapter 574 in definition of livestock after "equines and" substituted "alternative livestock" for "game farm animals"; and made minor changes in style. Amendment effective October 1, 1999.

## 81-9-218. Exemptions.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 1, Ch. 98, L. 2023. Amendment effective October 1, 2023.

*2021 Amendment:* Chapter 320 inserted (1)(c) regarding a producer who sells homemade food or slaughters fewer than 1,000 poultry birds a year; and made minor changes in style. Amendment effective April 30, 2021.

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

*1989 Amendment:* Deleted former (2) that read: "(2) a person engaged in custom slaughtering of livestock and preparation of the carcasses and parts and meat food products thereof only with respect to the slaughter of livestock delivered by the owner for custom slaughter and the preparation of the carcasses for use by the owner in his own household or by members of his household or nonpaying guests"; inserted (2) relating to custom slaughtering; and made minor changes in form. Amendment effective March 21, 1989.

## 81-9-219. Application.

**Compiler's Comments**

*2013 Amendment:* Chapter 92 near end after "as those acts read on" substituted "March 27, 2013" for "October 1, 1987". Amendment effective March 27, 2013.

*2007 Amendment:* Chapter 65 near end after "October 1, 1987" inserted reference to federal Humane Methods of Slaughter Act; and made minor changes in style. Amendment effective March 27, 2007.

## 81-9-220. Rules.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

*2005 Amendment:* Chapter 494 inserted (13) regarding rules for licensing and inspection of mobile slaughter facilities; and made minor changes in style. Amendment effective July 1, 2005.

*Statement of Intent:* The statement of intent attached to Ch. 577, L. 1987, provided: "This bill requires a statement of intent because section 4 [81-9-220] requires the board of livestock to adopt rules implementing the state meat inspection program. Section 4 [81-9-220] indicates the scope of the rules. It is intended that the rules conform in all respects to the requirements of the Federal Meat Inspection Act and the Federal Poultry Products Inspection Act, in order to qualify the state program under those acts. It is also intended that the program be developed and administered in cooperation with the food safety and inspection service, United States department of agriculture, to ensure that it is at least "equal to" the requirements contained in the federal law."

**Administrative Rules**

Title 32, chapter 6, subchapter 7, ARM Slaughterhouses, meat packing houses, meat depots, and mobile slaughter facilities.

### 81-9-226. Chief meat inspector — deputies — qualifications.

**Compiler's Comments**

*1989 Amendment:* Deleted second sentence of (1) that read: "Such person must be a veterinarian licensed in Montana who has practiced veterinary medicine for 5 years or longer." Amendment effective March 21, 1989.

**Administrative Rules**

ARM 32.6.716 Recalls.

### 81-9-227. Application for state meat inspection service — assignment of establishment number.

**Compiler's Comments**

*2005 Amendment:* Chapter 494 in (1) near beginning inserted "or mobile slaughter facility operator"; in (1)(a) after "establishment" inserted reference to name and address of owner of mobile slaughter facility and description of mobile unit; in (1)(b) inserted "whether mobile or in a fixed location"; in (2)(a) in first sentence at end after "and equipment" inserted reference to inclusion of mobile unit to be used as part of mobile slaughter facility and in second sentence near beginning and in third sentence near middle inserted "or mobile slaughter facility"; inserted (2)(b) regarding establishment number; and made minor changes in style. Amendment effective July 1, 2005.

### 81-9-228. Inspection stamps.

**Compiler's Comments**

*2005 Amendment:* Chapter 494 in (1) near middle inserted "including mobile slaughter facilities"; and made minor changes in style. Amendment effective July 1, 2005.

*1989 Amendment:* In (2) changed "offered" to "offer".

**Administrative Rules**

ARM 32.6.715 Label review.

### 81-9-229. Assignment of inspectors.

**Compiler's Comments**

*2009 Amendment:* Chapter 416 in (2) in first sentence after "buffalo" inserted "horses"; and made minor changes in style. Amendment effective October 1, 2009.

### 81-9-230. Antemortem and postmortem inspection required.

**Compiler's Comments**

*2009 Amendments — Composite Section:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Chapter 416 (2) in third sentence after "buffalo" inserted "horses"; and made minor changes in style. Amendment effective October 1, 2009.

### 81-9-232. Regulation of equine carcasses or products.

**Compiler's Comments**

*2013 Amendment:* Chapter 48 in (1) after "Equines" deleted "alternative livestock ranch animals, and rabbits"; in (2) after "equine" deleted "alternative livestock ranch animal, or rabbit"; and made minor changes in style. Amendment effective February 27, 2013.

*2001 Amendment:* Chapter 7 at beginning of (1) after "Equines" substituted "alternative livestock ranch" for "game farm"; near beginning of (2) after "equine" substituted "alternative livestock ranch" for "game farm"; and made minor changes in style. Amendment effective October 1, 2001.

### 81-9-233. Cooperation with state and federal authorities.

**Compiler's Comments**

*2019 Amendment:* Chapter 86 in (1) near beginning substituted "81-9-226 through 81-9-234, and 81-9-236" for "and 81-9-236" and at end deleted former last sentence that read: "If an official establishment fails to meet minimum applicable requirements of the department of environmental quality, inspection service to the establishment must be suspended as provided in 81-9-235 until the condition is remedied"; and made minor changes in style. Amendment effective March 21, 2019.

*Preamble:* The preamble attached to Ch. 86, L. 2019, provided: "WHEREAS, federal rules state that the Food Safety Inspection Service within the U.S. Department of Agriculture may suspend operations at a slaughterhouse without prior notice to protect public safety; and

WHEREAS, Montana's Meat and Poultry Inspection Program operates in a manner at least equal to federal law and regulations and has adopted the federal regulations in rule; and

WHEREAS, section 81-9-235, MCA, conflicts with federal rules."

*1995 Amendments — Composite Section:* Chapter 418 in (1), in two places, substituted "department of environmental quality" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 546 in (1), in two places, substituted "department of public health and human services" for "department of health and environmental sciences". Amendment effective July 1, 1995.

Pursuant to an executive order issued under the authority contained in sec. 569, Ch. 546, the state laboratory is within the Department of Environmental Quality.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clauses:* Section 503, Ch. 418, L. 1995, was a saving clause.

Section 571, Ch. 546, L. 1995, was a saving clause.

### 81-9-240. Equine slaughter or processing facilities — no injunction to stop — damages allowed for delay.

**Compiler's Comments**

*2023 Code Commissioner Correction:* In (1)(d) the Code Commissioner inserted brackets around the reference to part 3 to reflect the repeal of Title 75, chapter 10, part 3, by Ch. 144, L. 2023.

*Effective Date:* This section is effective October 1, 2009.

### 81-9-241. Judicial review of equine slaughter or processing facilities — surety bond — attorney fees — venue.

**Compiler's Comments**

*Effective Date:* This section is effective October 1, 2009.

## Part 3

## Rendering or Disposal Plants

### 81-9-301. Licensing of rendering or disposal plants.

**Compiler's Comments**

*1983 Amendments:* Chapter 444, in (2), substituted a fee established by the department for a license fee of $5; and in (3) provided for deposit in the department's earmarked revenue fund instead of the state general fund.

Chapter 281, in (3), substituted "state special revenue fund" for "earmarked revenue fund".

**Administrative Rules**

ARM 32.2.401 Department of Livestock license fees.

**Collateral References**

Fee-Financed Government: Issues Raised by Licensing Boards and Other Agencies Before the 2013-2014 Economic Affairs Interim Committee, Interim Report, Mont. Leg. Serv. Div. (2014).

### 81-9-302. Power of department to adopt and enforce rules.

**Administrative Rules**

Title 32, chapter 6, ARM Animal feeding, slaughter, and disposal.

Title 32, chapter 6, subchapter 11, ARM Rendering plants — vehicles and equipment.

### 81-9-313. Dead or fallen animal records.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 81-9-314. Animals to be tagged.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 81-9-315. Production of dead or fallen animal record on demand — animal not to be removed during transportation — investigation.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 81-9-316. Disposal of hides — inspection — filing of record.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

## Part 4
## Hide Dealers

### 81-9-402. Hide certificate — identification.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 81-9-403. Seizure and sale of hides when ownership cannot be determined — disposition of proceeds.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 81-9-411. Hide dealer or buyer's license fee — disposition of proceeds.

**Compiler's Comments**

*1983 Amendments:* Chapter 277 substituted reference to state special revenue fund for reference to earmarked revenue fund.

Chapter 444 substituted a fee established by the department for a $5 annual license fee.

**Administrative Rules**

ARM 32.2.401 Department of Livestock license fees.

# CHAPTER 10
# HORSE OWNER AMNESTY

## Part 1
## General Provisions

**Part Compiler's Comments**

*Effective Date:* This part is effective October 1, 2009.

### 81-10-102. Horse owner amnesty for horse transferred to department — fees.

**Compiler's Comments**

*2015 Amendment:* Chapter 150 in (1) in introductory clause substituted "the animal's health" for "the animal's normal health"; inserted (1)(b) concerning mutually agreed upon location; and made minor changes in style. Amendment effective October 1, 2015.

# CHAPTER 20
# POULTRY AND EGGS

**Chapter Administrative Rules**

Title 32, chapter 3, ARM Disease control.
Title 32, chapter 3, subchapter 15, ARM Poultry.
Title 32, chapter 12, ARM Eggs.

## Part 1
## Poultry

### 81-20-101. Poultry industry — powers and authority of department.

**Administrative Rules**

Title 32, chapter 3, ARM Disease control.
Title 32, chapter 6, ARM Animal feeding, slaughter, and disposal.
Title 32, chapter 12, ARM Eggs.

**Attorney General's Opinions**

*No Department Authority to Confiscate and Destroy Poultry:* The Livestock Sanitary Board (now Department of Livestock) is not empowered by 46-209, R.C.M. 1947 (now 81-20-101, MCA) to return to the consignor or confiscate and destroy poultry infected with or exposed to any infectious, contagious, communicable, or dangerous poultry disease when imported into Montana. 27 A.G. Op. 14 (1957).

## Part 2
## Eggs

**Part Administrative Rules**

Title 32, chapter 12, ARM Eggs.

### 81-20-201. Wholesale egg dealer's and egg grader's licenses — exemptions — fee.

**Compiler's Comments**

*2001 Amendment:* Chapter 225 in (1) near middle after "obtaining a" inserted "wholesale egg dealer's" and deleted former second sentence that read: "A licensee shall send to the department the reports that are requested by the department"; in (2) near middle of first sentence after "dealers" deleted "buying eggs for sale at retail and for dealers" and deleted former third sentence that read: "Licenses expire each year on the anniversary date established by rule by the board of review established in 30-16-302"; at end of (3)(a) substituted "25 cases a month over a 12-month period" for "25 cases per month"; inserted (3)(b) concerning license exemption for buying eggs for sale at retail; in (4) substituted "an average of 25 cases of eggs a month over a 12-month period" for "25 cases of eggs per month" and after "consumers shall" deleted "when selling candled eggs"; inserted (6) concerning sending information to department; and made minor changes in style. Amendment effective April 12, 2001.

*1997 Amendment:* Chapter 366 in (1), in fifth sentence after "expire", substituted "each year on the anniversary date established by rule by the board of review established in 30-16-302" for "March 31 each year after the date of issuance"; in (3), at end of fourth sentence after "expires", substituted "each year on the anniversary date established by rule by the board of review established in 30-16-302" for "March 31 each year after the date of issuance"; and made minor changes in style.

*1997 Statement of Intent:* The statement of intent attached to Ch. 366, L. 1997, provided: "A statement of intent is required for this bill because [section 1] [30-16-104] grants rulemaking authority to the board of review established in 30-16-302 for the purpose of implementing a one-stop business licensing pilot project required by the 54th Legislature."

*1983 Amendment:* In (1), substituted fees established by the department for a $5 fee for retail sales and $20 for wholesale; in (3) substituted a fee established by the department for a $5 grader's license fee.

**Administrative Rules**

ARM 32.2.401 Department of Livestock license fees.
ARM 32.12.1002 Application and fee for grader's license.
ARM 32.12.1003 License examination.
ARM 32.12.1004 Annual license renewal.

**81-20-203. Candling eggs intended for human consumption — candling defined.**

**Administrative Rules**

ARM 32.12.1001 Licensing egg graders — definitions.

**81-20-204. Certificate of candling or packing.**

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

**Administrative Rules**

ARM 32.12.103 Size of certificate of candling.
ARM 32.12.104 Eggs defined unfit for human consumption.

**81-20-205. Egg — when defined as unfit for human food.**

**Compiler's Comments**

*Adulterated Food — Federal Law:* The definition of adulterated food in the Federal Food, Drug, and Cosmetic Act is contained in United States Code, Title 21, sec. 342.

**Administrative Rules**

ARM 32.12.101 Eggs — definitions.
ARM 32.12.104 Eggs defined unfit for human consumption.

**81-20-206. Notice to purchaser of grade of eggs.**

**Compiler's Comments**

*2013 Amendment:* Chapter 94 in last sentence at end after "at the place of production" inserted "or at a farmer's market as defined in 50-50-102"; and made minor changes in style. Amendment effective March 27, 2013.

**81-20-207. Rules to be adopted by department of livestock.**

**Administrative Rules**

Title 32, chapter 12, ARM Eggs.

**81-20-209. Revocation of license.**

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

# CHAPTER 21
# DAIRY PRODUCTS

## Part 1
## Regulation of Dairies Selling Milk or Cream for Public Consumption

**81-21-101. Definitions.**

**Compiler's Comments**

*2021 Amendment:* Chapter 320 inserted definition of small dairy. Amendment effective April 30, 2021.

*1983 Amendment:* Inserted (2) defining public consumption.

**81-21-102. Licensing of milk plants and dairies selling milk or cream for public consumption.**

**Compiler's Comments**

*2021 Amendment:* Chapter 320 in (1) at beginning of introductory clause inserted exception clause; and made minor changes in style. Amendment effective April 30, 2021.

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

*1983 Amendment:* In (4), substituted fees established by the department for $50 for a milk factory, $50 for a fluid milk plant, and $5 for a dairy.

**Administrative Rules**

ARM 32.2.401 Department of Livestock license fees.

**Case Notes**

*Prosecution of Violations:* Defendants convicted of violating this section were entitled to a new trial when it was insinuated that one of the defendants was not going to speak truthfully and county prosecutor threatened defendant with perjury charges. St. v. Peterson, 138 M 257, 356 P2d 925 (1960).

**81-21-103. Exceptions of certain producers of dairy products.**

**Compiler's Comments**

*2021 Amendment:* Chapter 320 in (1) near beginning after "operators of" inserted "small dairies"; and made minor changes in style. Amendment effective April 30, 2021.

*1995 Amendments — Composite Section:* Chapter 418 in (1) and (2)(b) substituted "department of public health" for "department of health and environmental sciences"; in (2)(a), after "supervision or regulation", inserted "by the department of public health and human services"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 546 at end of (1) substituted "department of public health and human services" for "department of health and environmental sciences"; in (2)(a), after "supervision or regulation", inserted "by the department of public health and human services" and at end, after "for sale", substituted "at those facilities" for "thereat by the department of health and environmental sciences, nor does this section limit the"; in (2)(b) substituted "department of public health and human services" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Style changes in the chapters were slightly different. In each case, the codifier chose the most appropriate.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clauses:* Section 503, Ch. 418, L. 1995, was a saving clause.

Section 571, Ch. 546, L. 1995, was a saving clause.

## CHAPTER 22
## MANUFACTURED DAIRY PRODUCTS

**Chapter Administrative Rules**

Title 32, chapter 9, ARM General licensing and provisions.

Title 32, chapter 10, ARM Tester licensing.

### Part 1
### Administration

**81-22-101. Definitions.**

**Compiler's Comments**

*2021 Amendment:* Chapter 320 in definition of dairy substituted "6 or more lactating cows, 11 or more lactating goats, 11 or more lactating sheep, or 11 or more of any lactating hoofed mammals" for "one or more hoofed mammals"; inserted definition of small dairy; and made minor changes in style. Amendment effective April 30, 2021.

*2017 Amendment:* Chapter 159 in definition of dairy or dairy farm substituted "hoofed mammals" for "cows or goats"; and in definition of milk in two places substituted "hoofed mammals" for "cows". Amendment effective October 1, 2017.

*1997 Amendment:* Chapter 42 deleted definition of cheese factory that read: ""Cheese factory" means a place where cheese, including cream cheese, cottage cheese, creamed cottage cheese, cheese curd, cottage cheese dressing, and low-fat counterparts of cheese, either cultured or directly acidified, is made for commercial purposes"; deleted definition of frozen dessert plant that read: ""Frozen dessert plant" means a place where products named in subsections (27)(a)(iii) through (27)(a)(ix) are made for commercial purposes"; deleted definition of fruit ice cream that read: ""Fruit ice cream" must conform to the requirements of ice cream, except that the fruit ingredients must be from sound, clean, and mature fruit, and it must contain not less than 9% of milk fat"; deleted definition of ice or ice sherbet that read: ""Ice" or "ice sherbet" is the pure, clean, frozen product made from water and sugar with harmless fruit or fruit juice flavoring, with or without harmless coloring or added stabilizer composed of wholesome edible material, and must contain not less than 35/100 of 1% of acid, as determined by titrating with standard alkali and expressed as lactic acid. It may not contain milk solids"; deleted definition of ice cream factory that read: "An "ice cream factory" is a place where ice cream mix is frozen into ice cream for commercial purposes"; deleted definition of milk sherbet that read: ""Milk sherbet" is the pure, clean, frozen product made from milk product, water, and sugar, with harmless fruit or fruit juice flavoring and with or without harmless coloring, which must contain not less than 35/100 of 1% of acid, as determined by titrating with standard alkali and expressed as lactic acid, and with or without added stabilizer composed of wholesome edible material. It must contain not less than 4% by weight of solids"; deleted definition of raw milk or raw milk products that read: ""Raw milk" or "raw milk products" means milk or milk products that have not been treated by a process of pasteurization"; deleted definition of renovated butter or processed butter that read: ""Renovated butter" or "processed butter" is the product made by melting and reworking, without the addition or use of chemicals or substances except whole milk, cream, or salt, and must contain not less than 80% of milk fat"; deleted definition of skimmed milk cheese that read: ""Skimmed milk cheese" is the sound, solid, and ripened product made from skim milk by coagulating the casein with rennet or lactic acid, with or without ripening ferments and seasoning"; in definition of directly acidified deleted reference to direct acidification as part of defined term; in definition of French ice cream deleted references to cooked ice cream, ice custard, and parfaits as part of defined term; in definition of ice cream mix, in (b), expanded reference to include subsection (a)(vi) of definition of milk; adjusted subsection references; and made minor changes in style. Amendment effective March 12, 1997.

*1993 Amendment:* Chapter 10 in definition of Code of Federal Regulations substituted reference to Department of Health and Human Services for reference to Department of Health, Education, and Welfare; and made minor changes in style.

**Administrative Rules**

ARM 32.9.101 General licensing and provisions — definitions.

### 81-22-102. General authority of department.

**Compiler's Comments**

*2021 Amendment:* Chapter 320 inserted (4) prohibiting the department from establishing fees, rules, or standards for small dairies. Amendment effective April 30, 2021.

*1983 Amendment:* Inserted (3) requiring the Department to make rules and establish fees required under 81-23-202.

**Administrative Rules**

Title 32, chapter 2, subchapter 4, ARM Department of Livestock license fees, permit fees, and miscellaneous fees.

Title 32, chapter 9, subchapter 1, ARM Dairies and milk plants — general licensing and provisions.

Title 32, chapter 9, subchapter 2 through 8, ARM Milk quality requirements — processing of dairy products.

Title 32, chapter 10, ARM Tester licensing.

## Part 2
## Licensing Provisions

**Part Administrative Rules**

Title 32, chapter 10, subchapter 1, ARM Licensing milk and cream graders, weighers, and samplers.

### 81-22-201. License required to operate manufactured dairy products plant.

**Compiler's Comments**

*2021 Amendment:* Chapter 320 inserted (3) exempting small dairies from the licensing requirements of the section. Amendment effective April 30, 2021.

### 81-22-203. Renewal, suspension, or revocation of license — grounds — hearing — appeal to district court.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

**Administrative Rules**

ARM 32.9.103 Licensing of persons engaged in production of milk for manufacturing purposes.
ARM 32.9.104 Plant licensing.

## 81-22-204. License required for milk or cream route.

**Compiler's Comments**

*1983 Amendment:* Substituted a fee established by the department for fee of $5 annually.

**Administrative Rules**

ARM 32.2.401 Department of Livestock license fees.

## 81-22-205. Examination and licensing of persons engaged in testing.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

*1983 Amendment:* Near end of (1), substituted fee established by the department for license fee of $10.

**Administrative Rules**

ARM 32.2.401 Department of Livestock license fees.

Title 32, chapter 10, subchapter 2, ARM Licensing of milk and cream testers.

## 81-22-206. Licensing of graders, weighers, and samplers.

**Administrative Rules**

Title 32, chapter 10, ARM Tester licensing.

## 81-22-207. License — issuance and penalty.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

## 81-22-208. Licenses and schedule of license fees.

**Compiler's Comments**

*2015 Amendment:* Chapter 239 in (1)(a) in second sentence substituted "retail food establishment licensed as provided in Title 50, chapter 50" for "food service establishment licensed by the department of public health and human services, as defined in 50-50-102"; in (4) inserted "under this section"; and made minor changes in style. Amendment effective October 1, 2015.

*1995 Amendments — Composite Section:* Chapter 418 in (2)(a) substituted "department of public health" for "Montana department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 546 in (1)(a) substituted "department of public health and human services" for "Montana department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Style changes in the chapters were slightly different. In each case, the codifier chose the most appropriate.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clauses:* Section 503, Ch. 418, L. 1995, was a saving clause.

Section 571, Ch. 546, L. 1995, was a saving clause.

*1983 Amendment:* Substituted fees established by the department for $50 for manufactured dairy products plant, $5 for a cream station, $5 for a dairy producing milk for manufacturing purposes, $5 for a grader-weigher-sampler, $10 for a tester, and $5 for a hauler; and in (2) substituted fee established by the department for penalty of $5 per month or fraction of a month after January 31.

**Administrative Rules**

ARM 32.2.401 Department of Livestock license fees.

ARM 32.2.402 Penalty fees for nonrenewal of licenses and permits.

ARM 32.10.103 Application and fee for license.

ARM 32.10.105 Qualifying for license.

ARM 32.10.106 Annual license renewal.

**Collateral References**

Fee-Financed Government: Issues Raised by Licensing Boards and Other Agencies Before the 2013-2014 Economic Affairs Interim Committee, Interim Report, Mont. Leg. Serv. Div. (2014).

**81-22-209. License requirements applicable.**

**Compiler's Comments**

*1995 Amendments:* Chapter 418 at end substituted "department of public health" for "department of health and environmental sciences". Amendment effective July 1, 1995.

Chapter 546 at end substituted "department of public health and human services" for "department of health and environmental sciences". Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clauses:* Section 503, Ch. 418, L. 1995, was a saving clause.

Section 571, Ch. 546, L. 1995, was a saving clause.

## Part 3
## Inspection

**81-22-301. Tests and analyses — admissibility as evidence.**

**Compiler's Comments**

*1995 Amendment:* Chapter 418 in (1) substituted "department of public health" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

**81-22-303. Sampling and testing by department.**

**Compiler's Comments**

*2021 Amendment:* Chapter 320 in (1) at beginning inserted exception clause; inserted (2) prohibiting the department from sampling, testing, or retesting milk or cream sold as homemade food; and made minor changes in style. Amendment effective April 30, 2021.

**81-22-304. Department's right of entry into dairy or plants for inspection — penalty.**

**Compiler's Comments**

*2021 Amendment:* Chapter 320 inserted (3) providing that the department's right of entry does not apply to small dairies. Amendment effective April 30, 2021.

## Part 4
## Sanitation, Quality, and Labeling Requirements

**81-22-401. Grading of milk — condemnation of unsafe milk.**

**Compiler's Comments**

*2021 Amendment:* Chapter 320 at beginning of first sentence inserted exception clause; and made minor changes in style. Amendment effective April 30, 2021.

**Administrative Rules**

ARM 32.9.301 Dairy animal health.

**81-22-402. Employment of grader, weigher, and sampler — revocation of operator's license.**

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

**81-22-403. Plans for construction, remodeling, or relocation of manufacturing plant.**

**Compiler's Comments**

*1995 Amendment:* Chapter 418 in (3), in two places, substituted "department of environmental quality" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

## 81-22-404. Removal or destruction of products in case of potential health hazards.

**Compiler's Comments**

*1995 Amendments:* Chapter 418 in (1) substituted "department of public health" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 546 in (1) substituted "department of public health and human services" for "department of health and environmental sciences". Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clauses:* Section 503, Ch. 418, L. 1995, was a saving clause.

Section 571, Ch. 546, L. 1995, was a saving clause.

**Administrative Rules**

ARM 32.9.301 Dairy animal health.

## 81-22-405. Labeling of cheese containers.

**Compiler's Comments**

*2021 Amendment:* Chapter 320 at beginning inserted exception clause; and made minor changes in style. Amendment effective April 30, 2021.

## 81-22-410. Manufacture, sale, or importation of products containing extraneous fats.

**Administrative Rules**

ARM 32.8.102 Milk and milk products which may be sold.

## 81-22-412. Manufactured products to conform to standards of identity.

**Compiler's Comments**

*2021 Amendment:* Chapter 320 at beginning inserted exception clause; and made minor changes in style. Amendment effective April 30, 2021.

## 81-22-413. Pasteurization required.

**Compiler's Comments**

*2021 Amendment:* Chapter 320 inserted (2) providing that pasteurization and labeling requirements do not apply to milk or cream sold as homemade food or a homemade food product; and made minor changes in style. Amendment effective April 30, 2021.

## 81-22-414. Pasteurization apparatus and records.

**Compiler's Comments**

*1995 Amendments:* Chapter 418 in (1), in last sentence, substituted "department, the department of public health" for "department of livestock, the department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 546 in (1), in last sentence, substituted "department of public health and human services" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clauses:* Section 503, Ch. 418, L. 1995, was a saving clause.

Section 571, Ch. 546, L. 1995, was a saving clause.

**Administrative Rules**

ARM 32.9.417 and 32.9.418 Separators and pasteurization equipment requirements.

## 81-22-415. Pasteurization labeling.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

## 81-22-416. Milk and manufactured dairy products to conform to standards.

**Compiler's Comments**

*2021 Amendment:* Chapter 320 at beginning inserted exception clause; and made minor changes in style. Amendment effective April 30, 2021.

**Administrative Rules**

Title 32, chapter 8, ARM Fluid milk and grade A milk products.

Title 32, chapter 9, subchapter 2, ARM Milk quality requirements.

**81-22-420. Labeling of animal or vegetable fat contents on frozen desserts.**

**Compiler's Comments**

*2021 Amendment:* Chapter 320 inserted (4) providing that labeling requirements do not apply to milk or cream sold as homemade food or a homemade food product. Amendment effective April 30, 2021.

**81-22-421. Labeling on manufactured dairy products to conform to requirements.**

**Compiler's Comments**

*2021 Amendment:* Chapter 320 at beginning inserted exception clause; and made minor changes in style. Amendment effective April 30, 2021.

*1995 Amendments:* Chapter 418 at end substituted "department or the department of public health" for "department of livestock or the department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 546 at end substituted "department of public health and human services" for "department of health and environmental sciences". Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clauses:* Section 503, Ch. 418, L. 1995, was a saving clause.

Section 571, Ch. 546, L. 1995, was a saving clause.

**Administrative Rules**

Title 32, chapter 8, subchapter 2, ARM Milk freshness dating.
ARM 32.9.506 Butter labeling.
ARM 32.9.606 Cheddar cheese labeling.
ARM 32.9.706 Cottage cheese labeling.

## Part 5
## Records and Reports

**81-22-503. Buyers and plants to make records available to department.**

**Compiler's Comments**

*2021 Amendment:* Chapter 320 inserted (3) exempting small dairies from recordkeeping requirements. Amendment effective April 30, 2021.

# CHAPTER 23
# MILK PRICE CONTROL

**Chapter Compiler's Comments**

*Preamble:* The preamble attached to Ch. 242, L. 1995, provided: "WHEREAS, the Legislature finds it appropriate to decontrol minimum wholesale, jobber, and retail milk prices; and

WHEREAS, it is necessary for the Board of Milk Control to adopt additional procedures and fair trade practices to promote the sale of Montana milk at competitive prices; and

WHEREAS, the Legislature encourages the use of Montana milk by Montana processors and the elimination of practices that encourage the purchase of Montana milk out of state for subsequent resale in Montana at a price lower than that established by the Board."

**Chapter Administrative Rules**

Title 32, chapter 24, ARM Board of Milk Control.

**Chapter Case Notes**

*Milk Pricing Control — Actions Compelled by Law Not Unfair Trade Practices:* A third-party plaintiff brought an action for declaratory and injunctive relief against the operation and enforcement of certain milk pricing statutes, claiming those statutes violated the provisions of 30-14-205, and the third-party defendant moved to dismiss the claim on the grounds that it did not state a claim for relief. The court found that although the statutes challenged by the plaintiff did fix the price of milk, eliminate competition, and create a monopoly, the only reason whereby 30-14-224 could control was if that section expressly or impliedly repealed the Milk Price Control Act. The court found no such repeal had been intended by the Legislature. Hinshaw v. Beatrice Foods, Inc., 37 St. Rep. 1677 (D.C. Mont. 1980) (apparently not reported in Federal Supplement).

*Milk Pricing Control — Violation of Equal Protection:* A third-party plaintiff brought an action for declaratory and injunctive relief against the operation and enforcement of certain milk pricing statutes, claiming the statutes violated the Equal Protection Clause of the 14th amendment of the United States Constitution, and the defendant moved to dismiss the claim. The court found that the base plan established by the Board of Milk Control created a classification of milk producers based upon the past history of their deliveries to distributors and that while the states have wide discretion to make classifications in the area of economic regulation, it could not be said from the third-party complaint alone that there was no merit in the claimed denial of equal protection. Hinshaw v. Beatrice Foods, Inc., 37 St. Rep. 1677 (D.C. Mont. 1980) (apparently not reported in Federal Supplement).

*Milk Pricing Control — Violation of Sherman Act by Private Actions Compelled by State Law:* Although the base plan established by the Board of Milk Control creates a system whereby the price of milk is fixed, price competition is eliminated, and a select group is given a property right in a monopoly and therefore violates the concepts of sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2), the act does not make private actions compelled by Montana statutes and orders of the Board unlawful. Under the rationale of Parker v. Brown, 317 US 341 (1943), private actions compelled by state law, which would otherwise violate the Sherman Act, are immune from the operation of the act under certain standards satisfied in this case. Hinshaw v. Beatrice Foods, Inc., 37 St. Rep. 1677 (D.C. Mont. 1980) (apparently not reported in Federal Supplement).

### Chapter Collateral References

Montana's Milk Industry: An Analysis of the State-Regulated Market, Performance Audit, Mont. Leg. Audit Div. (October 2021).

## Part 1
## General Administration

### Part Collateral References

Montana's Milk Industry: An Analysis of the State-Regulated Market, Performance Audit, Mont. Leg. Audit Div. (October 2021).

### 81-23-101. Definitions.

### Compiler's Comments

*2021 Amendment:* Chapter 189 inserted definition of milk price forward contract; and made minor changes in style. Amendment effective July 1, 2021.

*Termination Provision Repealed:* Section 1, Ch. 188, L. 2011, repealed sec. 20, Ch. 361, L. 2009, which terminated the 2009 amendments to this section June 30, 2011. Effective April 15, 2011.

*2009 Amendment:* Chapter 361 throughout section in seven places substituted "board" for "department"; in (2) near middle following "products" inserted "not provided for under 7 CFR, part 1000.40"; and made minor changes in style. Amendment effective July 1, 2009, and terminates June 30, 2011.

*2007 Amendment:* Chapter 23 in (1) deleted definition of class I milk that read: ""Class I milk" includes all bottled or packaged milk, low fat, buttermilk, chocolate milk, whipping cream, commercial cream, half-and-half, skim milk, fortified skim milk, skim milk flavored drinks, eggnog, and any other fluid milk not specifically classified in this chapter, whether raw, pasteurized, homogenized, sterile, or aseptic", deleted definition of class II milk that read: ""Class II milk" includes milk used in the manufacture of ice cream and ice cream mix, ice milk, sherbet, cultured sour cream, cottage cheese, condensed milk, and powdered skim for human consumption", deleted definition of class III milk that read: ""Class III milk" includes milk used in the manufacture of butter, cheddar cheese, process cheese, livestock feed, powdered skim other than for human consumption, and skim milk dumped", and inserted definition of class; in (2) after "products" deleted "not expressly included in one of the classes defined in this section"; and made minor changes in style. Amendment effective October 1, 2007.

*2003 Amendment:* Chapter 135 in definition of class I milk near middle after "flavored drinks" inserted "eggnog"; in definition of class II milk after "sherbet" deleted "eggnog"; and made minor changes in style. Amendment effective July 1, 2003.

*1995 Amendments:* Chapter 242 deleted definition of jobber prices that read: ""Jobber prices" means those prices at which milk owned by a distributor is sold, in bulk or in packages, to a jobber or independent contractor"; deleted definition of retail prices that read: ""Retail prices" means those prices at which milk owned by a retailer is sold, in bulk or in packages, over the counter at retail or for consumption on the premises"; deleted definition of wholesale prices that read: ""Wholesale prices" means those prices at which milk owned by a distributor is sold, in bulk or in packages, to a retailer"; and made minor changes in style. Amendment effective January 1, 1996.

Chapter 333 deleted definition of Department that read: ""Department" means the department of commerce provided for in Title 2, chapter 15, part 18"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 546 in definition of person substituted "department of corrections" for "department of corrections and human services". Amendment effective July 1, 1995.

*Saving Clause:* Section 571, Ch. 546, L. 1995, was a saving clause.

*1993 Amendment:* Chapter 56 in definition of person substituted "an individual" for "a person" and after "association" inserted reference to the prison dairy. Amendment effective February 19, 1993.

*1981 Amendment:* Substituted "department of commerce" for "department of business regulation" in (1)(g).

**Case Notes**

*Wholesale Food Purchasing Organization Defined as Retailer:* The Supreme Court determined that Associated Food Stores, owned by various independent retail stores and taxed as a cooperative, which purchased products from manufacturers for resale to retailers, was not a jobber as defined in ARM 8.79.101 (now repealed), but rather was a retailer under 81-23-101 and ARM 8.79.101, and therefore must pay the wholesale rather than jobber price for milk under Montana's milk price control law. St. Dept. of Commerce v. Gallatin Dairies, Inc., 221 M 492, 719 P2d 790, 43 St. Rep. 1001 (1986).

*Chain Retailer "Distributing" to Its Stores Not Covered by Milk Control Law — What Is a Distributor:* Albertson's proposed to purchase raw milk from a licensed distributor that it would take to a licensed processor in Wyoming and then distribute to its six retail stores in Montana. The Department of Business Regulation issued a declaratory ruling that Albertson's "may not carry out the business it proposes under the current statutory framework" of the milk control law. Albertson's sought judicial review, and the District Court held that Albertson's contemplated activity did not make it a distributor subject to licensing under the milk control law and that the law did not prohibit the proposed activity either expressly or by implication. The Supreme Court affirmed the District Court holding. Albertson's, Inc. v. Dept. of Business Regulation, 184 M 12, 601 P2d 43, 36 St. Rep. 1793 (1979).

## 81-23-102. Policy.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 1, Ch. 426, L. 2023. Amendment effective May 4, 2023.

*1995 Amendment:* Chapter 242 in (1)(k), after "unless the producers", deleted "distributors, and others engaged in the marketing of milk"; and made minor changes in style. Amendment effective January 1, 1996.

**Case Notes**

*Minimum Prices:* The means selected to attain the object set forth in this section was a procedure set forth in 81-23-301 (repealed, 1983) and 81-23-302 whereby the Milk Control Board (now Board of Milk Control) was empowered to establish marketing areas in the state and to prescribe and enforce minimum producer, wholesale, and retail prices in such areas pursuant to the provisions of the (former) Milk Control Act (Title 81, ch. 23). (See 1995 amendment.) Mont. Milk Control Bd. v. Rehberg, 141 M 149, 376 P2d 508 (1962).

*Purpose of Statutes:* Because Title 81, ch. 23 (formerly the Milk Control Act), was aimed at activity injurious to health, it could be enforced by injunction under 81-23-406. Mont. Milk Control Bd. v. Rehberg, 141 M 149, 376 P2d 508 (1962).

*Reasonable Profit:* Reasonable profit, as used in subsection (1)(k) of this section, contemplated a minimum price at which milk could be sold in view of surrounding circumstances. Mont. Milk Control Bd. v. Rehberg, 141 M 149, 376 P2d 508 (1962).

## 81-23-103. General powers of department and board.

**Compiler's Comments**

*2021 Amendment:* Chapter 320 in (1) at beginning of first sentence inserted exception clause; and made minor changes in style. Amendment effective April 30, 2021.

*Termination Provision Repealed:* Section 1, Ch. 188, L. 2011, repealed sec. 20, Ch. 361, L. 2009, which terminated the 2009 amendments to this section June 30, 2011. Effective April 15, 2011.

*2009 Amendment:* Chapter 361 in (1) at beginning of first sentence substituted "board" for "department" and inserted second sentence regarding the board conducting hearings; in (3) at beginning substituted "department shall assist the board by investigating" for "department shall investigate" and at end substituted "by bringing proceedings to enforce the orders of the board" for "shall conduct hearings on any subject pertinent to the administration of this chapter"; at beginning of second sentence after "department" inserted "in exercising its enforcement duties"; inserted (4) regarding department's duty to provide staff to the board; and made minor changes in style. Amendment effective July 1, 2009, and terminates June 30, 2011.

*1995 Amendments:* Chapter 333 in (1), in second sentence after "health laws", deleted "or the law under which the department of livestock is constituted together with the department of livestock rules" and in third sentence, after "environmental sciences", deleted "the board of livestock"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 418 in last sentence of (1) substituted "department of public health" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 546 in last sentence of (1) substituted "department of public health and human services" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clauses:* Section 503, Ch. 418, L. 1995, was a saving clause.

Section 571, Ch. 546, L. 1995, was a saving clause.

**Administrative Rules**

Title 32, chapter 24, ARM Board of Milk Control.

ARM 32.24.101 Organization of Board of Milk Control.

Title 32, chapter 24, subchapter 5, ARM Quota and pooling rules.

### 81-23-104. Rules and orders.

**Compiler's Comments**

*Termination Provision Repealed:* Section 1, Ch. 188, L. 2011, repealed sec. 20, Ch. 361, L. 2009, which terminated the 2009 amendments to this section June 30, 2011. Effective April 15, 2011.

*2009 Amendment:* Chapter 361 at beginning of first sentence substituted "board" for "department" and near end before "board" deleted "department or the"; and made minor changes in style. Amendment effective July 1, 2009, and terminates June 30, 2011.

**Administrative Rules**

Title 32, chapter 24, ARM Board of Milk Control.

Title 32, chapter 24, subchapter 5, ARM Quota and pooling rules.

### 81-23-105. Testing of milk.

**Compiler's Comments**

*1995 Amendment:* Chapter 333 near end of (1), after "department", deleted "of commerce"; near beginning of (2), after "department", deleted "of commerce"; at end of (3), after "department", deleted "of livestock"; near beginning of (4), after "department", deleted "of commerce"; and made minor changes in style. Amendment effective July 1, 1995.

*1985 Amendment:* In (1) before "establish a program", changed "shall" to "may".

*1985 Appropriations Act — Milk Control Fees — Milk Testing Equipment:* Section 17, Category C, Department of Livestock narrative of HB 500, "The General Appropriations Act of 1985", provided in part: "The appropriation in item 2 in fiscal 1986 includes $27,600 from the state special revenue fund for milk control authorized in section 81-23-202, MCA. The assessment authorized in section 81-23-202, MCA, in effect July 1, 1985, will not be reduced until this expenditure has been made. This amount has been generated under the provisions of section 81-23-105, MCA, for milk testing. This is to assist in the purchase of milk testing equipment authorized in this appropriation."

*1981 Amendment:* Substituted "department of commerce" for "department of business regulation" in (1), (2), and (4).

**Administrative Rules**

Title 32, chapter 24, ARM Board of Milk Control.

### 81-23-106. Application.

**Attorney General's Opinions**

*Licensure of Out-of-State Producer, Distributor, or Producer-Distributor:* A producer, distributor, or producer-distributor resident of another state may be required to obtain a license from the Department of Business Regulation (now Department of Commerce) under section 27-408, R.C.M. 1947 (now 81-23-201, MCA) before marketing its products in this state. 36 A.G. Op. 58 (1976).

## Part 2
## Licensing

**Part Case Notes**

*Chain Retailer "Distributing" to Its Stores Not Covered by Milk Control Law:* Albertson's proposed to purchase raw milk from a licensed distributor that it would take to a licensed processor in Wyoming and then distribute to its six retail stores in Montana. The Department of Business Regulation issued a declaratory ruling that Albertson's "may not carry out the business it proposes under the current statutory framework" of the milk control law. Albertson's sought judicial review, and the District Court held that Albertson's contemplated activity did not make it a distributor subject to licensing under the milk control law and that the law did not prohibit the proposed activity either expressly or by implication. The Supreme Court affirmed the District Court holding. Albertson's, Inc. v. Dept. of Business Regulation, 184 M 12, 601 P2d 43, 36 St. Rep. 1793 (1979).

*Accrual of Cause of Action:* Three-year Statute of Limitations provided under section 93-2607, R.C.M. 1947 (since repealed), did not bar action on milk distributor's bond where distributor had pursued administrative and court proceedings in intervening 3-year period and surety had knowledge of earlier proceedings since cause of action did not accrue until plaintiff had right of action and plaintiff had no right of action until administrative remedies had been exhausted. Mont. Milk Control Bd. v. Hartford Accident & Indem. Co., 153 M 299, 456 P2d 302 (1969).

**Part Collateral References**

Montana's Milk Industry: An Analysis of the State-Regulated Market, Performance Audit, Mont. Leg. Audit Div. (October 2021).

### 81-23-201. Licenses to producers, producer-distributors, distributors, and jobbers.

**Compiler's Comments**

*Termination Provision Repealed:* Section 1, Ch. 188, L. 2011, repealed sec. 20, Ch. 361, L. 2009, which terminated the 2009 amendments to this section June 30, 2011. Effective April 15, 2011.

*2009 Amendments — Composite Section:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Chapter 361 in third sentence near beginning substituted "board" for "department"; and made minor changes in style. Amendment effective July 1, 2009, and terminates June 30, 2011.

**Case Notes**

*Chain Retailer "Distributing" to Its Stores Not Covered by Milk Control Law:* Albertson's proposed to purchase raw milk from a licensed distributor that it would take to a licensed processor in Wyoming and then distribute to its six retail stores in Montana. The Department of Business Regulation issued a declaratory ruling that Albertson's "may not carry out the business it proposes under the current statutory framework" of the milk control law. Albertson's sought judicial review, and the District Court held that Albertson's contemplated activity did not make it a distributor subject to licensing under the milk control law and that the law did not prohibit the proposed activity either expressly or by implication. The Supreme Court affirmed the District Court holding. Albertson's, Inc. v. Dept. of Business Regulation, 184 M 12, 601 P2d 43, 36 St. Rep. 1793 (1979).

*Application of Section:* The license fee exacted by this section and 81-23-202 applied to milk that was ultimately sold by a distributor outside an established market area. Heimbichner v. Mont. Milk Control Bd., 134 M 366, 332 P2d 922 (1958).

*Collection of License Fees:* The Board of Milk Control (formerly the Montana Milk Control Board) could collect license fees based on the whole volume of milk sold by producer whether within a certain marketing area or anywhere else within the state of Montana. Heimbichner v. Mont. Milk Control Bd., 134 M 366, 332 P2d 922 (1958).

**Attorney General's Opinions**

*Licensure of Out-of-State Producer, Distributor, or Producer-Distributor:* A producer, distributor, or producer-distributor resident of another state may be required to obtain a license from the Department of Business Regulation (now Department of Commerce) under this section before marketing its products in this state. 36 A.G. Op. 58 (1976).

### 81-23-202. Licenses — disposition of income.

**Compiler's Comments**

*2017 Amendment:* Chapter 79 in (3) near beginning substituted "the fees under this section, including rules identifying the milk hundredweight equivalent conversion factor used for calculating the amount of the fees levied on manufactured dairy products" for "each fee". Amendment effective October 1, 2017.

*2015 Amendment:* Chapter 271 in (5) substituted "before the 25th day of each month" for "quarterly before January 15, April 15, July 15, and October 15 of each year" and at end substituted "month" for "calendar quarter"; in (6) substituted "the board may revoke a license upon due cause and after a hearing. A licensee shall pay all assessments accrued through the date a license is revoked under this section" for "a license under this chapter automatically terminates and is void" and substituted current third sentence for "A terminated license must be reinstated by the board upon payment of a delinquency fee equal to 30% of the assessment that was due"; and made minor changes in style. Amendment effective July 1, 2015.

*Termination Provision Repealed:* Section 1, Ch. 188, L. 2011, repealed sec. 20, Ch. 361, L. 2009, which terminated the 2009 amendments to this section June 30, 2011. Effective April 15, 2011.

*2009 Amendment:* Chapter 361 throughout section in six places substituted "board" for "department"; in (1) in second sentence near beginning following "license" deleted "from the department"; and made minor changes in style. Amendment effective July 1, 2009, and terminates June 30, 2011.

*2003 Amendment:* Chapter 135 in (4)(a) near beginning of first sentence after "fee" deleted "of 14.97 cents", after "volume of" substituted "all classes of milk" for "class I milk", and after "sold by a" substituted "person licensed by the department" for "producer", inserted second sentence requiring that the fee be established pursuant to 81-1-102(2), and deleted former third sentence that read: "The board shall include this fee in its formulas for fixing by rule the minimum producer prices for class I milk in 81-23-302"; inserted (4)(b) requiring monthly milk production reports; and made minor changes in style. Amendment effective July 1, 2003.

*1995 Amendments:* Chapter 242 in (4), in last sentence after "producer", deleted "wholesale, jobber, and retail". Amendment effective January 1, 1996.

Chapter 333 in (1), near middle of first sentence, substituted "department, as provided in 81-22-202" for "department of livestock"; in (4), at end of first sentence after "department", deleted "of livestock"; in (7), at beginning of first sentence, deleted "Except for the assessment provided for in subsection (4)" and in second sentence, in two places, inserted reference to chapter 22; deleted former (8) that read: "(8) The assessment provided for in subsection (4) must be deposited by the department in an account in the state special revenue fund. Money in the account must be used to carry out the purposes of Title 81, chapter 22"; and made minor changes in style. Amendment effective July 1, 1995.

*1993 Amendment:* Chapter 566 inserted (4) assessing a fee of 14.97 cents per hundredweight on class I milk; in (5), near end after "department", inserted "and the fee established in subsection (4)"; at beginning of (7) inserted exception clause; inserted (8) regarding deposit of the assessment in the state special revenue fund; and made minor changes in style. Amendment effective July 1, 1993.

*Effective Date — Applicability:* Section 2, Ch. 566, L. 1993, provided: "[This act] is effective July 1, 1993. Payment of the assessment in [section 1] [81-23-202] begins with the quarterly payment due on October 15, 1993."

*1985 Appropriations Act — Milk Control Fees — Milk Testing Equipment:* Section 17, Category C, Department of Livestock narrative of HB 500, "The General Appropriations Act of 1985", provided in part: "The appropriation in item 2 in fiscal 1986 includes $27,600 from the state special revenue fund for milk control authorized in section 81-23-202, MCA. The assessment authorized in section 81-23-202, MCA, in effect July 1, 1985, will not be reduced until this expenditure has been made. This amount has been generated under the provisions of section 81-23-105, MCA, for milk testing. This is to assist in the purchase of milk testing equipment authorized in this appropriation."

*1983 Amendment:* Substituted reference to state special revenue fund for reference to earmarked revenue fund.

**Administrative Rules**

ARM 32.2.401 Department of Livestock license fees.

ARM 32.9.103 Licensing of persons engaged in production of milk for manufacturing purposes.

**Case Notes**

*Application of Section:* The license fee exacted by this section and 81-23-201 applied to milk that was ultimately sold by a distributor outside an established market area. Heimbichner v. Mont. Milk Control Bd., 134 M 366, 332 P2d 922 (1958).

*Collection of License Fees:* The Board of Milk Control (formerly the Montana Milk Control Board) could collect license fees based on the whole volume of milk sold by producer whether within a certain marketing area or anywhere else within the state of Montana. Heimbichner v. Mont. Milk Control Bd., 134 M 366, 332 P2d 922 (1958).

**Attorney General's Opinions**

*Liability of Licensed Manufacturing and Distribution Branch of Chain for Assessment:* The licensed manufacturing and distribution branch of a supermarket chain is liable for payment of the distributor's assessment in this section (former section 27-409, R.C.M. 1947) with respect to raw milk or finished products imported from another state for ultimate sale within this state. 36 A.G. Op. 58 (1976).

*Nonliability of Retail Branch of Supermarket Chain for Payment of Assessment:* The retail branch of a supermarket chain is not liable for payment of the producer's and/or distributor's assessment specified in this section (former section 27-409, R.C.M. 1947) with respect to dairy products imported from another state for ultimate sale within this state. 36 A.G. Op. 58 (1976).

**Collateral References**

Fee-Financed Government: Issues Raised by Licensing Boards and Other Agencies Before the 2013-2014 Economic Affairs Interim Committee, Interim Report, Mont. Leg. Serv. Div. (2014).

## **81-23-203. Application for licenses.**

**Compiler's Comments**

*Termination Provision Repealed:* Section 1, Ch. 188, L. 2011, repealed sec. 20, Ch. 361, L. 2009, which terminated the 2009 amendments to this section June 30, 2011. Effective April 15, 2011.

*2009 Amendment:* Chapter 361 in two places substituted "board" for "department". Amendment effective July 1, 2009, and terminates June 30, 2011.

*1995 Amendment:* Chapter 333 at end of first sentence substituted "prepared by the department and containing the information required by the department" for "prepared under authority of the department, and an applicant shall state facts concerning his circumstances and the nature of the business to be conducted which in the opinion of the department are necessary for the administration of this chapter" and in second sentence, after "department", deleted "of livestock"; and made minor changes in style. Amendment effective July 1, 1995.

**Administrative Rules**

ARM 32.9.103 Licensing of persons engaged in production of milk for manufacturing purposes.

ARM 32.9.104 Plant licensing.

## **81-23-204. Declining, suspending, and revoking licenses — penalties in lieu of suspension or revocation.**

**Compiler's Comments**

*Termination Provision Repealed:* Section 1, Ch. 188, L. 2011, repealed sec. 20, Ch. 361, L. 2009, which terminated the 2009 amendments to this section June 30, 2011. Effective April 15, 2011.

*2009 Amendment:* Chapter 361 throughout section in five places substituted "board" for "department"; in (1) in second sentence near middle after "rule of the board" deleted "or department"; in (2) near end of first sentence following "rule of the" deleted "department or" and inserted second sentence concerning assessment of penalties; and made minor changes in style. Amendment effective July 1, 2009, and terminates June 30, 2011.

*1983 Amendments:* Chapter 23, near end of (1), after "department may" deleted "at its discretion".

Chapter 277 substituted reference to state special revenue fund for reference to earmarked revenue fund.

**Case Notes**

*Action for Unpaid Fees:* Under 81-23-406 the Milk Control Board (now the Board of Milk Control) could maintain an action against a dairy operator for unpaid license and assessment fees imposed upon him by the Board between 1958 and 1960 without suspending or revoking right of dairy operator to do business by using the provisions of this section. Mont. Milk Control Bd. v. Maier, 140 M 38, 367 P2d 305 (1961).

## Part 3

## Regulation of Milk Prices

**Part Administrative Rules**

Title 32, chapter 24, ARM Board of Milk Control.

**Part Case Notes**

*Constitutionality:* The price-fixing provisions of 81-23-301 (now repealed) did not offend due process. Mont. Milk Control Bd. v. Rehberg, 141 M 149, 376 P2d 508 (1962).

*Minimum Prices:* The means selected to attain the object of Title 81, ch. 23 (formerly the Milk Control Act), set forth in 81-23-102 were the procedure outlined in 81-23-301 (now repealed). Mont. Milk Control Bd. v. Rehberg, 141 M 149, 376 P2d 508 (1962).

**Part Collateral References**

Montana's Milk Industry: An Analysis of the State-Regulated Market, Performance Audit, Mont. Leg. Audit Div. (October 2021).

### 81-23-302. Establishment of minimum prices.

**Compiler's Comments**

*Termination Provision Repealed:* Section 1, Ch. 188, L. 2011, repealed sec. 20, Ch. 361, L. 2009, which terminated the 2009 amendments to this section June 30, 2011. Effective April 15, 2011.

*2009 Amendment:* Chapter 361 in (1) at end substituted "board" for "department"; in (17) near middle of first sentence after "must be" deleted "enforced and", at end inserted "and enforced by the board", and inserted second sentence making an enforcement action subject to 81-23-407; and made minor changes in style. Amendment effective July 1, 2009, and terminates June 30, 2011.

*2007 Amendment:* Chapter 23 in (1) near beginning after "shall" inserted "by adopting rules" and at end substituted "classes of utilization of milk as defined by the department" for "class I, class II, and class III milk by adopting rules in a manner prescribed by the Montana Administrative Procedure Act"; in (7) near end after "milk" deleted "in classes I, II, and III"; in (11) near beginning of first sentence after "rules" deleted "after notice and hearing in the manner prescribed by the Montana Administrative Procedure Act"; in (13) near beginning of first sentence after "amend" substituted "a rule" for "an official rule"; in (14) near end of second sentence after "proceed by" deleted "official"; in (15)(a) in second, third, and fourth sentences before "order" deleted "official"; in (15)(d) at end of second sentence after "hearing" deleted "as required under the Montana Administrative Procedure Act"; and made minor changes in style. Amendment effective October 1, 2007.

*1999 Amendment:* Chapter 416 in third sentence in (15)(a) after "mail" deleted "and by secret ballot" and deleted former fourth sentence that read: "The board shall keep confidential the vote of each producer, producer-distributor, and distributor voting in the referendum"; and made minor changes in style. Amendment effective October 1, 1999.

*1995 Amendments — Composite Section:* Chapter 242 in (1), after "producer", deleted "wholesale, jobber, and retail" and after "class I" deleted "milk and minimum producer prices only for"; in (3), after "producers", deleted "distributors, jobbers, retailers"; in (4), in two places after "costs of production", deleted "and distribution"; deleted (5)(b), (5)(f), and (5)(g) concerning ability of consumers to purchase milk, cost of distributing milk, and cost of jobbing milk (see 1995 Session Law for text); deleted (7)(b) that read: "(b) wholesale prices for milk in class I shall be computed"; deleted (7)(c) that read: "(c) jobber prices for milk in class I shall be computed"; deleted (7)(d) that read: "(d) retail prices for milk in class I shall be computed"; in (8) deleted second sentence that read: "If the evidence presented to the board at any public hearing for the establishment of revision of milk pricing formulas is found by the board to require the establishment of separate and varying wholesale prices for any particular uses, the board shall designate the reasons therefor and establish such separate formulas"; inserted (10) requiring certain distributors to purchase milk from Montana producers; in (11) inserted last two sentences authorizing Board to adopt rules; adjusted subsection references; and made minor changes in style. Amendment effective January 1, 1996.

Chapter 333 at end of (17) substituted "by the department" for "by the milk control bureau of the department of commerce"; and made minor changes in style. Amendment effective July 1, 1995.

Style changes in the chapters were slightly different. In each case, the codifier chose the most appropriate.

*1995 Statement of Intent:* The statement of intent attached to Ch. 333, L. 1995, provided: "It is the intent of the legislature that the rules promulgated by the department of commerce regarding the control of milk prices will be continued and enforced by the department of livestock."

*1987 Amendment:* In (14)(a), near beginning of first sentence after "petition by", substituted "10% or 20 of the licensed producers in Montana, whichever is less, or upon petition by any licensed" for "any producer", in second sentence, near end, inserted "by mail and by secret ballot", and inserted third through fifth sentences relating to referendum (see 1987 Session Law for text); inserted (14)(b) outlining provisions the Board may include in the order establishing the statewide pooling arrangement; inserted (14)(c) allowing withdrawal of cash reserves to fund initial pool startup and requiring reimbursement; and inserted (14)(d) to provide that a pooling arrangement order may be rescinded or amended pending notice and hearing.

*1983 Amendment:* In (1), after "class III milk" deleted "in all areas of the state"; deleted former (5)(i), which read: "a reasonable return on necessary investment to all ordinarily efficient and economical milk dealers"; deleted former (10), which read: "The milk produced in one natural marketing area and sold in another natural marketing area shall be paid for by a distributor or dealer in accordance with the pricing order of the area where produced at the price therein specified of the class or use in which it is ultimately used or sold."; in (11), deleted references to a natural marketing area; at end of (12), after "formulas" deleted "in all market areas of the state"; in (14), deleted several references to marketing areas; and in (15), after "quota plans" deleted "or areawide".

*1981 Amendment:* Substituted "department of commerce" for "department of business regulation" in (17).

**Administrative Rules**

Title 32, chapter 24, ARM Board of Milk Control.

**Case Notes**

*Constitutionality:*

Since the Legislature of Montana in enacting this statute acted in the exercise of its police power to supervise the milk industry, Art. XV, sec. 20, 1889 Mont. Const. (not reenacted), had no application. Mont. Milk Control Bd. v. Rehberg, 141 M 149, 376 P2d 508 (1962).

The price-fixing provisions of this section did not offend due process and did not unconstitutionally delegate legislative power. Mont. Milk Control Bd. v. Rehberg, 141 M 149, 376 P2d 508 (1962).

*Nuisance:* A sale of milk at a price less than the minimum prescribed by the Milk Control Board (now the Board of Milk Control) under this section, being a violation of 81-23-405, was a nuisance which could be enjoined by the Board under 81-23-406. Mont. Milk Control Bd. v. Rehberg, 141 M 149, 376 P2d 508 (1962).

*Authority for Institution of Proceedings:* Petition disclosed that "unanimous consent of all members of the board" had been had prior to the institution of the proceeding as formerly required by 81-23-406, where the petition stated that the executive secretary of the board "as such administrative officer, has the authority of said Board to institute this action on their behalf under the provisions of R.C.M. 1947, section 27-424 [now 81-23-406]". State ex rel. Mont. Milk Control Bd. v. District Court, 138 M 179, 355 P2d 664 (1960).

*Facts to Be Noticed by Board:* If the Milk Control Board (now the Board of Milk Control) proposed to base any part of an official order fixing minimum prices upon facts within its own knowledge, it had to give notice of the specific facts which it would consider. State ex rel. Mont. Milk Control Bd. v. District Court, 138 M 179, 355 P2d 664 (1960).

*Retail Price:* When the retail price charged for some of the milk was more than twice the price paid by the distributor to the producer, there was a violation of the statute. (See 1995 amendment.) Heimbichner v. Mont. Milk Control Bd., 134 M 366, 332 P2d 922 (1958).

## 81-23-303. Rules of fair trade practices.

**Compiler's Comments**

*2021 Amendment:* Chapter 189 in (1) near middle of second sentence inserted "and as provided in subsection (2)"; inserted (2) stating that a payment subject to a milk price forward contract that is less than the minimum producer price is not a violation of this section; and made minor changes in style. Amendment effective July 1, 2021.

*Termination Provision Repealed:* Section 1, Ch. 188, L. 2011, repealed sec. 20, Ch. 361, L. 2009, which terminated the 2009 amendments to this section June 30, 2011. Effective April 15, 2011.

*2009 Amendment:* Chapter 361 at beginning of introductory clause substituted "board" for "department". Amendment effective July 1, 2009, and terminates June 30, 2011.

*2001 Amendment:* Chapter 7 near middle of second sentence of introductory clause after "pursuant to" substituted "81-23-302(11)" for "81-23-302(10)". Amendment effective October 1, 2001.

*1995 Amendment:* Chapter 242 in second sentence of introductory clause, at beginning, inserted exception; deleted former (4) that read: "(4) the purchasing, processing, bottling, packaging, transporting, delivering, or otherwise handling of milk which is to be or is sold or otherwise disposed of at less than the minimum wholesale and minimum retail prices established by the board"; and made minor changes in style. Amendment effective January 1, 1996.

*1983 Amendment:* In (4), after "handling" deleted "in any marketing area".

**Administrative Rules**

Title 32, chapter 24, ARM Board of Milk Control.

**Case Notes**

*Promotional Schemes:* Contest awarding college scholarships to winning applicants was not prohibited by this section where applicants were not required to purchase dairy products in order to participate and contest did not directly or indirectly affect the price of milk charged by the dairy or paid by its customers. A promotional scheme intended to draw noncustomers into purchasing a dairy's milk products was not prohibited by this section unless the contest affected the price of milk charged by the dairy or paid by its customers. Jersey Creamery, Inc. v. Bd. of Milk Control, 160 M 249, 502 P2d 30 (1972).

*Preparation of Rules:*

This section was not intended to stand independently but rather as a mandatory guide for the Milk Control Board (now the Board of Milk Control) in preparing its rules. Mont. Milk Control Bd. v. Community Creamery Co., 139 M 523, 366 P2d 151 (1961).

Rules promulgated by the Milk Control Board (now the Board of Milk Control) governing unfair trade practices were invalid because they failed to encompass all five of the unfair methods of doing business that the Legislature expressly stated should be contained in their rules. Mont. Milk Control Bd. v. Community Creamery Co., 139 M 523, 366 P2d 151 (1961).

*Validity of Rules:* Rules governing unfair trade practices adopted by the Milk Control Board (now the Board of Milk Control) were invalid because they were not in accordance with the delegated authority of the Board. Mont. Milk Control Bd. v. Community Creamery Co., 139 M 523, 366 P2d 151 (1961).

*Violation of Fair Trade Practices:* A violation of fair trade occurred when a party violated properly promulgated rules of the Milk Control Board (now the Board of Milk Control), enacted pursuant to this section. Mont. Milk Control Bd. v. Community Creamery Co., 139 M 523, 366 P2d 151 (1961).

## Part 4
## Enforcement

**Part Collateral References**

Montana's Milk Industry: An Analysis of the State-Regulated Market, Performance Audit, Mont. Leg. Audit Div. (October 2021).

**81-23-401. Entry, inspection, and investigation.**

**Compiler's Comments**

*2021 Amendment:* Chapter 320 at beginning of first sentence inserted exception clause; and made minor changes in style. Amendment effective April 30, 2021.

*2009 Purported Amendment:* Although sec. 11, Ch. 361, L. 2009, purported to amend this section, the final version of the text remained unamended.

### 81-23-402. Reports of dealers — accounting system — records.

**Compiler's Comments**

*Termination Provision Repealed:* Section 1, Ch. 188, L. 2011, repealed sec. 20, Ch. 361, L. 2009, which terminated the 2009 amendments to this section June 30, 2011. Effective April 15, 2011.

*2009 Amendment:* Chapter 361 throughout section in six places substituted "board" for "department"; inserted (1)(b) regarding request and provision of information; and made minor changes in style. Amendment effective July 1, 2009, and terminates June 30, 2011.

**Administrative Rules**

Title 32, chapter 24, ARM Board of Milk Control.

### 81-23-403. Disposition of fines.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

*1987 Amendment:* Near beginning of (1), after "court", inserted "other than a justice's court".

*1983 Amendment:* Substituted reference to state special revenue fund for reference to earmarked revenue fund.

### 81-23-404. Cooperation with other governmental agencies.

**Compiler's Comments**

*Termination Provision Repealed:* Section 1, Ch. 188, L. 2011, repealed sec. 20, Ch. 361, L. 2009, which terminated the 2009 amendments to this section June 30, 2011. Effective April 15, 2011.

*2009 Amendment:* Chapter 361 in two places substituted "board" for "department". Amendment effective July 1, 2009, and terminates June 30, 2011.

### 81-23-405. Violations made misdemeanors — penalties.

**Compiler's Comments**

*2021 Amendment:* Chapter 320 at beginning of first sentence inserted exception clause; and made minor changes in style. Amendment effective April 30, 2021.

*Termination Provision Repealed:* Section 1, Ch. 188, L. 2011, repealed sec. 20, Ch. 361, L. 2009, which terminated the 2009 amendments to this section June 30, 2011. Effective April 15, 2011.

*2009 Amendment:* Chapter 361 in (1) near middle following "license from the" substituted "board" for "department"; and made minor changes in style. Amendment effective July 1, 2009, and terminates June 30, 2011.

**Case Notes**

*Nuisance:* A sale of milk at a price less than the minimum prescribed by the Milk Control Board (now the Board of Milk Control) under 81-23-302, being a violation of this section, was a nuisance which could be enjoined by the Board under 81-23-406. Mont. Milk Control Bd. v. Rehberg, 141 M 149, 376 P2d 508 (1962).

*Action for Unpaid Fees:* Under 81-23-406 the Milk Control Board (now the Board of Milk Control) could maintain an action against a dairy operator for unpaid license and assessment fees imposed upon him by the Board between 1958 and 1960 without subjecting the dairy operator to penal provisions of this section. Mont. Milk Control Bd. v. Maier, 140 M 38, 367 P2d 305 (1961).

### 81-23-406. Additional remedies.

**Compiler's Comments**

*Termination Provision Repealed:* Section 1, Ch. 188, L. 2011, repealed sec. 20, Ch. 361, L. 2009, which terminated the 2009 amendments to this section June 30, 2011. Effective April 15, 2011.

*2009 Amendment:* Chapter 361 in four places substituted "board" for "department"; and made minor changes in style. Amendment effective July 1, 2009, and terminates June 30, 2011.

*1995 Amendment:* Chapter 333 in fourth sentence substituted "department of livestock" for "department of commerce"; and made minor changes in style. Amendment effective July 1, 1995.

*1981 Amendment:* Substituted "department of commerce" for "department of business regulation".

**Case Notes**

*Nuisance:* A sale of milk at a price less than the minimum prescribed by the Milk Control Board (now the Board of Milk Control) under 81-23-302, being a violation of 81-23-405, was a nuisance which could be enjoined by the Board under this section. Mont. Milk Control Bd. v. Rehberg, 141 M 149, 376 P2d 508 (1962).

**81-23-407. Appeal of action or decision.**

**Compiler's Comments**

*Termination Provision Repealed:* Section 1, Ch. 188, L. 2011, repealed sec. 20, Ch. 361, L. 2009, which terminated this section June 30, 2011. Effective April 15, 2011.

*Effective Date:* Section 19, Ch. 361, L. 2009, provided that this section is effective July 1, 2009.

*Termination:* Section 20, Ch. 361, L. 2009, provided: "[Sections 1 through 16] terminate June 30, 2011."

## CHAPTER 29
## RESOURCE AND PROPERTY PROTECTION

**Chapter Law Review Articles**

Cutting the Mussel's Threads: A Legal Perspective on Invasive Species, Frandsen, 46 Pub. Land & Resources L. Rev. 40 (2024), https://scholarworks.umt.edu/plrlr/vol46/iss1/5/.

### Part 1
### Feral Swine

**Part Compiler's Comments**

*Effective Date:* Section 10, Ch. 429, L. 2015, provided: "[This act] is effective on passage and approval." Approved May 5, 2015.

**Part Law Review Articles**

Cutting the Mussel's Threads: A Legal Perspective on Invasive Species, Frandsen, 46 Pub. Land & Resources L. Rev. 40 (2024), https://scholarworks.umt.edu/plrlr/vol46/iss1/5/.

**81-29-103. Presence of feral swine — notification — immediate threat.**

**Administrative Rules**

ARM 32.22.201 Feral swine mandatory reporting.

**81-29-106. Authority — costs — rulemaking.**

**Administrative Rules**

ARM 32.22.201 Feral swine mandatory reporting.

## CHAPTER 30
## PROTECTION OF FARM ANIMALS AND RESEARCH FACILITIES

**Chapter Compiler's Comments**

*Effective Date:* Section 6, Ch. 205, L. 1991, provided: "[This act] [Title 81, ch. 30] is effective on passage and approval." Approved March 27, 1991.

### Part 1
### Farm Animal and Research Facility Protection Act

**81-30-102. Definitions.**

**Compiler's Comments**

*2015 Amendment:* Chapter 161 in definition of effective consent in (c) substituted "mental disease or disorder" for "mental disease or defect". Amendment effective April 1, 2015.

# TITLE 82
# MINERALS, OIL, AND GAS

## CHAPTER 1
## GENERAL PROVISIONS

**Chapter Administrative Rules**

Title 36, chapter 22, ARM Board of Oil and Gas Conservation.

**Chapter Case Notes**

*Judgment Construed to Prevent Excavating That Causes Sloughing, Slumping, or Subsidence Within 30-Foot Buffer — District Court Erred in Denying Motion for Contempt:* The defendant, who operates a gold mine on his property, was permanently enjoined from excavating within 30 feet of the plaintiffs' property boundary to ensure lateral support. After the defendant failed to abide by the order and a previous written agreement, the plaintiffs filed a motion for contempt to remediate for sloughing and ground cracking that occurred as a result of the excavating. The District Court denied the motion and awarded attorney fees to the defendant. The Supreme Court reversed, holding that the defendant was prohibited from excavating in a way that caused sloughing, slumping, or subsidence into the 30-foot buffer. Levens v. Ballard, 2011 MT 153, 361 Mont. 108, 255 P.3d 195.

*Sandstone Not Considered Mineral With Respect to Mineral Reservation in Lease — Summary Judgment Proper:* A deed conveying property to Craig reserved to Hart the rights, leases, and royalties to minerals on the property. After the sale, Craig mined and sold sandstone from a quarry on the property. Based on the reservation, Hart sued for the money Craig collected from the sale of the sandstone. The District Court granted summary judgment to Craig, and on appeal the Supreme Court affirmed. Sandstone is not considered an exceptionally rare or valuable mineral simply because it can be sold commercially. Therefore, sandstone was not considered to be a mineral included in the general reservation of mineral rights. Hart v. Craig, 2009 MT 283, 352 M 209, 216 P3d 197 (2009). See also Farley v. Booth Bros. Land & Livestock Co., 270 M 1, 890 P2d 377 (1995).

*Scoria Not Mineral With Respect to Mineral Reservation in Lease — Payments for Surface Damage From Removing Scoria Pass With Land:* Farley argued that under a lease to Booth reserving mineral rights, Farley was entitled to receive the payments from Western Energy Company to compensate for surface damages incurred in removing scoria from the land. The Supreme Court held that scoria was used in road building, but it was not of a rare and exceptional quality that would make it a mineral with respect to the mineral reservation clause in a lease. Farley also argued that the payments for surface damage in removing the scoria were royalty payments and as such personal property that did not pass to Booth when Booth purchased the surface rights to the property. The Supreme Court held that regardless of whether a royalty interest is personal or real property was of no significance because the royalty was appurtenant to the land and passed to Booth upon purchase of the surface. Farley v. Booth Bros. Land & Livestock Co., 270 M 1, 890 P2d 377, 52 St. Rep. 46 (1995).

*Mineral Lands Leasing Act:* District Courts have discretion to deny or grant injunctive relief upon finding that the government is in violation of the Federal Coal Leasing Amendments Act of 1976. N. Cheyenne Tribe v. Hodel, 842 F2d 224 (9th Cir. 1988).

*Indian Mineral Development Act:* The tribe could unilaterally rescind a proposed mineral development agreement before action by the Secretary of the Interior. Quantum Exploration v. Clark, 780 F2d 1457 (9th Cir. 1988).

*Oil and Gas Conveyances:* Montana is an ownership-in-place state with regard to oil, gas, and other minerals. Title to the mineral interest in land may be separated from the rest of the fee simple title. Under a mineral deed conveyance, the grantee receives, among other incidents, the right to go on land and explore for and produce oil and gas. A mineral reservation right of entry is an easement and conveys no interest in the underlying oil, gas, or minerals or in oil, gas, or minerals produced from the land. The right of entry is an incorporeal hereditament. McDonald v. Unirex, Inc., 221 M 156, 718 P2d 316, 43 St. Rep. 709 (1986).

**Chapter Law Review Articles**

Leveraging ESG Principles to Help Secure Critical Mineral Supply Chains, Royer, 46 Pub. Land & Resources L. Rev. 1 (2024), https://scholarworks.umt.edu/plrlr/vol46/iss1/4/.

## Part 1
## Geophysical Exploration

**Part Administrative Rules**

Title 36, chapter 22, ARM Board of Oil and Gas Conservation.

**Part Case Notes**

*Right to Explore for Minerals as Including Right to Conduct Resource Inventory Operations:* A mineral reservation executed in the 1940s, allowing the grantor to use the surface to explore for minerals, includes the right to conduct resource inventory operations and other activities necessary to compile the environmental information that must be obtained before the state will allow mining operations to commence. W. Energy Co. v. Genie Land Co., 195 M 202, 635 P2d 1297, 38 St. Rep. 1791 (1981).

**Part Law Review Articles**

Wrongful Geophysical Exploration, Rice, 44 Mont. L. Rev. 53 (1983).

### 82-1-101. Persons required to comply.

**Compiler's Comments**

*1989 Amendment:* Inserted (2)(c) regarding seismic shot holes. Amendment effective March 20, 1989.

*1989 Statement of Intent:* The statement of intent attached to Ch. 190, L. 1989, provided: "A statement of intent is required for this bill to provide further guidance to the board of oil and gas conservation on the content of rules addressing plugging and abandonment of seismic shot holes. The rules should describe:

(1) plugging requirements, which may vary with geologic conditions; and
(2) surface restoration requirements around the seismic shot hole."

*1985 Amendment:* In (1) after "purpose of", substituted "seismic exploration in which exploration entry is made upon the surface estate for the acquisition of geophysical data" for "geophysical exploration in which exploration the seismograph is utilized along with explosives for the determination of geophysical data"; and in (2) in two places substituted "seismic" for "geophysical".

*1983 Amendment:* Inserted (2) requiring Board to adopt rules regarding exploration crews and activities.

*1983 Statement of Intent:* The statement of intent attached to SB 350 (Ch. 116, L. 1983) provided: "A statement of intent is required for this bill because it delegates rulemaking authority to the Board of Oil and Gas Conservation in section 1 [82-1-101(2)].

The intent is to provide the Board with the authority to adopt rules to identify geophysical exploration crews operating in this state and to designate areas where geophysical exploration may not be allowed. These powers are desirable so that landowners can readily identify the seismic crews operating on their land and to allow the Board to prohibit seismic shots in sensitive areas such as near wells and structures."

### 82-1-104. Indemnification of property owners — restoration of surface.

**Compiler's Comments**

*2015 Amendment:* Chapter 69 inserted (1)(b) concerning financial instrument filing fees; and made minor changes in style. Amendment effective February 27, 2015.

*2007 Amendment:* Chapter 33 in (1) near beginning of first sentence before "surety" deleted "good and sufficient" and in two places after "bond" inserted "cash, certificate of deposit, or other instrument acceptable to the secretary of state" and in second sentence after "forfeiture of the" inserted "surety" and after "bond" inserted "cash, certificate of deposit, or other instrument acceptable to the secretary of state"; in (2) near beginning of first sentence after "surface" inserted "rights" and near beginning of second sentence after "board" inserted "of oil and gas conservation"; in (4) at beginning of first sentence after "The" inserted "surety", after "bond" inserted "cash, certificate of deposit, or other instrument acceptable to the secretary of state", and after "exploration is" substituted "conducted" for "carried on or engaged in", in second sentence near beginning after "liability" substituted "for the exploration activities may not" for "of the surety shall in no event", before "bond" inserted "surety", and at end after "bond" inserted "cash, certificate of deposit, or other instrument acceptable to the secretary of state", and in third sentence in two places before "bond" inserted "surety" and in two places after "bond" inserted "cash, certificate of deposit, or other instrument acceptable to the secretary of state"; and made minor changes in style. Amendment effective October 1, 2007.

*1985 Amendment:* In (1) in first sentence, at beginning, inserted "Prior to performing such seismic activity", after "corporation" deleted "desiring to engage in such geophysical exploration", in three places substituted "seismic" for "geophysical", and inserted second sentence referring to court-determined forfeiture; in middle of (2) inserted "or other material approved by the board of oil and gas conservation"; and in (3) substituted "Upon completion of any seismic exploration, the person, firm, or corporation shall remove all stakes, markers, cables, ropes, wires, and debris or other material used in such exploration and shall also restore the surface around any shot holes as near as practicable to its original condition" for "The person, firm, or corporation shall also restore the surface around the same as near as practicable to its original condition".

*1983 Amendment:* Near middle of (2), deleted "replacing all drill cuttings and" before "filling the hole"; at end of first sentence in (2), substituted language following "capping the same" for "with an impervious material at least 1 foot in depth, the top of which shall be 4 feet below the surface of the land".

**Case Notes**

*Existence of Contract — Payment of Tort Judgment for Drilling Damages as Precluding Determination:* Plaintiffs sued defendant for damages claimed to have occurred to their farmlands when a seismographic hole drilled and shot by defendant brought a continuous water flow to the surface, damaging farmland. Defendants left the area and later tried unsuccessfully to plug the hole. The jury found for plaintiffs and awarded actual and punitive damages. Defendant paid the award for actual damages and appealed the award of punitive damages. Defendant claimed the case involved a contract and that punitive damages were not properly allowable. By satisfying the judgment for actual damages, defendant acceded to the correctness of the judgment and accepted its benefits. When a judgment is paid, it passes beyond the review of a superior court. The question of whether a contract existed was submitted to the jury. Their judgment was based on a tort theory, comparative negligence. Because this judgment was satisfied, the Supreme Court could not rule on whether a contract was involved. Dahl v. Petroleum Geophysical Co., 194 M 294, 632 P2d 1136, 38 St. Rep. 1474 (1981).

*Sealing of Shot Holes:* Sealing "shot" holes by pouring excess cuttings down them and plugging the orifice with an aluminum plug by forcing it down into the hole so that the top of the plug was below plow depth was in compliance with this section when the holes were only 4½ inches in diameter, in view of expert testimony that seismographic holes tend to slough and cave, releasing lateral support from materials around the hole and that the pressure from the weight of the earth above has a tendency to force the material toward the center, sealing the hole. Haynie v. N. Pacific Ry. Co., 158 M 247, 490 P2d 715 (1971).

## 82-1-105. Exploration permit.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

## 82-1-107. Permitholder to furnish information to surface owner.

**Compiler's Comments**

*2007 Amendments — Composite Section:* Chapter 33 in (1) near middle of introductory clause after "corporation" inserted "conducting the seismic activity"; in (1)(d) at beginning after "number" substituted "or other identifying information for the surety bond, cash, certificate of deposit, or other instrument acceptable to the secretary of state" for "of the bond"; and made minor changes in style. Amendment effective October 1, 2007.

Chapter 57 in (1) in first sentence near middle substituted "surface owner, as defined in 82-10-502" for "surface user" and at end inserted "shall provide copies of Title 82, chapter 10, part 5, this part, and, if available, a current publication produced by the environmental quality council entitled "A Guide to Split Estates in Oil and Gas Development""; in (1)(f) near middle and in (2) near beginning substituted "surface owner" for "surface user"; inserted (3) regarding surface owner notice to those responsible for surface operations; and made minor changes in style. Amendment effective October 1, 2007.

*Applicability:* Section 7, Ch. 57, L. 2007, provided: "[This act] applies to proceedings begun on or after October 1, 2007."

*1985 Amendment:* Throughout section substituted "seismic" for "geophysical"; at end of (1)(c) inserted "or, if self-insured, evidence of such self-insurance"; in (1)(e) substituted "a description of the planned seismic activity and where it will take place" for "a description of the surface areas where the planned geophysical activity will take place"; and inserted (2) requiring surface user to provide certain information to permitholder.

### 82-1-108. Filing record of work performed.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

*1985 Amendment:* Near beginning of (1) and near middle of (2) substituted "seismic" for "geophysical"; and near end of (2) extended time in which record must be supplied from 10 to 30 days.

### 82-1-111. Definitions.

**Compiler's Comments**

*Saving Clause:* Section 6, Ch. 379, L. 1993, was a saving clause.

**Case Notes**

*Coal Seam Methane Gas Not Part of Coal Estate — Ownership of and Right to Develop:* In 1984, Carbon County gave a deed to Reserve's predecessor in interest conveying all "coal and coal rights with the right of ingress and egress to mine and remove the same" on certain lands within the county. In 1990, the county gave an oil and gas lease to Florentine, giving Florentine the right to operate for and produce from the disputed property "oil and all gas including coal seam methane of whatsoever nature or kind". Carbon County filed a quiet title action against Reserve, asserting the county's claims to all of the mineral and mineral rights, excluding the coal and coal rights, on the disputed property. The District Court held that the coal seam methane gas was part of the coal estate and was included in the conveyance of coal and coal rights by the county to Reserve's predecessor in interest. The Supreme Court held that coal seam methane gas is not a constituent part of coal. Thus, it may be severed from the coal estate. As the lessee of Carbon County, the owner of the gas estate, Florentine has the right to drill for and to produce coal seam methane gas either in advance of or during coal mining operations. Reserve has a mutual, simultaneous right to extract and to capture the gas for safety purposes, incident to its coal operations. Carbon County v. Union Reserve Coal Co., Inc., 271 M 459, 898 P2d 680, 52 St. Rep. 529 (1995).

*New Legislative Definitions — Not Unlawful Taking of Coal Seam Methane Gas From Owners of Coal or Coal Lands:* In a dispute between the county, the gas lessee of the county, and the owner of coal rights, the latter claimed that 1993 legislative changes in the definitions of gas, oil, and coal either were regulatory in nature only and did not affect rights or, in the alternative, that if the amendments did remove coal seam methane gas ownership from coal owners, then the removal was without compensation and so constituted an unconstitutional taking. The Supreme Court held that the question of taking without compensation was moot because the legislation was prospective in nature and there was a severance of the gas estate from the coal estate under the plain language of the grant. Carbon County v. Union Reserve Coal Co., Inc., 271 M 459, 898 P2d 680, 52 St. Rep. 529 (1995).

## Part 2
## Cancellation and Forfeiture of Oil, Gas, or Mineral Leases

**Part Case Notes**

*Oil and Gas Leases Not Forfeited — Temporary Cessation — Attorney Fees Recoverable:* In a dispute over oil and gas leases, the plaintiffs alleged the leases automatically terminated because the well failed to produce oil until after the primary term of the lease expired and because the defendant failed to establish the temporary cessation of production doctrine. The Supreme Court held that while forfeitures of oil and gas leases are favored to prevent lands being burdened by profitless and unworked leases, the District Court correctly concluded the leases were in full force and effect since some oil was actually produced before the primary lease term expired. Because the plaintiffs failed to establish that the leases were forfeited, the defendant's attorney fees were recoverable under 82-1-202. Moerman v. Prairie Rose Resources, Inc., 2013 MT 241, 371 Mont. 338, 308 P.3d 75, applying Somont Oil Co., Inc. v. A & G Drilling, Inc., 2002 MT 141, 310 Mont. 221, 49 P.3d 598.

*Coordination of Habendum and Pugh Clauses in Oil and Gas Lease — Shut-In Gas Well Considered Producing Well for Lease Purposes — Lease Extended on Section With Producing Well, Terminated on Undeveloped Sections for Lack of Timely Rental Payments:* Plaintiff's oil and gas leases had habendum clauses, which provided that the primary leases would be extended as long as oil or gas was produced or drilling operations continued on any of the leased property, and Pugh clauses, which provided that production would not serve to extend the primary term of a lease unless the lessee paid an annual per-acre rental fee prior to the end of the primary term. By the end of the primary term, plaintiff had only one shut-in well developed on the leasehold. Depending on the habendum clauses, plaintiff concluded that there was not a producing well on the leasehold, so the Pugh clauses did not take effect and rental payments were not required. Depending on the Pugh clauses, defendants concluded that because there were no producing wells on the leasehold and because the rental fee on the shut-in well was 2 days late, all of plaintiff's leases were canceled. In reconciling the clauses, the District Court correctly found that: (1) the Pugh clauses required that rental payments be paid on or before the expiration of the primary term in order to extend leases on undeveloped sections; and (2) because time is of the essence in oil and gas leases and plaintiff did not pay timely rental, the leases expired by their own terms on all sections except the section containing the shut-in well, which was considered a producing well, and that lease would continue under the habendum clause as long as plaintiff used reasonable diligence in marketing the gas. Sandtana, Inc. v. Wallin Ranch Co., 2003 MT 329, 318 M 369, 80 P3d 1224 (2003).

*No Requirement for Further Development When Delay Rental Payments Made:* When the clear language of an oil lease allowed lessee to make annual delay rental payments instead of engaging in drilling or production operations and when the payments were made and accepted by lessor, the covenant to develop was not breached and lessee was relieved of drilling obligations, except that of offset drilling. Sundheim v. Reef Oil Corp., 247 M 244, 806 P2d 503, 48 St. Rep. 181 (1991).

*Reasonable Notice Required Before Duty to Drill Offset Well Arises:* Clarifying its opinion in U.V. Indus., Inc. v. Danielson, 184 M 203, 602 P2d 571 (1979), the Supreme Court held that before a lessee's duty to drill an offset well arises, the lessee must have reasonable notice of the necessity to protect the leasehold. Notice "can either be express, from the lessor, or constructive, gained from the surrounding circumstances". This rule is only applicable in cases when a lessor is seeking relief in the form of damages. If he is seeking other forms of relief, such as forfeiture of the lease, he must give written notice in order to give the lessor a chance to cure the breach. Sundheim v. Reef Oil Corp., 247 M 244, 806 P2d 503, 48 St. Rep. 181 (1991).

*Act of God or Similar Clause in Lease — Failure to Remedy Reasonably Correctable Situation:* Oil and gas lease contained a provision that if production and operations were stopped the lessee had 90 days to resume them, and if lessee did not do so the lease was terminated. It also contained a clause stating that if production or operations were stopped because of circumstances beyond the lessee's reasonable control, the lease was not terminated. The state ordered production stopped because of saltwater seepage from a saltwater pit at the well site. The lessee could have corrected the leakage with a truckload of mud, which was available, and it was reasonable for lessee to do so. Therefore, the clause saving the lease from termination did not apply and the lease terminated after 90 days. Edington v. Creek Oil Co., 213 M 112, 690 P2d 970, 41 St. Rep. 1990 (1984).

*Conditioning Termination of Lease on Judicial Ruling of Breach:* Oil and gas lease contained a provision that if production and operations were stopped and the lessee did not resume them within 90 days, the lease was terminated. It also contained a provision that the lease was not forfeited for breach of an implied covenant until it was finally judicially determined that the breach existed and the breach was not remedied within a reasonable time after the determination. The first clause was an express condition, not an implied covenant, and where lessee did not follow it, the lease terminated by its own express language and could not be saved by the second clause. Edington v. Creek Oil Co., 213 M 112, 690 P2d 970, 41 St. Rep. 1990 (1984).

*Reentry by Lessee Following Termination of Lease — Willful Trespass:* Oil and gas lease contained a provision that if production and operations were stopped and lessee did not resume them within 90 days, the lease was terminated. Production and operations were stopped and not resumed until years later, at a time when the lease had terminated and lessor had granted a lease to someone else. Lessee was a willful trespasser in entering and recommencing drilling as lessee knew the lease had expired by its own terms. Lessee thus was not entitled to proceeds from the oil produced after the reentry or to cost of producing the oil. Edington v. Creek Oil Co., 213 M 112, 690 P2d 970, 41 St. Rep. 1990 (1984).

*No Default for Failure to Furnish Accounting and Keep Open Records:* Where the plaintiffs served the defendants notice of default of an operating agreement, the District Court did not err in granting summary judgment for the defendants on the issue of the defendants' failure to furnish an accounting to the plaintiffs of all minerals mined, processed, and sold and the defendants' failure to keep open for inspection complete records of the milling operation. The operating agreement required only that the defendants maintain accounts and keep them open for inspection during regular business hours. The defendants made clear to the plaintiffs that accounts were open for inspection, but the plaintiffs did not ask to inspect the documents nor did they ask to see those kept in out-of-state offices. Since defendants were willing to cooperate, there was no default in this respect. Lewis v. St., 207 M 361, 675 P2d 107, 41 St. Rep. 9 (1984).

*No Default for Failure to Pay Interest on Royalty Payment — Mineral Lease Not Requiring Payment of Interest:* Where the plaintiff lessors of mineral rights gave the defendant lessees notice of default for failure to make a rental payment and the lessees tendered a check for that payment, the District Court did not err in granting summary judgment for the defendants in a later action for default brought by the plaintiffs. Even assuming that payment of interest in the royalty was due under 31-1-106, the agreement of the parties did not require payment of interest. Failure to remit interest was not in default of that agreement. Moreover, the default notice failed to notify the defendants that interest was due, contrary to the default clause of the parties' agreement. Failure to pay the interest was therefore immaterial. Lewis v. St., 207 M 361, 675 P2d 107, 41 St. Rep. 9 (1984).

*No Default for Failure to Provide Records and Data When Needed Information Not Specified:* Where the plaintiffs served notice of default of an operating agreement upon the defendants for failure to provide maps, assay reports, drilling results, and other data but failed to specify the documents or information not provided, the District Court did not err in granting summary judgment for the defendants in a default action brought by the plaintiffs. Defendants informed plaintiffs they were unsure what documents or information was lacking and asked for a clarification, which plaintiffs failed to provide. Plaintiffs cannot claim default if they failed to specify the deficiency as required by the operating agreement. Lewis v. St., 207 M 361, 675 P2d 107, 41 St. Rep. 9 (1984).

*No Default in Payment by Personal Check:* Where the defendants were given notice of default of an operating agreement for failure to make royalty payments but tendered a personal check for the royalties within the time allowed by the agreement for curing the default, the District Court did not err in granting summary judgment for the defendants in a default action subsequently brought by the plaintiffs. The operating agreement did not specify the form in which payment was to be made, and even though the plaintiffs had earlier requested payment in gold bullion, the defendants had never agreed to such payment. The evidence before the District Court was undisputed that prior payments had all been made by check and accepted, and the defendants had no reason to suspect dishonor. There was therefore no default in payment by check. Lewis v. St., 207 M 361, 675 P2d 107, 41 St. Rep. 9 (1984).

*No Default Where Lien Removed Within Period for Remedy of Default:* Where the plaintiffs served notice of default of an operating agreement upon the defendants for allowing a lien to be placed against the plaintiffs' mine, the District Court did not err in granting summary judgment for the defendant in a default action brought by the plaintiffs. The notice of judicial sale applied only to an interest in the property held by a previous partner of a defendant and did not affect the plaintiffs' interest in the mine. Even if the sale was a "lien" within the meaning of the operating agreement, it was removed within the 60-day period for remedying a default. Lewis v. St., 207 M 361, 675 P2d 107, 41 St. Rep. 9 (1984).

*Operating Agreement Not Violation of Rule Against Perpetuities:* Where the plaintiffs and defendants entered into an agreement for the operation of a mine that provided for two extensions of the 5-year primary term of the agreement only if the defendants were "engaged in commercial production of minerals" and only if "active mining operations" were in progress, the District Court did not err in granting summary judgment for the defendants and holding that the agreement did not violate the rule against perpetuities. Under the rationale of Consol. Mines Corp. v. O'Connell, 107 M 273, 85 P2d 345 (1938), the lease could be perpetually renewed but was limited by the required facts being found to exist at time of renewal. This is not a perpetuity. Lewis v. St., 207 M 361, 675 P2d 107, 41 St. Rep. 9 (1984).

*Forfeiture of Gas and Oil Lease — Common-Law Offset Drilling Rule:* Where an oil and gas lease provided that no change in ownership of the land was to be binding upon the lessees until after lessee had been given a copy of any such transfer, lessor's grantees' right to damages for failure to drill an offset well under the common-law offset drilling rule could not be defeated by a failure to give the required notice, as the purpose of the notice is to prevent the lessee's forfeiture of the lease for failure to pay delay rentals to the proper party. Such required notice has nothing to do with implied covenants. U. V. Indus., Inc. v. Danielson, 184 M 203, 602 P2d 571 (1979).

*Construction of Lease in Favor of Lessor:* An oil and gas lease should be construed strictly against the lessee and in favor of the lessor. Daley v. Torrey, 69 M 599, 223 P 498 (1924).

**Part Law Review Articles**

Remedies for Breach of Implied Covenants in Oil and Gas Leases in Montana, Gordon, 28 Mont. L. Rev. 187 (1967).

Effect of County and State Recordation of Options on Federal Oil and Gas Leases, 20 Mont. L. Rev. 101 (1958).

Oil and Gas Interests in a Decedent's Estate, Morris, 17 Mont. L. Rev. 85 (1955).

Assignments by the Landowner and the Lessee, Sullivan, 17 Mont. L. Rev. 64 (1955).

Elemental Principles of the Modern Oil and Gas Lease, Brown, 17 Mont. L. Rev. 39 (1955).

Nature of the Landowner's Interest in Oil and Gas, Walker, 17 Mont. L. Rev. 22 (1955).

A Survey of Oil and Gas Law in Montana as It Relates to the Oil and Gas Lease, Sullivan, 16 Mont. L. Rev. 1 (1955).

Oil and Gas Leases on Federal Land, Malone, 14 Mont. L. Rev. 20 (1953).

Oil and Gas Leasehold and Other Estates, Shepherd, 14 Mont. L. Rev. 1 (1953).

### 82-1-201. Release of record upon forfeiture, cancellation, or expiration of lease — penalty.

**Compiler's Comments**

*1997 Amendment:* Chapter 228 inserted (2) regarding request for recordation of assignment or release of more than one lease; and made minor changes in style.

*1985 Amendment:* Near beginning of (1) before "forfeited", substituted "and recorded is" for "shall become" and after "forfeited", inserted "canceled, or expires"; near middle of (1) after "forfeiture", inserted "cancellation, or expiration"; and inserted (2) making violation of section a misdemeanor.

**Case Notes**

*Plaintiff Prevailing Party on Release of Majority of Oil and Gas Leases Entitled to Attorney Fees:* Plaintiff filed suit to compel release of 28 oil and gas leases in 1998, and defendants eventually executed release on 20 leases, leaving 8 leases for the jury to address at trial. Following remand at a second trial, plaintiff prevailed on three more leases, and upon a second appeal, the Supreme Court ordered execution on the remaining five leases as well. Thus, as the prevailing party on 23 leases even before the second appeal, plaintiff was entitled to reasonable attorney fees pursuant to this section. Somont Oil Co., Inc. v. A&G Drilling, Inc., 2006 MT 90, 332 M 56, 137 P3d 536 (2006).

*Automatic Termination Clause — Notice Not Required:* In 1965, Larsons executed a 5-year oil and gas lease to Sun Oil. In 1968, Sun Oil assigned the lease to Miami Oil. In 1980, Larsons sent Miami a letter noting drilling activities had been discontinued for the 2 previous years and requesting a release of its lease or assignment. Miami did not respond. Three months later, Larsons commenced an action to quiet title and obtain a release of the lease. Miami Oil argued that since production had commenced during the primary term of the lease, the lease could not be terminated unless notice was given pursuant to the habendum clause of the lease. The court relied on an automatic termination clause based on a cessation of production without resumption for more than 90 days. No notice was required because termination of the lease was automatic. The court adopted the reasoning and rule of Lynch v. Southern Coast Drilling Co., 442 S.W.2d 804 (Tex. Civ. App. 1969), in quieting title for the Larsons. Miami Oil Producers, Inc. v. Larson, 203 M 225, 661 P2d 1260, 40 St. Rep. 407 (1983), followed in Sundheim v. Reef Oil Corp., 247 M 244, 806 P2d 503, 48 St. Rep. 181 (1991).

*Development:* Lessor who intends to claim forfeiture, where development is an element, has the duty to demand that development proceed or commence. Braun v. Mon-O-Co Oil Corp., 133 M 101, 320 P2d 366 (1958).

*Implied Covenant to Drill Offset Wells:* Alleged failure to drill offset wells for protection of leased acreage in accordance with implied covenant to do so was not a breach of contract where there was no market for the gas that would be produced, and the drilling would thus have been a useless act. Severson v. Barstow, 103 M 526, 63 P2d 1022 (1936).

*Implied Covenant to Find Market:* Where the principal consideration for a lease on oil or gas lands is the payment of royalty, the lease, silent on the subject, carries an implied covenant to use reasonable diligence to market the product. Severson v. Barstow, 103 M 526, 63 P2d 1022 (1936).

*Definition of "Forfeiture":* "Forfeiture" means the deprivation of the right of the lessee to retain possession under the lease because of nonperformance of an obligation or condition imposed upon him by the lease. Steven v. Potlatch Oil & Ref. Co., 80 M 239, 260 P 119 (1927).

*Time for Demanding Release:* Lessor is not required to wait 60 days after forfeiture before making demand but may do so at any time, provided suit is not commenced before the expiration of the 60-day period during which it is the duty of the lessee to make release. Steven v. Potlatch Oil & Ref. Co., 80 M 239, 260 P 119 (1927).

*Written Notice Not Required:* The lessor of oil and gas rights is not required to give written notice of his intention to declare a forfeiture of the lease for failure of the lessee to commence drilling operations within the time stipulated in order for the lessor to prevail in an action brought under 82-1-201 through 82-1-204. Solberg v. Sunburst Oil & Gas Co., 76 M 254, 246 P 168 (1926).

*Operations After Forfeiture:* After forfeiture of an oil and gas lease has been declared and demand made for its return for nonperformance of the condition to commence drilling operations within a given time, it is immaterial that the lessee thereafter commenced drilling, and the lessee's failure to release the lease of record within 60 days entitles the lessor to prosecute his action under 82-1-201 through 82-1-204. Solberg v. Sunburst Oil & Gas Co., 76 M 254, 246 P 168 (1926).

*Construction of Lease in Favor of Lessor:* An oil and gas lease should be construed strictly against the lessee and in favor of the lessor. Daley v. Torrey, 69 M 599, 223 P 498 (1924).

*Written Portion of Lease Controlling:* Written paragraph in lease providing that in the event a well was not commenced within the time limit mentioned in the lease the instrument should be null and void was controlling as against a printed one under which, if the operations were not commenced within that time, the lessor should pay $2 per acre for each additional year commencement of drilling was delayed. Daley v. Torrey, 69 M 599, 223 P 498 (1924).

## 82-1-202. Action to compel release — procedure without court action.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

**Case Notes**

*Oil and Gas Leases Not Forfeited — Temporary Cessation — Attorney Fees Recoverable:* In a dispute over oil and gas leases, the plaintiffs alleged the leases automatically terminated because the well failed to produce oil until after the primary term of the lease expired and because the defendant failed to establish the temporary cessation of production doctrine. The Supreme Court held that while forfeitures of oil and gas leases are favored to prevent lands being burdened by profitless and unworked leases, the District Court correctly concluded the leases were in full force and effect since some oil was actually produced before the primary lease term expired. Because the plaintiffs failed to establish that the leases were forfeited, the defendant's attorney fees were recoverable under 82-1-202. Moerman v. Prairie Rose Resources, Inc., 2013 MT 241, 371 Mont. 338, 308 P.3d 75, applying Somont Oil Co., Inc. v. A & G Drilling, Inc., 2002 MT 141, 310 Mont. 221, 49 P.3d 598.

*Oil and Gas Habendum Clause Obligating Maintenance of Production — Jury Instructions Allowing Consideration of Causes of Cessation of Production Improper When Evidence Shows Lack of Production of Paying Quantities:* Actions to terminate oil and gas leases invoke two distinct inquiries: (1) whether the lease is producing in paying quantities; and (2) if not, whether the cessation in production is permanent or temporary. As an ownership-in-place state, in Montana, the lessee's interest terminates upon the occurrence of a stated event, which, under the habendum clause in effect here, was the cessation of production in paying quantities. Paying quantities is defined as the amount that would pay a small profit over the cost of operation, excluding the initial cost of bringing the well into production. Thus, the finder of fact must necessarily consider income generated from the property and the expenses incurred in its operation. However, in an effort to mitigate the harshness of the automatic termination rule, courts developed the temporary cessation of production rule, which shifts the burden to defendant to prove that cessation is temporary once plaintiff establishes that the lease has halted production. To determine whether a cessation is temporary or permanent, a jurisdiction considers the cause of the cessation, the time reasonably required to restore production, and the diligence exercised by the lessee in restoring production. Ownership-in-place jurisdictions generally limit temporary cessations to mechanical or production breakdowns. If there is a lack of market, if the lease is capable of producing in paying quantities, and if the lessee is using reasonable diligence to market the product, Montana law considers the lease as one that is producing in paying quantities and will not reach the temporary cessation of production question. The District Court in this case allowed jury consideration of oil prices, economic considerations, and defendant's financial condition in determining whether cessation was temporary or permanent. However, plaintiff established that the leases in question failed to produce in paying quantities during the prescribed accounting period. At that point, analysis implicating economic factors concluded. Therefore, the Supreme

Court held that allowing jury consideration of defendant's economic factors was an abuse of discretion and was prejudicial to plaintiff, warranting a new trial. Somont Oil Co., Inc. v. A&G Drilling, Inc., 2002 MT 141, 310 M 221, 49 P3d 598 (2002), following Berthelote v. Loy Oil Co., 95 M 434, 28 P2d 187 (1933), and Christian v. A. A. Oil Corp., 161 M 420, 506 P2d 1369 (1973). On remand, defendants bore the burden of proving that cessation of production on all eight leases at issue was temporary, that all cessations in production were caused by sudden involuntary stoppages or mechanical breakdown of the wells, and that defendants engaged in diligent efforts to immediately restore production. However, given a complete lack of evidence from defendants as to why the majority of wells failed to operate and whether repairs were undertaken, there was no basis for submitting the question of temporary cessation to the jury, and plaintiff was entitled to judgment as a matter of law. Additionally, the District Court did not err in limiting retrial to the second inquiry articulated in Somont I, id., concerning whether the cessation in production was permanent or temporary or in limiting the timeframe for which evidence could be presented regarding restoration of production to the leases. Somont Oil Co., Inc. v. A&G Drilling, Inc., 2006 MT 90, 332 M 56, 137 P3d 536 (2006). See also Watson v. Rochmill, 155 SW 2d 783 (Tex. 1941).

Following remand pursuant to Somont Oil Co., Inc. v. A&G Drilling, Inc., 2006 MT 90, 332 M 56, 137 P3d 536 (2006) (Somont II), plaintiff filed a renewed motion seeking damages for defendant's plugging the wells on the conceded leases. The District Court held that the damage claim was barred by res judicata. Plaintiff appealed, but the Supreme Court affirmed. The issue of damages was part of the litigation from the beginning in 1998. In the appeal that resulted from Somont II, plaintiff did not argue that it did not have a full opportunity to litigate whether damages were due, and nothing in the record indicated that plaintiff was precluded from litigating for damages. The litigation came to a close upon the decision in Somont II, and plaintiff's further claim for damages was prohibited by res judicata because plaintiff was barred from relitigating a claim that it already had an opportunity to litigate. Somont Oil Co. v. A&G Drilling, Inc., 2008 MT 447, 348 M 12, 199 P3d 241 (2008).

*Standing to Compel Release of Oil and Gas Leases Gained by Assignment:* Lessors of five oil and gas leases assigned plaintiff the right to sue defendant to compel release of the oil and gas leases. Defendant asserted that plaintiff lacked standing to sue because under this section, the owner of the leased premises may sue, but plaintiff was not the owner of the leases. The Supreme Court noted the longstanding rule that rights assigned from contracts between private individuals are assignable, that nonassignability is the exception, and that in the absence of a nonassignability clause, either party may generally make an assignment of contract rights. Further, under former Rule 17(a), M.R.Civ.P. (now superseded), a party vested with legal title is considered a real party in interest. Each of the leases in question provided for assignment of rights, one of which was the right to compel termination of a lessee's interest. Thus, plaintiff, having been vested with legal title by assignment, had standing to compel release of the leases. Somont Oil Co., Inc. v. A&G Drilling, Inc., 2002 MT 141, 310 M 221, 49 P3d 598 (2002).

*Automatic Termination Clause — Notice Not Required:* In 1965, Larsons executed a 5-year oil and gas lease to Sun Oil. In 1968, Sun Oil assigned the lease to Miami Oil. In 1980, Larsons sent Miami a letter noting drilling activities had been discontinued for the 2 previous years and requesting a release of its lease or assignment. Miami did not respond. Three months later, Larsons commenced an action to quiet title and obtain a release of the lease. Miami Oil argued that since production had commenced during the primary term of the lease, the lease could not be terminated unless notice was given pursuant to the habendum clause of the lease. The court relied on an automatic termination clause based on a cessation of production without resumption for more than 90 days. No notice was required because termination of the lease was automatic. The court adopted the reasoning and rule of Lynch v. Southern Coast Drilling Co., 442 S.W.2d 804 (Tex. Civ. App. 1969), in quieting title for the Larsons. Miami Oil Producers, Inc. v. Larson, 203 M 225, 661 P2d 1260, 40 St. Rep. 407 (1983), followed in Sundheim v. Reef Oil Corp., 247 M 244, 806 P2d 503, 48 St. Rep. 181 (1991).

*Venue of Action:* Although an action under this section combines three different causes of action, (1) an action for cancellation of the lease, (2) an action for the statutory penalty, and (3) an action for damages, the principal cause of action is for cancellation of the lease, which is a local nontransitory action in rem, and the defendant is not entitled to a change of venue as to any part of the action from the county where the real estate is located to the county of his residence. Beavers v. Rankin, 142 M 570, 385 P2d 640 (1963).

*Attorney Fees:*

Since this statute authorizes recovery of attorney fees, the Trial Court may act upon its own knowledge concerning value of attorneys' services and award fee without taking evidence. Stanolind Oil & Gas Co. v. Guertzgen, 100 F2d 299 (1938).

Where both lessor and lessee secured a portion of the relief they sought in action for cancellation of gas lease, neither party was required to pay the other's attorney fees. Severson v. Barstow, 103 M 526, 63 P2d 1022 (1936).

*Nature of Action:*

Action under these sections is one at law but embodies principle of equitable relief; Court should seek to do equity as between the parties. Severson v. Barstow, 103 M 526, 63 P2d 1022 (1936).

An action for the cancellation of an oil and gas lease and for recovery of damages and the statutory penalty for failure to release, brought under 82-1-201 through 82-1-204, is one at law, even through incidentally it calls for equitable relief. Stranahan v. Independent Natural Gas Co., 98 M 597, 41 P2d 39 (1935); Berthelote v. Loy Oil Co., 95 M 434, 28 P2d 187 (1933).

An action to compel the release of an oil and gas lease of record on the ground that the lessee had failed to commence drilling operations within the time fixed in the lease, by reason of which it became forfeited, and for the recovery of the statutory penalty, damages, and attorney's fees is one at law, entitling plaintiff to a jury trial. Solberg v. Sunburst Oil & Gas Co., 70 M 177, 225 P 612 (1924).

*Burden to Prove Diligence to Find Market:* In an action under 82-1-201 through 82-1-204 to cancel gas lease for failure to find market for gas produced, burden is upon lessee to establish fact that he used reasonable diligence in trying to find a market. Severson v. Barstow, 103 M 526, 63 P2d 1022 (1936).

*Limitation of Action:* A statute such as 82-1-202 that gives a right which existed before the statute and merely increases the damages by adding a penalty is not a penalty statute within the meaning of 27-2-211, the Statute of Limitations applicable to penalty statutes. Abell v. Bishop, 86 M 478, 284 P 525 (1930).

*Grant by Lessor:* When the lessor of oil and gas lands, after demanding a cancellation of the lease as required by 82-1-203, conveys title by warranty deed to another, both then have a remedial interest in the cause of action for cancellation of the lease when they join as plaintiffs in the action commenced after the passage of title. Failure of the grantee to make demand upon the lessee to clear the record of the instrument prior to commencement of the action does not destroy either plaintiff's right to maintain the suit since the lessor's demand was sufficient to meet the requirements of 82-1-203. Abell v. Bishop, 86 M 478, 284 P 525 (1930).

*Abatement of Action:* Although plaintiff's land was sold on foreclosure sale after his action for damages brought under 82-1-201 through 82-1-203 was commenced, the period of redemption having expired prior to retrial of the cause, it did not result in the abatement of the action under section 93-2824, R.C.M. 1947 (since repealed). Solberg v. Sunburst Oil & Gas Co., 76 M 254, 246 P 168 (1926).

*Construction of Lease — Time When Drilling Required:* In an action to have an oil and gas lease forfeited for failure of the lessee to "commence drilling operations for oil" within the time specified in the lease, the phrase "commence drilling operations for oil" in the lease means the commencement of actual drilling and not the commencement of preliminary work necessary to such drilling. Evidence that a well is not "spudded in" is sufficient to make out a prima facie case of forfeiture. Solberg v. Sunburst Oil & Gas Co., 73 M 94, 235 P 761 (1925).

*Damages:*

To warrant recovery of special damages, i.e., such damages as are the natural but not the necessary result of defendant's wrongful act, they must be pleaded. Solberg v. Sunburst Oil & Gas Co., 73 M 94, 235 P 761 (1925).

Proof that lessee's failure to make release prevented lessor from making a new lease was admissible to show nominal damages recoverable under this section but inadmissible to show special damages. Solberg v. Sunburst Oil & Gas Co., 73 M 94, 235 P 761 (1925).

## 82-1-203. Demand for release prior to action.

### Compiler's Comments

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

*1981 Amendment:* Deleted "letterpress or carbon or written" before "copy" in the last sentence.

### Case Notes

*Lessee Unable to Rely on Lack of Notice to Successors in Interest:* In 1965, Larsons executed a 5-year oil and gas lease to Sun Oil. In 1968, Sun Oil assigned the lease to Miami Oil. In 1980, Larsons sent Miami a letter noting drilling activities had been discontinued for the 2 previous years and requesting a release of its lease or assignment. Miami did not respond. Three months later, Larsons commenced an action to quiet title and obtain a release of the lease. Miami contended Larsons were not entitled to relief as they had not prior to commencing the action for release served notice of demand for release on every holder of any type of interest in the leasehold. Larsons made demand only on Miami and not on any of the other parties. Miami not only refused to execute the release but refused to supply the names of its successors in interest. The court refused to reward Miami for recalcitrance. The court held the purpose of 82-1-203 is served when one or all of the owners in interest in a mineral fee demand(s) release of a lease after its date of forfeiture or termination. A lessor's claim for relief against a particular lessee will not be defeated by failure to make contemporaneous demands on every one of the lessee's successors in interest. Miami Oil Producers, Inc. v. Larson, 203 M 225, 661 P2d 1260, 40 St. Rep. 407 (1983).

## Part 3

## Trusts for Unlocatable Mineral Owners

### 82-1-302. Creation of trust for unlocatable mineral, leasehold, or royalty interest owners.

**Compiler's Comments**

*1997 Amendment:* Chapter 126 in (3), after first "clerk of court", inserted "or, if the clerk of court declines to act as trustee, the department of revenue" and substituted "authorize the clerk of court or the department" for "authorize him"; inserted (4) relating to appointment of Department of Revenue as trustee; and made minor changes in style.

**Case Notes**

*Definitions of "Related Documents" and "Tract of Land":* Under 82-1-302, the term "related documents" refers to instruments which give a property interest holder the right to produce his property for such items as minerals. The interest holder's records of production and division proceeds also qualify as related documents. "Tract of land" includes all parcels described in a single lease, mineral deed, or other instrument giving a producer the right to produce property. In re Mont. Pac. Oil & Gas Co., 189 M 11, 614 P2d 1045, 37 St. Rep. 1238 (1980).

*Fees for Creation of a Trust:* Petitions filed pursuant to 82-1-302 and 82-1-305 are "special proceedings" within the meaning of 27-1-102, and as such, a fee of $20 is proper to assess for each such proceeding filed. In re Mont. Pac. Oil & Gas Co., 189 M 11, 614 P2d 1045 (1980).

*Section Relating to Unlocatable Mineral Interest Owners Not Unconstitutionally Vague:* Under the rule of law established in Cramp v. Bd. of Public Instruction, 368 US 278 (1961), that the due process test for vagueness of a statute is whether the law is so vague and uncertain that men of common intelligence must guess at its meaning, 82-1-305 is not unconstitutionally vague. This section (before 1997 amendment) can be interpreted to mean the following:

"1. Any person holding funds payable to persons the holder cannot locate, produced from mineral interests or mineral production, including oil and gas, must turn the funds over to the clerk of the local District Court. A grace period of six months is allowed from the enactment of the statutes.

2. Subsequent to the enactment of the statutes, no holder of the type stated above may continue holding payments for the account of unlocatable persons for longer than six months. In turning over the monies to the clerk of the court as required by the statutes, the holder must petition for a trust as provided for in section 82-1-302, MCA.

3. Civil penalties are provided for failure to comply with the statutes." In re Mont. Pac. Oil & Gas Co., 189 M 11, 614 P2d 1045, 37 St. Rep. 1238 (1980).

### 82-1-303. No further liability for petitioner.

**Compiler's Comments**

*1981 Amendment:* Substituted "unlocatable owners" for "absent owners" after "income due to the".

### 82-1-304. Administration of trust.

**Compiler's Comments**

*2013 Amendment:* Chapter 264 in (5) substituted "72-38-902" for "72-34-114". Amendment effective October 1, 2013.

*Severability:* Section 161, Ch. 264, L. 2013, was a severability clause.

*1997 Amendment:* Chapter 126 in (4) substituted "must be kept in force" for "shall be in force"; in (5), in first sentence, substituted "invest funds in a prudent manner" for "invest funds under his management in the manner of a prudent man" and in second sentence, after "credited", inserted "to the department of revenue or, if the clerk of the court is the trustee"; and made minor changes in style.

*1989 Amendment:* At end of first sentence of (5) substituted "provided in 72-34-114" for "defined in 72-21-104".

### 82-1-305. Trust for unlocatable mineral, leasehold, and royalty interest owners — penalty.

**Compiler's Comments**

*1997 Amendment:* Chapter 126 deleted former (1) that read: "(1) Any bonuses, rental payments, royalties, and other income now held by any person or association for unlocatable owners or claimants of an interest in minerals underlying a tract of land must be deposited with the clerk of the district court in which the tract is located within 6 months after July 1, 1979. An accounting for the funds, any related documents, and any instrument creating a trust must be filed with the funds"; in (1), after "owners or claimants of", substituted "an interest in minerals underlying a tract of land. Within the 6-month period, the person shall petition" for "an interest in minerals, but in such case must petition"; in (2), after "subsection (1)", deleted "or (2)", substituted "on funds subject to subsection (1)" for "on such funds", and after "financial institutions" substituted "in any district in which the property or part of the property is located" for "in that district"; and made minor changes in style.

**Case Notes**

*Fees for Creation of a Trust:* Petitions filed pursuant to 82-1-302 and 82-1-305 are "special proceedings" within the meaning of 27-1-102, and as such, a fee of $20 is proper to assess for each such proceeding filed. In re Mont. Pac. Oil & Gas Co., 189 M 11, 614 P2d 1045 (1980).

*No Violation of Equal Protection:* Section 82-1-305 does not violate the equal protection clause of the federal and state constitutions. The state through its Legislature has a legitimate interest in establishing a classification for the protection of unlocated owners of interests in minerals or in mineral production and in providing a method for the protection of mineral producers, including oil and gas operators, as a defense against liability from future claims of such unlocated owners. In re Mont. Pac. Oil & Gas Co., 189 M 11, 614 P2d 1045, 37 St. Rep. 1238 (1980).

*Section Not Unconstitutionally Vague:* Under the rule of law established in Cramp v. Bd. of Public Instruction, 368 US 278 (1961), that the due process test for vagueness of a statute is whether the law is so vague and uncertain that men of common intelligence must guess at its meaning, 82-1-305 is not unconstitutionally vague. This section (before 1997 amendment) can be interpreted to mean the following:

"1. Any person holding funds payable to persons the holder cannot locate, produced from mineral interests or mineral production, including oil and gas, must turn the funds over to the clerk of the local District Court. A grace period of six months is allowed from the enactment of the statutes.

2. Subsequent to the enactment of the statutes, no holder of the type stated above may continue holding payments for the account of unlocatable persons for longer than six months. In turning over the monies to the clerk of the court as required by the statutes, the holder must petition for a trust as provided for in section 82-1-302, MCA.

3. Civil penalties are provided for failure to comply with the statutes." In re Mont. Pac. Oil & Gas Co., 189 M 11, 614 P2d 1045, 37 St. Rep. 1238 (1980).

### 82-1-306. Filing of addresses.

**Compiler's Comments**

*1997 Amendment:* Chapter 126 in (1), after "county", substituted "in which the land is located a notice containing the person's address and a description of the person's interest in the minerals. Filing the notice creates a rebuttable presumption" for "wherein the mineral interests lie a notice of his address and the legal description of his interest and thereby establish a rebuttable presumption"; inserted (2) requiring Clerk and Recorder to forward copy of notice to trustee; and made minor changes in style.

## Part 4
## Constitutional Challenges

### 82-1-401. Determination of constitutionality.

**Compiler's Comments**

*Preamble:* The preamble attached to Ch. 361, L. 2003, provided: "WHEREAS, Article II, section 3, of the Montana Constitution enumerates certain inalienable individual rights, including the right to a clean and healthful environment, the right of pursuing life's basic necessities, the right of enjoying and defending an individual's life and liberty, the right of acquiring, possessing, and protecting property, and the right of seeking individual safety, health, and happiness in all lawful ways; and

WHEREAS, the constitutionally enumerated rights are by their very nature bound to result in competing interests in specific fact situations; and

WHEREAS, Article IX, section 1, of the Montana Constitution provides that the state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations and directs the Legislature to provide for the administration and enforcement of this duty and also directs the Legislature to provide adequate remedies for the protection of the environmental life support system from degradation and to provide adequate remedies to prevent unreasonable depletion and degradation of natural resources; and

WHEREAS, the Legislature has reviewed the intent of the framers of the 1972 Montana Constitution as evidenced in the verbatim transcripts of the constitutional convention; and

WHEREAS, there is no indication that one enumerated inalienable right is intended to supersede other inalienable rights, including the right to use property in all lawful means; and

WHEREAS, the Legislature, mindful of its constitutional obligation to provide for the administration and enforcement of the constitution, has enacted a comprehensive set of laws to accomplish the goals of the constitution, including the Montana Clean Indoor Air Act of 1979, Title 50, chapter 40, part 1, MCA; the Montana Environmental Policy Act, Title 75, chapter 1, parts 1 through 3, MCA; the Clean Air Act of Montana, Title 75, chapter 2, parts 1 through 4, MCA; water quality laws, Title 75, chapter 5, MCA; The Natural Streambed and Land Preservation Act of 1975, Title 75, chapter 7, part 1, MCA; The Montana Solid Waste Management Act, Title 75, chapter 10, part 2, MCA; The Montana Hazardous Waste Act, Title 75, chapter 10, part 4, MCA; the Comprehensive Environmental Cleanup and Responsibility Act, Title 75, chapter 10, part 7, MCA; the Montana Megalandfill Siting Act, sections 75-10-901 through 75-10-945, MCA; the Montana Underground Storage Tank Installer and Inspector Licensing and Permitting Act, Title 75, chapter 11, part 2, MCA; the Montana Underground Storage Tank Act, Title 75, chapter 11, part 5, MCA; the Montana Major Facility Siting Act, Title 75, chapter 20, MCA; the Open-Space Land and Voluntary Conservation Easement Act, Title 76, chapter 6, MCA; the Environmental Control Easement Act, Title 76, chapter 7, MCA; The Strip and Underground Mine Siting Act, Title 82, chapter 4, part 1, MCA; The Montana Strip and Underground Mine Reclamation Act, Title 82, chapter 4, part 2, MCA; The Opencut Mining Act, Title 82, chapter 4, part 4, MCA; and The Nongame and Endangered Species Conservation Act, Title 87, chapter 5, part 1, MCA."

*Severability:* Section 39, Ch. 361, L. 2003, was a severability clause.

*Effective Date:* Section 40, Ch. 361, L. 2003, provided that this section is effective on passage and approval. Approved April 16, 2003.

*Retroactive Applicability:* Section 41, Ch. 361, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to actions for judicial review or other causes of action challenging the issuance of a permit, petition for review, amendment, license, arbitration, action, certificate, or inspection that are pending but not yet decided on or after [the effective date of this act]." Effective April 16, 2003.

## Part 5
## Exemption of Fossils

### 82-1-501. Fossils exempted.

**Compiler's Comments**

*Effective Date:* Section 7, Ch. 136, L. 2019, provided: "[This act] is effective on passage and approval." Approved April 16, 2019.

*Retroactive Applicability:* Section 8, Ch. 136, L. 2019, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to instruments severing mineral estates from surface estates that do not convey fossils by a clear and express grant."

*Preamble:* The preamble attached to Ch. 136, L. 2019, provided: "WHEREAS, fossils are part of Montana's history and landscape; and

WHEREAS, for fossils found on federal land, the federal government treats fossils as part of the surface estate and not minerals; and

WHEREAS, the Montana Legislature, as a matter of the policy of the state, presumes that for instruments governed by Montana law, the term "minerals" in an instrument does not include fossils."

*Saving Clause:* Section 5, Ch. 136, L. 2019, was a saving clause.

*Severability:* Section 6, Ch. 136, L. 2019, was a severability clause.

## Part 6
## Critical Infrastructure Facility — Trespass

### 82-1-601. Definitions.

**Compiler's Comments**

*Effective Date:* Section 7, Ch. 522, L. 2021, provided: "[This act] is effective on passage and approval." Approved May 14, 2021.

*Severability:* Section 6, Ch. 522, L. 2021, was a severability clause.

### 82-1-602. Criminal penalties.

**Compiler's Comments**

*Effective Date:* Section 7, Ch. 522, L. 2021, provided: "[This act] is effective on passage and approval." Approved May 14, 2021.

*Severability:* Section 6, Ch. 522, L. 2021, was a severability clause.

### 82-1-603. Civil penalties.

**Compiler's Comments**

*Effective Date:* Section 7, Ch. 522, L. 2021, provided: "[This act] is effective on passage and approval." Approved May 14, 2021.

*Severability:* Section 6, Ch. 522, L. 2021, was a severability clause.

### 82-1-604. Exempt activities.

**Compiler's Comments**

*Effective Date:* Section 7, Ch. 522, L. 2021, provided: "[This act] is effective on passage and approval." Approved May 14, 2021.

*Severability:* Section 6, Ch. 522, L. 2021, was a severability clause.

# CHAPTER 2
# MINING GENERALLY

**Chapter Law Review Articles**

Eminent Domain: Exploitation of Montana's Natural Resources, Kaze, 35 Mont. L. Rev. 279 (1974).

Taxation of Mineral Interests Under Article XII, Section 3, of the [1889] Montana State Constitution, Dye, 32 Mont. L. Rev. 47 (1971).

The Pelton Decision: A Symbol—A Guaranty That the Development and Conservation of Our Nation's Resources Will Keep Pace With Our National Demands, Veeder, 27 Mont. L. Rev. 27 (1965).

The New Multiple Use Mining Law, 20 Mont. L. Rev. 92 (1958).

Uranium and Its Legal Implications in Montana, 18 Mont. L. Rev. 180 (1957).

## Part 1
## Location and Record of Claims

**Part Case Notes**

*Necessity for Substantial Compliance:* The provisions of local statutes relative to the location and recording notice of the location of mining claims are not only valid, but they are mandatory, and must be substantially complied with in order that the locator may acquire any right under his location. Thompson v. Barton Gulch Min. Co., 63 M 190, 207 P 108 (1922); Wilson v. Freeman 29 M 470, 75 P 84 (1876).

### 82-2-101. Manner of locating claim.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

**Case Notes**

*Application of Prudent Man Standard to Nonrival Claims — District Court Erred as Matter of Law:* The plaintiff had valid patented mining claims as well as an underground mine entry and tunnel to access the claims. The defendants had unpatented mining claims and claimed that the plaintiff's use of the mine entry constituted trespass. The plaintiff ultimately filed a petition for declaratory judgment seeking to invalidate the defendants' claims. In determining that valuable mineral deposits were present on the defendants' claims, and that therefore the claims were valid, the District Court applied the prudent man standard according to Boscarino v. Gibson, 207 Mont. 112, 672 P.2d 1119 (1983), and granted the defendants summary judgment. On appeal, the Supreme Court reversed, holding that the District Court had erred as a matter of law by applying an incorrect and lower discovery standard. The Supreme Court remanded the matter to the District Court to vacate its order and to grant summary judgment in favor of the plaintiff. Mines Management, Inc. v. Fus, 2019 MT 276, 398 Mont. 15, 453 P.3d 371.

*Mining Waste Dispute — Summary Judgment Improper — Plaintiff Not Provided Opportunity to Provide Facts:* The plaintiff asserted trespass and conversion causes of action in District Court against the defendant for removing mining waste from a placer claim that overlapped the common border of mining claims that were owned by both parties. After considering cross-motions for summary judgment, the District Court granted summary judgment in favor of the defendant, reasoning that the plaintiff's load claim was not supported by a load discovery, the waste materials were placer deposits and as such the plaintiff had no interest in the waste materials, and the plaintiff's lode claim was not a sufficient interest to maintain a trespass action. On appeal, the Supreme Court reversed and remanded the case to District Court. The court held that the plaintiff had no opportunity to prove that it had discovered sufficient materials. Additionally, there were further questions of fact that needed to be resolved before the District Court could determine as a matter of law that the plaintiff's load claim did not give it a sufficient interest to maintain a trespass action. Tags Realty, LLC v. Runkle, 2015 MT 166, 379 Mont. 416, 352 P.3d 616. See also Mines Management, Inc. v. Fus, 2019 MT 276, 398 Mont. 15, 453 P.3d 371.

*Meaning of "Discovery":* Whether or not a mineral claimant has made a discovery sufficient to make valid his location is a question for the trier of fact. It is not required for validity that the mineral deposits must be sufficiently extensive to pay the mine's operating expenses, nor is there a requirement that the ground must yield any specific quantity of a particular mineral. Rather, the rule is that to constitute a "discovery" under mining law, it is sufficient that a particular mineral be found in the ground in a quantity that justifies the locator's development of the claim with a reasonable expectation of finding the mineral in payment quantities. Boscarino v. Gibson, 207 M 112, 672 P2d 1119, 40 St. Rep. 1931 (1983).

*Notice of Location — Posting at Point of Discovery:* When the record revealed that the notice was not posted near any discovery point, but rather was posted in the center of the claim and that the individual posting the claim had not seen any mineralization at the point the notice was posted, there was insufficient evidence to support the jury's verdict that the attempted claim was valid. The Anaconda Co. v. Whittaker, 188 M 66, 610 P2d 1177, 37 St. Rep. 902 (1980).

*Actual Discovery of Minerals Required:* When the record revealed that no one had actually found minerals in place on the claim but that the attempted discovery was based on geological studies for potential discovery of mineralization, there was insufficient evidence to support the jury's verdict that the attempted claim was valid. The Anaconda Co. v. Whittaker, 188 M 66, 610 P2d 1177, 37 St. Rep. 902 (1980).

*Rights Against Subsequent Locator With Notice:* Under 82-2-112, the failure to record a verified location of a mining claim does not operate to deprive the locator of his interest therein as against one who enters the property and makes a subsequent location with notice of the prior claim. Harvey v. Havener, 135 M 437, 340 P2d 1084 (1959).

*Location Notice to Accurately Describe Claim:* In action to quiet title to mining claims, location notices of defendants were void where they were so indefinite and uncertain that it would be very difficult or perhaps impossible to locate the corners of the claims. Robinson v. Laffon, 131 M 446, 311 P2d 768 (1957).

*Exclusive Right of Possession:* One in rightful possession of a lawfully made placer mining location is guaranteed the exclusive right of possession, excluding anyone else from entering thereon during the life of the location for any purpose. Conway v. Fabian, 108 M 287, 89 P2d 1022 (1939).

*Placer Rights Subject to Right to Mill Tailings:* The locator of a placer mining claim does not have the right to mill tailings placed thereon by the operator of a quartz mine that have not been abandoned, the owner of the tailings having had a right to deposit them upon the public domain or upon lands of which he had possession. A mineral location thereafter made upon such lands is subject to the right of the prior deposit. Conway v. Fabian, 108 M 287, 89 P2d 1022 (1939).

*Area of Claim:* The area bounded by a mining location must be within the limits granted by the statute—1,500 feet in length by 600 in width—and boundaries beyond such limits do not impart notice to subsequent locators, they not being required to look for stakes or boundaries beyond such limits. Thompson v. Barton Gulch Min. Co., 63 M 190, 207 P 108 (1922).

*Boundaries:*

The boundaries of a mining location must be so definite and certain that, taking the discovery as the initial point, they may be readily traced. The declaratory statement must furnish such information that a person of reasonable intelligence may therefrom find the claim and run its lines. Thompson v. Barton Gulch Min. Co., 63 M 190, 207 P 108 (1922).

The right of the Legislature to provide rules for the marking of the boundaries of mining claims and to provide for a record of such a claim and for what the recorded paper must contain is fully settled in this state. Baker v. Butte City Water Co., 28 M 222, 72 P 617 (1903), affirmed in Butte City Water Co. v. Baker, 196 US 119, 49 L Ed 409, 25 S Ct 211 (1905).

*Substantial Compliance Necessary:*

The provisions of this section, calling for the posting of a notice of location of a quartz lode mining claim containing a statement of the number of feet claimed along the course of the vein from the point of discovery, and of the next section, requiring the recordation of a certificate of location in the office of the County Clerk showing the direction and distance claimed along the course of the vein, etc., must be substantially complied with. Thompson v. Barton Gulch Min. Co., 63 M 190, 207 P 108 (1922).

Evidence that the locator of a mining claim substantially complied with the requirements of the federal statutes is not alone sufficient to a valid location, a substantial compliance with the state statutes also being required. Ringling v. Mahurin, 59 M 38, 197 P 829 (1921).

There can be no valid location of a mining claim without a discovery and a compliance with the requirements of the state statute. Ferris v. McNally, 45 M 20, 121 P 889 (1912); Baker v. Butte City Water Co., 28 M 222, 72 P 617 (1903); Sanders v. Noble, 22 M 110, 55 P 1037 (1899); Upton v. Larkin, 7 M 449, 17 P 728 (1888).

Where the locator had posted his notice a considerable distance away from the point of discovery but about a month thereafter, in accordance with the statute, sank his discovery shaft at the point where he posted his notice, and in the meantime another had made discovery and posted his notice, the location of the former must be postponed to the date when he posted his notice at the point of discovery because of the intervening rights of the latter. Butte N. Copper Co. v. Radmilovich, 39 M 157, 101 P 1078 (1909).

Where the locator of a lode mining claim failed to comply with the requirements of the statute relative to completing his location after the posting of his declaratory statement and another made a location conflicting with the claim of the prior discoverer, the area in conflict did not revert to the public domain but inured to the benefit of the junior locator who, by performing the necessary work required by the statute, became entitled to the possession of it. Helena Gold & Iron Co. v. Baggaley, 34 M 464, 87 P 455 (1906). See Street v. Delta Min. Co., 42 M 371, 112 P 701 (1910); Ferris v. McNally, 45 M 20, 121 P 889 (1912).

*Failure to Complete Claim:* Sections 82-2-101 through 82-2-104, modifying to some extent the requirements of the law with relation to the location of mining claims, go no further than to direct the Courts to disregard defects or irregularities in the posted and recorded notice and the failure to do any of the other acts made necessary to complete a location when it appears that such acts have in fact been done before a location of the same ground has been made by another. However, these sections do not excuse the performance of any act, even though the subsequent locator has notice of a prior location, which is required to perfect the location. Ringling v. Mahurin, 59 M 38, 197 P 829 (1921).

*Prior Right by Discovery and Notice:* By discovery and the posting of notice of claim, the discoverer acquires a right to make a location to the exclusion of one who thereafter enters and makes a location pending the time allowed by this section to complete the marking of the boundaries and the required excavation work. Ferris v. McNally, 45 M 20, 121 P 889 (1912).

*Development Work:* In addition to the acts required by the federal statutes, the state might rightfully exact of the locator of a quartz lode mining claim the doing of development work and the filing for record of a declaratory statement. Orton v. Bender, 43 M 263, 115 P 406 (1911); Butte Consol. Min. Co. v. Barker, 35 M 327, 89 P 302, 90 P 177 (1907); Mares v. Dillon, 30 M 117, 75 P 963 (1904).

*Independent Acts to Be Done:* The law contemplates that the location of a mining claim shall consist of a number of distinct acts which are independent of each other. The last that may be done does not relate back to the first, and all must be performed before a legal location exists. Thornton v. Kaufman, 40 M 282, 106 P 361 (1910); McKay v. McDougall, 25 M 258, 64 P 669 (1901); Gonu v. Russell, 3 M 358 (1879).

*Manifestation of Intention to Claim Quartz Lode:* Under the Political Code of 1895 the only way the locator of a quartz lode mining claim could manifest his intention to claim the ground embraced within his boundaries, in good faith under the mining laws, was by means either of a discovery shaft or a crosscut sunk or made from an opening upon the claim sought to be located and not upon grounds over which he had not complete control as a matter of right or from which he might be excluded at any time at the option of another. Butte Consol. Min. Co. v. Barker, 35 M 327, 89 P 302, 90 P 177 (1907).

*Constitutionality:* State statutes providing additional requirements for valid location of mining claims to those imposed by acts of Congress are not in violation of the United States Constitution and acts of Congress. While the validity of a law of the Territory requiring a location notice to be verified was doubted in Wenner v. McNulty, 7 M 30, 14 P 643 (1887), the power of a state legislature to impose additional burdens upon the locator of a mining claim is now definitely settled. Purdum v. Laddin, 23 M 387, 59 P 153 (1899); Berg v. Koegel, 16 M 266, 40 P 605 (1895); McCowan v. Maclay, 16 M 234, 40 P 602 (1895); Metcalf v. Prescott, 10 M 283, 25 P 1037 (1891); O'Donnell v. Glenn, 8 M 248, 19 P 302 (1888).

*Possession Alone Insufficient:* A location of a mining claim is not made by taking possession alone but by working on the ground, recording, and doing whatever else is required for that purpose by the acts of Congress and the local laws and regulations. Purdum v. Laddin, 23 M 387, 59 P 153 (1899); Garfield M. & M. Co. v. Hammer, 6 M 53, 8 P 153 (1886); Upton v. Larkin 5 M 600, 6 P 66 (1885).

*Power to Swing Claim:* Though a locator has posted a notice under state and federal statutes stating the general course of the vein, he may, within 90 days, swing his claim in any direction required to include the vein, where no bad faith is shown. Sanders v. Noble, 22 M 110, 55 P 1037 (1899).

*Procedure for Quartz Lode Claim Generally:* Relative to the successive steps for making a valid location of a quartz lode mining claim, see Orton v. Bender, 43 M 263, 115 P 406 (1911); Thornton v. Kaufman, 40 M 282, 106 P 361 (1910); Butte N. Copper Co. v. Radmilovich, 39 M 157, 101 P 1078 (1909); Butte Consol. Min. Co. v. Barker, 35 M 327, 89 P 302, 90 P 177 (1907).

*Notice Generally:* For decisions as to the requisites of a valid location of a mining claim and the sufficiency or insufficiency of notice of location and declaratory statement under former statutes, see, generally, Consol. Gold & Sapphire Min. Co. v. Struthers, 41 M 565, 111 P 152 (1910); Giberson v. Tuolumne Copper Min. Co., 41 M 396, 109 P 974 (1910); Tiggeman v. Mrzlak, 40 M 19, 105 P 77 (1909); Butte N. Copper Co. v. Radmilovich, 39 M 157, 101 P 1078 (1909); Hickey v. Anaconda Copper Min. Co., 33 M 46, 81 P 806 (1905); Mares v. Dillon, 30 M 117, 75 P 963 (1904); Wilson v. Freeman, 29 M 470, 75 P 84 (1904); Brownfield v. Bier, 15 M 403, 39 P 461 (1895); Freezer v. Sweeney, 8 M 508, 21 P 20 (1888); Gamer v. Glenn, 8 M 371, 20 P 654 (1888); Flick v. Gold Hill & Lee Mtn. Min. Co., 8 M 298, 20 P 807 (1888); McBurney v. Berry, 5 M 300, 5 P 867 (1885).

### Collateral References

Mineral Lands and Mining, Title 30, U.S.C.

Mining Regulations — Location — Recordation, 30 U.S.C. § 28.

## 82-2-102. Record of certificate of location.

### Compiler's Comments

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

*1991 Amendment:* In (1), at end of first sentence, deleted "and within 20 days thereafter, the county clerk shall provide a copy thereof to the department of state lands, Helena, Montana".

*Section Not Codified:* Section 50-703, R.C.M. 1947, a statute giving effect to mining locations that were recorded before the statute was enacted, was not codified in the MCA. This statute has not been repealed and is still valid law. Citation may be made to Sec. 3613, Pol. C. 1895.

### Case Notes

*Valid Location of Mine — Test:* A condition precedent to a valid mining location is the actual discovery of a vein, lode, or ledge of rock in place bearing a valuable mineral deposit. If a subsequent locator questions the existence of such a discovery, it is incumbent on the original locator to prove he discovered sufficient minerals to meet the prudent man test. That test is whether minerals have been found and the evidence is such that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. The ore need not be in sufficient quantity to support a profitable mining operation, nor must any specific amount of ore be found. In the present case, a certificate of location filed by the original locator was, under this section, sufficient prima facie evidence of a valid discovery. Silver Jet Mines, Inc. v. Schwark, 210 M 81, 682 P2d 708, 41 St. Rep. 933 (1984).

*Reference to Natural or Permanent Monument:* The fact that location certificate did not refer to a natural or permanent monument was of no significance when the contestant found a copy of the certificate at the entrance to the mine. McCarthy v. Morris, 159 M 227, 497 P2d 97 (1972).

*Rights Against Subsequent Locator With Notice:* Under 82-2-112, the failure to record a verified location of a mining claim does not operate to deprive the locator of his interest therein as against one who enters the property and makes a subsequent location with notice of the prior claim. Harvey v. Havener, 135 M 437, 340 P2d 1084 (1959).

*Invalid Certificates as Cloud on Title:* Recorded certificates of location may cloud the title when apparently valid but actually, under the mining law, invalid. Hopkins v. Walker, 244 US 486, 61 L Ed 1270, 37 S Ct 711 (1917).

*Statement to Be Self-Evident:* The declaratory statement of a mining location required to be filed for record cannot be supplemented by proof of what was actually done in the premises. Dolan v. Passmore, 34 M 277, 85 P 1034 (1906); Hahn v. James, 29 M 1, 73 P 965 (1903).

*Statement to Be Verified:*

A declaratory statement of location of quartz mining claim, required to be recorded, must be under oath. McCowan v. Maclay, 16 M 234, 40 P 602 (1895); Brownfield v. Bier, 15 M 403, 39 P 461 (1895); Mattingly v. Lewisohn, 13 M 508, 25 P 111 (1893); Russell v. Hoyt, 4 M 412, 2 P 25 (1882). In O'Donnell v. Glenn, 8 M 248, 19 P 302 (1888), the Supreme Court held that a declaratory statement which does not contain the required affidavit is void and that decision has since then been followed uniformly. Washoe Copper Co. v. Junila, 43 M 178, 115 P 916 (1911). See Hickey v. Anaconda Copper Min. Co., 33 M 46, 81 P 806 (1905).

An affidavit to a declaratory statement of a quartz mining claim, made on information, has been held sufficient under a statute in Wenner v. McNulty, 7 M 30, 14 P 643 (1887), and the fact that the locator verified the statement on information only, instead of on his personal knowledge, did not render the statement void under a statute requiring such statement to be verified by the "oath of the locator". In the absence of proof tending to impeach the truth of the facts stated in a declaratory statement for a mining claim, it is immaterial to an adverse locator that the declaration was verified on information only. Mares v. Dillon, 30 M 117, 75 P 963 (1904).

A location notice, the affidavit to which did not contain notarial evidence that the party making it took an oath or was ever present before the officer, was held to be sufficient. Metcalf v. Prescott, 10 M 283, 25 P 1037 (1891). So, too, an affidavit to the declaratory statement of a quartz location, which disclosed that the statement was sworn to 1 year before the location of the lode, was considered fatal to the validity of the location in the absence of proof that the affidavit was wrongly dated by mistake of the notary. Berg v. Koegel, 16 M 266, 40 P 605 (1895). But where it appeared that the declaratory statement was sworn and subscribed to before an officer having power to administer an oath, it was valid although affiant's name did not appear in the body of the instrument. Davidson v. Bordeaux, 15 M 245, 38 P 1075 (1895).

## 82-2-103. Affidavit of performance of annual work.

### Compiler's Comments

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### Case Notes

*Failure to File Affidavit — Effect on Possessory Interests:* Section 82-2-103 was enacted to supplement federal statutory law relating to annual improvements. That law simply requires work to be done annually. If the work is done, the claim is not open for relocation. Thus, in this quiet title action plaintiffs did not forfeit their interest in four mining claims upon which they faithfully performed the annual labor although they failed to file affidavits of performance of annual assessment work for one year. Defendants were not entitled to relocate the mining claims upon discovery of plaintiffs' omission to file affidavits. Section 82-2-103 does not mandate forfeiture of possessory interests in a claim if an affidavit is not filed. The only penalty is that the claimant must use other proof of the assessment work to avoid opening the claim for relocation. O'Connor v. Wilke, 217 M 422, 705 P2d 572, 42 St. Rep. 1298 (1985).

*Sufficiency of Annual Assessment Work — Attribution to Another Claim:* Where second locator of unpatented mining claim challenged the sufficiency of the required annual assessment work of successor to original locator, the court need scrutinize only the assessment work of 1980, since second locator did not locate his claim until that year. If the 1980 work was sufficient, the successor had a valid claim. If it was insufficient, even sufficient work during prior years could not save successor's claim, presuming a valid location by second locator. Generally, assessment work must tend to develop the claim and facilitate the extraction of ore. The work was sufficient where it consisted of securing the tunnel entrance on an adjoining patented claim to prevent unauthorized entry, clearing growth on the path to the tunnel, and clearing about 6,000 square yards of ground. The work on the adjoining patented claim could be attributed to the unpatented claim since evidence showed the clearing would be used as the needed base of operations for mining the unpatented claim and that the claim could be mined from the tunnel. Silver Jet Mines, Inc. v. Schwark, 210 M 81, 682 P2d 708, 41 St. Rep. 933 (1984).

*Filing of Annual Assessment Affidavit Mandatory:* Under former law, the filing of an annual affidavit could be used as proof that the assessment work had been done, but filing the affidavit was not required. It is now mandatory to file such an affidavit, and failure to file it is prima facie evidence that the assessment work has not been done. Sawyer-Adecor Int'l, Inc. v. Anglin, 198 M 440, 646 P2d 1194, 39 St. Rep. 1118 (1982).

*Amount of Work Required:* Recorded affidavit was prima facie evidence that annual assessment work was done, and it was not important how much work was done. McCarthy v. Morris, 159 M 227, 497 P2d 97 (1972).

*Preservation of Evidence:* Such statutes as this relate not to the effect of doing the work or making the improvements, as required by law but to the method of preserving prima facie evidence of the fact that such requirement has been fulfilled. Davidson v. Bordeaux, 15 M 245, 38 P 1075 (1895); Coleman v. Curtis, 12 M 301, 30 P 266 (1892).

*Oral Evidence:* The affidavit of annual representation is prima facie evidence of the facts recited, but oral evidence may be given to prove that the work was done, and it will not be regarded as error to admit the affidavit. Davidson v. Bordeaux, 15 M 245, 38 P 1075 (1895).

*Payment for Work Done:* Where labor performed as annual representation upon a mining claim is done by other than the owner, it is not necessary that such work be actually paid for by the owner in order to be effectual for that purpose. Coleman v. Curtis, 12 M 301, 30 P 266 (1892).

## 82-2-105. Relocation of abandoned claim.

### Compiler's Comments

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### Case Notes

*Mining Waste Dispute — Summary Judgment Improper — Plaintiff Not Provided Opportunity to Provide Facts:* The plaintiff asserted trespass and conversion causes of action in District Court against the defendant for removing mining waste from a placer claim that overlapped the common border of mining claims that were owned by both parties. After considering cross-motions for summary judgment, the District Court granted summary judgment in favor of the defendant, reasoning that the plaintiff's load claim was not supported by a load discovery, the waste materials were placer deposits and as such the plaintiff had no interest in the waste materials, and the plaintiff's lode claim was not a sufficient interest to maintain a trespass action. On appeal, the Supreme Court reversed and remanded the case to District Court. The court held that the plaintiff had no opportunity to prove that it had discovered sufficient materials. Additionally, there were further questions of fact that needed to be resolved before the District Court could determine as a matter of law that the plaintiff's load claim did not give it a sufficient interest to maintain a trespass action. Tags Realty, LLC v. Runkle, 2015 MT 166, 379 Mont. 416, 352 P.3d 616. See also Mines Management, Inc. v. Fus, 2019 MT 276, 398 Mont. 15, 453 P.3d 371.

*Intent to Abandon:* In determining what constitutes abandonment of personal property (in the instant case mill tailings), the paramount object of inquiry is the intention of the owner to abandon, gathered from his acts or statements. Hence, where the owner of a mill tailing dump took measures to preserve it at considerable expense for future treatment, there was no abandonment. Conway v. Fabian, 108 M 287, 89 P2d 1022 (1939), followed in Hawkins v. Mahoney, 1999 MT 296, 297 M 98, 990 P2d 776, 56 St. Rep. 1185 (1999).

## 82-2-106. Rights of relocator.

### Compiler's Comments

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

**Case Notes**

*Mining Waste Dispute — Summary Judgment Improper — Plaintiff Not Provided Opportunity to Provide Facts:* The plaintiff asserted trespass and conversion causes of action in District Court against the defendant for removing mining waste from a placer claim that overlapped the common border of mining claims that were owned by both parties. After considering cross-motions for summary judgment, the District Court granted summary judgment in favor of the defendant, reasoning that the plaintiff's load claim was not supported by a load discovery, the waste materials were placer deposits and as such the plaintiff had no interest in the waste materials, and the plaintiff's lode claim was not a sufficient interest to maintain a trespass action. On appeal, the Supreme Court reversed and remanded the case to District Court. The court held that the plaintiff had no opportunity to prove that it had discovered sufficient materials. Additionally, there were further questions of fact that needed to be resolved before the District Court could determine as a matter of law that the plaintiff's load claim did not give it a sufficient interest to maintain a trespass action. Tags Realty, LLC v. Runkle, 2015 MT 166, 379 Mont. 416, 352 P.3d 616. See also Mines Management, Inc. v. Fus, 2019 MT 276, 398 Mont. 15, 453 P.3d 371.

*Sufficiency of Annual Assessment Work — Attribution to Another Claim:* Where second locator of unpatented mining claim challenged the sufficiency of the required annual assessment work of successor to original locator, the court need scrutinize only the assessment work of 1980, since second locator did not locate his claim until that year. If the 1980 work was sufficient, the successor had a valid claim. If it was insufficient, even sufficient work during prior years could not save successor's claim, presuming a valid location by second locator. Generally, assessment work must tend to develop the claim and facilitate the extraction of ore. The work was sufficient where it consisted of securing the tunnel entrance on an adjoining patented claim to prevent unauthorized entry, clearing growth on the path to the tunnel, and clearing about 6,000 square yards of ground. The work on the adjoining patented claim could be attributed to the unpatented claim since evidence showed the clearing would be used as the needed base of operations for mining the unpatented claim and that the claim could be mined from the tunnel. Silver Jet Mines, Inc. v. Schwark, 210 M 81, 682 P2d 708, 41 St. Rep. 933 (1984).

*Relocation Under Former Statutes:* For a general discussion of relocation of mining claims under former statutes, see McKay v. McDougall, 25 M 258, 64 P 669 (1901).

## 82-2-107. Amended location.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

## 82-2-108. Relocation by owner.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

**Case Notes**

*Relocation of Claim Held Not to Require Abandonment of Former Overlapping Claim:* Noranda Minerals Corporation's predecessor in interest, the United States Borax and Chemical Corporation (Borax), located several mining claims that partially overlapped previously existing Borax mining claims. The Wilderness Society (TWS) challenged the validity of Borax's later claim, asserting that the later claim could not be approved by the U.S. Forest Service unless the earlier claim had been replaced, abandoned, or automatically extinguished and therefore constituted unappropriated ground. The Ninth Circuit Court of Appeals, distinguishing Tiggeman v. Mrzlak, 40 M 19, 105 P 77 (1909), and Lehman v. Sutter, 60 M 97, 198 P 1100 (1921), and relying upon Harvey v. Havener, 135 M 437, 340 P2d 1084 (1959), affirmed the judgment of the U.S. District Court and held that there was nothing in the language of 82-2-109 or this section requiring the interpretation of those statutes in the manner asserted by TWS. Wilderness Society v. Dombeck, 168 F3d 367 (9th Cir. 1999).

*Failure to Excavate:* Where relocators of their own claims did not do the excavation work required to be done under this section before another had located the same ground, their attempted relocations were nugatory. Lehman v. Sutter, 60 M 97, 198 P 1100 (1921).

## 82-2-109. Amendment or relocation not waiver of acquired rights.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

**Case Notes**

*Relocation of Claim Held Not to Require Abandonment of Former Overlapping Claim:* Noranda Minerals Corporation's predecessor in interest, the United States Borax and Chemical Corporation (Borax), located several mining claims that partially overlapped previously existing Borax mining claims. The Wilderness Society (TWS) challenged the validity of the later claim, asserting that the later claim could not be approved by the U.S. Forest Service unless the earlier claim had been replaced, abandoned, or automatically extinguished and therefore constituted unappropriated ground. The Ninth Circuit Court of Appeals, distinguishing Tiggeman v. Mrzlak, 40 M 19, 105 P 77 (1909), and Lehman v. Sutter, 60 M 97, 198 P 1100 (1921), and relying upon Harvey v. Havener, 135 M 437, 340 P2d 1084 (1959), affirmed the judgment of the U.S. District Court and held that there was nothing in the language of 82-2-108 or this section requiring the interpretation of those statutes in the manner asserted by TWS. Wilderness Society v. Dombeck, 168 F3d 367 (9th Cir. 1999).

## 82-2-110. Rights of third persons not affected.

**Case Notes**

*Actual Knowledge:* Where subsequent locators had actual knowledge of prior locations and the only defects on which they relied in attempting to prove that the claim of the prior locators was of no force and effect were defects in a recorded certificate which, under 82-2-112, did not deprive the locators of their rights, they could not rely on this section to avoid the force and effect of 82-2-107 through 82-2-109. Harvey v. Havener, 135 M 437, 340 P2d 1084 (1959).

## 82-2-111. Validating locations already made.

**Case Notes**

*Retroactive Effect:* This section has a retroactive effect, and a failure to comply with the statutes as to recordation of locations is cured by subsequent issuance of a patent. Butte & Superior Copper Co. v. Clark-Mont. Realty Co., 248 F 609 (1918).

## 82-2-112. Defective locations good against persons with notice.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

**Case Notes**

*Rights Against Subsequent Locator With Notice:* Under 82-2-112, the failure to record a verified location of a mining claim does not operate to deprive the locator of his interest therein as against one who enters the property and makes a subsequent location with notice of the prior claim. Harvey v. Havener, 135 M 437, 340 P2d 1084 (1959).

*Notice to Subsequent Locators:*

In action to quiet title, it appeared that defendants were aware of the claims of plaintiffs and were watching to ascertain whether plaintiffs performed their assessment work. Plaintiffs had been interested in their claims for 21 years, and they were originally located in 1930. One of the defendants had been familiar with the area of the claims since 1932. Defendants in such circumstances could not maintain that they located their claims without notice of the prior claims of plaintiffs. Robinson v. Laffon, 131 M 446, 311 P2d 768 (1957).

In view of the provision of this section that defects in a recorded certificate of location of a mining claim are not material where the person relying on the defects made his location with notice thereof, allegations in his complaint, in an action to determine an adverse claim, relating to such defects are immaterial. Lehman v. Sutter, 60 M 97, 198 P 1100 (1921); Heilman v. Loughrin, 57 M 380, 188 P 370 (1920).

*Title Required to Take Advantage of Defects:* In an action in ejectment to recover possession of a mining claim, where defendants did not attempt to show title in themselves to the portion of the claim in dispute, either by location or any other method provided for by the federal statutes, they were in no position to take advantage of alleged defects in the original and amended declaratory statements of location. Consol. Gold & Sapphire Min. Co. v. Struthers, 41 M 565, 111 P 152 (1910).

## 82-2-113. Effect of patent.

**Case Notes**

*Rejection by Federal Land Department:* Where the federal Land Department did not merely reject an application for patent to placer mining location but declared that the ground covered thereby was nonmineral in character and that the location was null and void, the force and effect of the location was destroyed, the land within its boundaries reverted to the public domain, and only the federal government could question the right of another to enter thereon and reclaim mill tailings deposited on it. Conway v. Fabian, 108 M 287, 89 P2d 1022 (1939).

*Retroactive Effect:* In an action to quiet title and for an accounting of ore alleged to have been unlawfully taken, the Court properly held this section to have retroactive effect, notwithstanding a statutory prohibition against retroactive effects without a specific declaration of retroactivity, as the language of the statute itself evidenced an intent that it should apply to claims made before the enactment of the law. Butte & Superior Copper Co. v. Clark-Mont. Realty Co., 248 F 609 (1918).

*Amendment of Description:* A locator who had misdescribed his claim as running easterly and westerly was entitled under this section to file an amended declaratory statement that the claim ran in a northerly and southerly direction to correspond to the staking of the claim on the ground. Wilson v. Freeman, 29 M 470, 75 P 84 (1904).

### 82-2-114. Amended locations.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

*Section Not Codified:* Section 50-716, R.C.M. 1947, a validation clause, was not codified in the MCA. This clause has not been repealed and is still valid law. Citation may be made to Sec. 2, p. 57, L. 1901.

**Case Notes**

*Amendment Relates Back:*

An amended declaratory statement confers no rights which did not exist prior to the filing of the amended statement but relates back to the first location. Milwaukee Gold Extraction Co. v. Gordon, 37 M 209, 95 P 995 (1908). See Giberson v. Tuolumne Copper Min. Co., 41 M 396, 109 P 974 (1910).

An amended declaratory statement relates back to the date of the original location, by virtue of the locator's discovery, his prior possession, the posting of the notice, the marking of the boundaries, the doing of the necessary development work, and the attempted compliance with the law relating to the filing of the declaratory statement for record. Butte Consol. Min. Co. v. Barker, 35 M 327, 89 P 302, 90 P 177 (1907). See Giberson v. Tuolumne Copper Min. Co., 41 M 396, 109 P 974 (1910).

*Change of Name of Claim:* The addition of a word to the name of a mining claim in an amended declaratory statement was insufficient to invalidate the statement, where such statement declares on its face that it is an amended declaratory statement, and the ground embraced therein is the same as in the original. Butte Consol. Min. Co. v. Barker, 35 M 327, 89 P 302, 90 P 177 (1907).

### 82-2-115. Filing of false mining claims.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

## Part 2

## Rights-of-Way and Eminent Domain

**Part Law Review Articles**

Inflation and the Valuation of Future Economic Losses, Formuzis & O'Donnell, 38 Mont. L. Rev. 297 (1977).

The Montana Law of Valuation in Eminent Domain, Sullivan, 34 Mont. L. Rev. 90 (1973).

Montana's Condemnation Procedure — The Inadequacy of the "Commission System" of Determining Compensation, Beiswanger, 25 Mont. L. Rev. 105 (1963).

*Recent Decisions — Land Valuation — Testimony of Nonprofessional:* St. v. Peterson, 134 M 52, 328 P2d 617 (1958), held that in a proceeding in which the state sought to condemn certain business property, it was error to exclude testimony concerning the value of the defendant's property even though the witness was not a professional in the field of land evaluation, as he was familiar with the property in question and his testimony would have been relevant to the issue of value, and it was not error to admit evidence as to the revenue produced from the condemned property. Fredricks, 22 Mont. L. Rev. 80 (1960).

Easements and Market Value, Cromwell, 17 Mont. L. Rev. 143 (1956).

The Doctrine of Public Use in Eminent Domain in Montana, White, 9 Mont. L. Rev. 53 (1948).

## 82-2-201. Right-of-way of owners of mines.

### Case Notes

*Oil Well Not Considered Mine to Which Right-of-Way May Be Obtained Through Eminent Domain — No Condemnation Power of Private Individuals and Corporation Except Through Legislative Grant — Condemnation Statutes Strictly Construed:* Plaintiff filed a federal action seeking to condemn an access easement and right-of-way across defendant's ranch land for access to drill and operate oil wells. The federal District Court certified two questions to the Montana Supreme Court regarding whether: (1) exploration and development of a federal oil and gas lease are considered a mine that constitutes a public use under 70-30-102; and (2) this section grants the owner of a federal oil and gas lease the power, as the owner of a "mining claim", to condemn a right-of-way across land of another for access to explore and develop the lease. The Supreme Court answered both questions in the negative. Private individuals and corporations, like state agencies, have no inherent power of eminent domain, so their authority to condemn derives only from a legislative grant. Public uses for which the power of eminent domain are granted must be interpreted pursuant to the plain language set forth by the Legislature and may not be implied. Because eminent domain interferes with the fundamental constitutional right to the private ownership of real property, any statute that allows condemnation of private property must be strictly construed, giving the statute its plain interpretation but favoring the person's fundamental rights. Under the plain meaning of 70-30-102, oil wells are not considered mines to which rights-of-way for roads may be obtained through eminent domain proceedings. Further, exploration and development of a federal oil and gas lease are not a mine that constitutes a public use, so the owner of an oil and gas lease has no power under this section to condemn a right-of-way. McCabe Petroleum Corp. v. N Bar Ranch, LLC, 2004 MT 73, 320 M 384, 87 P3d 995 (2004), following St. v. Aitchison, 96 M 335, 30 P2d 805 (1934), and Bozeman v. Vaniman, 264 M 76, 869 P2d 790 (1994), and distinguishing Mid-Northern Oil Co. v. Walker, 65 M 414, 211 P 353 (1922), Rice Oil Co. v. Toole County, 86 M 427, 284 P 145 (1930), and Mont. Talc Co. v. Cyprus Mines Corp., 229 M 491, 748 P2d 444 (1987).

## 82-2-203. Proceedings to obtain right-of-way.

### Compiler's Comments

*2015 Amendment:* Chapter 55 near beginning substituted "necessary that the owner have a right-of-way for any of the purposes mentioned in 82-2-201 and 82-2-202 in order to work the mine or mining claim successfully and conveniently" for "necessary to enable the owner to do so successfully and conveniently that the owner should have a right-of-way for any of the purposes mentioned in 85-2-201 and 85-2-202"; and at end of first sentence substituted "right-of-way be granted" for "right-of-way be awarded". Amendment effective October 1, 2015.

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### Case Notes

*Right to Use Common Road Established by Express Grant in Deed — Prescriptive Easement Inapplicable:* Appellants contended that they were entitled to an injunction because the presence of a gate across a common road changed the nature of their easement from prescriptive to permissive. However, because their right to use the common road was obtained by express grant in their deed pursuant to an agreement under this section that allows owners of certain mining claims to obtain a right-of-way by agreement, there was no prescriptive use and no basis for appellants' argument that the presence of the gate diminished their right to use the common road. The fact that appellants did not use the easement to any significant extent, coupled with the trial court's setting of standards regarding the gate, affirmed that the court did not abuse its discretion in denying appellants' request for an injunction to prevent maintenance of a locked gate across the common road. Gabriel v. Wood, 261 M 170, 862 P2d 42, 50 St. Rep. 1246 (1993), distinguishing Finley v. Rutherford, 151 M 488, 444 P2d 306 (1968), Cope v. Cope, 158 M 388, 493 P2d 336 (1971), and Larson v. Burnett, 158 M 421, 492 P2d 921 (1972), and followed in Engel v. Gampp, 2000 MT 17, 298 M 116, 993 P2d 701, 57 St. Rep. 96 (2000), and Tungsten Holdings, Inc. v. Kimberlin, 2000 MT 24, 298 M 176, 994 P2d 1114, 57 St. Rep. 125 (2000).

*Water Rights Condemnation:* The proceedings prescribed by this section are not applicable to a city seeking to condemn water rights for the purpose of establishing a water supply system. Helena v. Rogan, 27 M 135, 69 P 709 (1902).

*Attempt to Agree Required:* Where a mine owner desires to acquire a right-of-way across the lands of another, jurisdiction to consider the petition is not conferred unless it affirmatively appears therefrom that the petitioners have endeavored in good faith to come to an agreement with the owners of the lands to purchase the required right-of-way. Glass v. Basin Min. & Concentrating Co., 22 M 151, 55 P 1047 (1899).

### 82-2-204. Proceedings before the court.

**Administrative Rules**

Title 17, chapter 24, subchapter 12, ARM Strip and Underground Mine Reclamation Act — special departmental procedures and program.

### 82-2-205. Court order and appointment of commissioners.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 82-2-221. Eminent domain for open-pit mining — purchase of property required.

**Compiler's Comments**

*2001 Amendment:* Chapter 125 throughout section substituted references to condemnor for references to plaintiff; in (1) inserted reference to Title 70, chapter 30; and made minor changes in style. Amendment effective October 1, 2001.

*Interim Study Bill — Eminent Domain:* Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

**Law Review Articles**

Montana's Statutory Protection of Surface Owners From Strip Mining and Resultant Problems of Mineral Deed Construction, Karell, 37 Mont. L. Rev. 347 (1976).

### 82-2-222. Construction of alternate facilities.

**Compiler's Comments**

*2001 Amendment:* Chapter 125 in two places substituted "condemnor" for "plaintiff"; in first sentence inserted reference to Title 70, chapter 30; and made minor changes in style. Amendment effective October 1, 2001.

*Interim Study Bill — Eminent Domain:* Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

### 82-2-224. Notice of condemnation — filing of plat.

**Compiler's Comments**

*2001 Amendment:* Chapter 125 in first sentence inserted reference to Title 70, chapter 30; and made minor changes in style. Amendment effective October 1, 2001.

*Interim Study Bill — Eminent Domain:* Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

*1983 Amendment:* After "all owners" inserted "and purchasers under contracts for deed".

**Law Review Articles**

Montana's Statutory Protection of Surface Owners From Strip Mining and Resultant Problems of Mineral Deed Construction, Karell, 37 Mont. L. Rev. 347 (1976).

## Part 3
## Landowner Notification of Surface Operations

### 82-2-303. Written notice and approval required before commencement of operations.

**Case Notes**

*Open-Pit Excavation Necessary for Backslope as Authorized Public Use — Landowner Notification Act Ineffectual to Prevent Condemnation:* An open-pit excavation necessary to backslope the mining of an ore body is an authorized public use for which condemnation may be had. The Landowner Notification Act appears to preclude this kind of condemnation because under 82-2-303, an open-pit mine operator must obtain from the surface owner of private lands specific written approval of proposed work before commencing operations. However, the Supreme Court noted that the Act was aimed at the protection of private persons, while eminent domain law, constitutionally grounded and deriving from the power of sovereignty, was enacted to protect the public good. The court found it inconceivable that the Legislature intended provisions enacted for the benefit of private persons to overcome and supersede provisions preserving the public good. Therefore, the Landowner Notification Act was found not to adversely affect the right to use eminent domain against a nonconsenting landowner. Mont. Talc Co. v. Cyprus Mines Corp., 229 M 491, 748 P2d 444, 44 St. Rep. 2161 (1987). See also McCabe Petroleum Corp. v. N Bar Ranch, LLC, 2004 MT 73, 320 M 384, 87 P3d 995 (2004), wherein the Supreme Court held that eminent domain condemnation provisions applicable to open-pit mines in Mont. Talc Co. did not apply to oil and gas leases and wells.

## Part 4
## Assaying of Ore and Payment for Consignments

### 82-2-401. Sampling rooms required.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 82-2-402. Samples of 50 pounds per ton to be retained until settlement.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 82-2-405. Notice of selection.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 82-2-421. Time for payment for ores.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

*Portion of Section Not Codified:* A portion of section 50-301, R.C.M. 1947, concerning payment for minerals shipped but not paid for upon the effective date of the former law, was not codified in the MCA. Such portion of the section has not been repealed and is still valid law. Citation may be made to sec. 1, Ch. 37, L. 1911, as amended by sec. 1, Ch. 5, L. 1953.

## Part 7
## Sand and Gravel Deposit Program

**Part Compiler's Comments**

*Effective Date:* Section 4, Ch. 276, L. 2009, provided that this part is effective April 17, 2009.

### 82-2-701. Sand and gravel deposit program — investigation — purpose — prioritization.

**Compiler's Comments**

*2021 Amendment:* See 2021 Session Law for amendment made by sec. 112, Ch. 261, L. 2021. Amendment effective April 20, 2021.

*2017 Code Commissioner Correction:* Pursuant to sec. 24, Ch. 275, L. 2017, the code commissioner in (4)(b) substituted "local government interim committee" for "education and local government interim committee" to reflect amendments made by Ch. 167, L. 2017.

# CHAPTER 4
# RECLAMATION

**Chapter Administrative Rules**

Title 17, chapter 24, ARM Reclamation.

**Chapter Case Notes**

*No Constitutional Limitation on Appropriation of Resource Indemnity Trust Funds Beyond Principal:* Nothing in the Montana Constitution as a whole or in the plain language of Art. IX, sec. 2, Mont. Const., places a limitation on the appropriation of resource indemnity trust funds beyond the $100 million principal, which must remain inviolate. Butte-Silver Bow Local Gov't v. St., 235 M 398, 768 P2d 327, 46 St. Rep. 87 (1989).

*Trust Funds Not Limited to Reclamation of Land Disturbed by Taking of Natural Resources:* The appropriation or allocation of resource indemnity trust funds is not limited to the reclamation of lands disturbed by the taking of natural resources. Therefore, the use of funds for programs related to improving the total environment does not violate the fiduciary duty of the state toward the trust in allocating trust funds. Butte-Silver Bow Local Gov't v. St., 235 M 398, 768 P2d 327, 46 St. Rep. 87 (1989).

*Right to Explore for Minerals as Including Right to Conduct Resource Inventory Operations:* A mineral reservation executed in the 1940s, allowing the grantor to use the surface to explore for minerals, includes the right to conduct resource inventory operations and other activities necessary to compile the environmental information that must be obtained before the state will allow mining operations to commence. W. Energy Co. v. Genie Land Co., 195 M 202, 635 P2d 1297, 38 St. Rep. 1791 (1981).

**Chapter Law Review Articles**

Constitutional Challenges to the Surface Mining Control and Reclamation Act, Habein, 43 Mont. L. Rev. 235 (1982).

Recent Developments in Montana Natural Resources Law, Roberts & Stone, 38 Mont. L. Rev. 169 (1977).

Montana's Statutory Protection of Surface Owners From Strip Mining and Resultant Problems of Mineral Deed Construction, Karell, 37 Mont. L. Rev. 347 (1976).

Strip Mining on Reservation Lands—Protecting the Environment and the Rights of Indian Allotment Owners, Anderson, 35 Mont. L. Rev. 209 (1974).

Strip Mining Reclamation Requirements in Montana—A Critique, Muckelston, 32 Mont. L. Rev. 66 (1971).

## Part 1

## Strip and Underground Mine Siting

**Part Administrative Rules**

Title 17, chapter 24, subchapter 18, ARM Rules governing Montana strip-mine and underground-mine siting law.

**Part Law Review Articles**

The Hard Rock Mining Bill: House Bill 243, Fagg, 43 Pub. Land & Resources. L. Rev. 183 (2020).

### 82-4-102. Intent — findings — policy and purpose.

**Compiler's Comments**

*2021 Amendment:* Chapter 324 in (3)(a) near beginning after "authority" inserted "to adopt rules and"; deleted former (3)(b) that read: "(b) to vest in the board the authority to adopt rules"; and made minor changes in style. Amendment effective July 1, 2021.

*2003 Amendment:* Chapter 361 inserted (1) relating to constitutional obligations and legislative intent; and made minor changes in style. Amendment effective April 16, 2003.

*Preamble:* The preamble attached to Ch. 361, L. 2003, provided: "WHEREAS, Article II, section 3, of the Montana Constitution enumerates certain inalienable individual rights, including the right to a clean and healthful environment, the right of pursuing life's basic necessities, the right of enjoying and defending an individual's life and liberty, the right of acquiring, possessing, and protecting property, and the right of seeking individual safety, health, and happiness in all lawful ways; and

WHEREAS, the constitutionally enumerated rights are by their very nature bound to result in competing interests in specific fact situations; and

WHEREAS, Article IX, section 1, of the Montana Constitution provides that the state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations and directs the Legislature to provide for the administration and enforcement of this duty and also directs the Legislature to provide adequate remedies for the protection of the environmental life support system from degradation and to provide adequate remedies to prevent unreasonable depletion and degradation of natural resources; and

WHEREAS, the Legislature has reviewed the intent of the framers of the 1972 Montana Constitution as evidenced in the verbatim transcripts of the constitutional convention; and

WHEREAS, there is no indication that one enumerated inalienable right is intended to supersede other inalienable rights, including the right to use property in all lawful means; and

WHEREAS, the Legislature, mindful of its constitutional obligation to provide for the administration and enforcement of the constitution, has enacted a comprehensive set of laws to accomplish the goals of the constitution, including the Montana Clean Indoor Air Act of 1979, Title 50, chapter 40, part 1, MCA; the Montana Environmental Policy Act, Title 75, chapter 1, parts 1 through 3, MCA; the Clean Air Act of Montana, Title 75, chapter 2, parts 1 through 4, MCA; water quality laws, Title 75, chapter 5, MCA; The Natural Streambed and Land Preservation Act of 1975, Title 75, chapter 7, part 1, MCA; The Montana Solid Waste Management Act, Title 75, chapter 10, part 2, MCA; The Montana Hazardous Waste Act, Title 75, chapter 10, part 4, MCA; the Comprehensive Environmental Cleanup and Responsibility Act, Title 75, chapter 10, part 7, MCA; the Montana Megalandfill Siting Act, sections 75-10-901 through 75-10-945, MCA; the Montana Underground Storage Tank Installer and Inspector Licensing and Permitting Act, Title 75, chapter 11, part 2, MCA; the Montana Underground Storage Tank Act, Title 75, chapter 11, part 5, MCA; the Montana Major Facility Siting Act, Title 75, chapter 20, MCA; the Open-Space Land and Voluntary Conservation Easement Act, Title 76, chapter 6, MCA; the Environmental Control Easement Act, Title 76, chapter 7, MCA; The Strip and Underground Mine Siting Act, Title 82, chapter 4, part 1, MCA; The Montana Strip and Underground Mine Reclamation Act, Title 82, chapter 4, part 2, MCA; The Opencut Mining Act, Title 82, chapter 4, part 4, MCA; and The Nongame and Endangered Species Conservation Act, Title 87, chapter 5, part 1, MCA."

*Severability:* Section 39, Ch. 361, L. 2003, was a severability clause.

*Retroactive Applicability:* Section 41, Ch. 361, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to actions for judicial review or other causes of action challenging the issuance of a permit, petition for review, amendment, license, arbitration, action, certificate, or inspection that are pending but not yet decided on or after [the effective date of this act]." Effective April 16, 2003.

*1995 Amendment:* Chapter 418 in (2)(b), after "rules", deleted "to suspend and revoke permits, and to conduct hearings". Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

## 82-4-103. Definitions.

### Compiler's Comments

*1995 Amendment:* Chapter 418 in definition of Board substituted "board of environmental review provided for in 2-15-3502" for "board of land commissioners as provided for in Article X, section 4, of the constitution of this state"; in definition of Department substituted "department of environmental quality provided for in 2-15-3501" for "department of state lands provided for in Title 2, chapter 15, part 32"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1981 Amendment:* Substituted "82-4-203" for "82-4-203(12)" in (3).

## 82-4-112. Administration.

### Compiler's Comments

*2021 Amendment:* Chapter 324 inserted (1)(a) concerning adopting rules pertaining to new strip mines, to new underground mines, and to other matters; and made minor changes in style. Amendment effective July 1, 2021.

*2001 Amendment:* Chapter 79 in (1)(b) after "issue" deleted "after an opportunity for hearing"; in (1)(d) substituted "issue an order" for "issue, after opportunity for hearing, a final order" and after "notice of" substituted "violation" for "noncompliance"; deleted former (6) that read: "(6) conduct hearings under provisions of this part or rules adopted by the board"; inserted (2) requiring the board to conduct hearings under this part; and made minor changes in style. Amendment effective March 20, 2001.

*Preamble:* The preamble attached to Ch. 79, L. 2001, provided: "WHEREAS, certain environmental statutes administered by the Montana Department of Environmental Quality provide that a person aggrieved by a decision of the Department may appeal that decision to the Director of the Department; and

WHEREAS, the possibility of an appeal prevents the Director from becoming involved in certain Department decisions that are subject to appeal to the Director; and

WHEREAS, section 82-4-427, MCA, states that a contested case hearing requested under The Opencut Mining Act must be held within 30 days after the hearing is requested; and

WHEREAS, it is difficult for the Department to conduct a contested case hearing under that Act within 30 days after the hearing is requested; and

WHEREAS, certain revisions to statutes administered by the Department are necessary for clarity and consistency and to conform the statutes to current drafting style."

*Saving Clause:* Section 18, Ch. 79, L. 2001, was a saving clause.

*1995 Amendment:* Chapter 418 inserted (2) concerning remedial measures to comply with rules; inserted (4) concerning final order revoking permit; inserted (6) concerning hearings; and deleted former (6) that read: "(6) adopt rules with respect to the filing of reports, the issuance of permits, and other matters of procedure and administration". Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

**82-4-113. Receipts paid into general fund.**

**Compiler's Comments**

*1981 Amendment:* Substituted "general fund" for language dealing with a special agency account, the mining and reclamation fund, and its administration; substituted "penalties" for "forfeit funds".

**82-4-122. Application and approval of permit.**

**Compiler's Comments**

*2005 Amendment:* Chapter 337 near beginning of (2) in exception clause inserted "75-1-205(4) and". Amendment effective April 21, 2005.

*Applicability:* Section 22, Ch. 337, L. 2005, provided: "[This act] applies to environmental impact statements on which the agency responsible for preparation commenced preparation after December 31, 2004."

*2001 Amendment:* Chapter 299 in (2) at beginning inserted exception clause; and made minor changes in style. Amendment effective October 1, 2001.

*Applicability:* Section 16, Ch. 299, L. 2001, provided: "[This act] applies to environmental reviews that are begun after [the effective date of this act]." Effective October 1, 2001.

**82-4-123. Permit fee and surety bond.**

**Compiler's Comments**

*2021 Amendment:* Chapter 324 at end of second sentence substituted "department" for "board". Amendment effective July 1, 2021.

*1995 Amendment:* Chapter 418 in second sentence, after "determined by the", substituted "department" for "board on the recommendation of the commissioner"; and in third sentence, after "limits, the", substituted "department" for "board". Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

**82-4-127. Effect of siting permit on subsequent mining permits.**

**Compiler's Comments**

*2007 Amendment:* Chapter 44 in first sentence after "82-4-227(2) and" substituted "(7), the department shall provide written notification" for "(4), it shall so state in a written statement" and at end after "operator" inserted "that the department has enough information to approve or disapprove the application"; and made minor changes in style. Amendment effective October 1, 2007.

**82-4-129. Noncompliance — suspension of permits.**

**Compiler's Comments**

*2021 Purported Amendment:* Although sec. 85, Ch. 324, L. 2021, purported to amend this section, the final version of the text remained unamended.

*1995 Amendment:* Chapter 418 in (1), in first sentence in two places after "department", deleted reference to Board and near end substituted "director of the department" for "commissioner" and in second sentence, after "certified", deleted "or registered"; near end of second sentence of (2) substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

### 82-4-130. Procedure for hearings.

**Compiler's Comments**

*2001 Amendment:* Chapter 79 inserted (1) allowing an aggrieved person to request a hearing; in (2) substituted language applying the contested case provisions of the Montana Administrative Procedure Act to the hearing for former sentence that read: "All hearing and appeal procedures shall be in accordance with the Montana Administrative Procedure Act"; and made minor changes in style. Amendment effective March 20, 2001.

*Preamble:* The preamble attached to Ch. 79, L. 2001, provided: "WHEREAS, certain environmental statutes administered by the Montana Department of Environmental Quality provide that a person aggrieved by a decision of the Department may appeal that decision to the Director of the Department; and

WHEREAS, the possibility of an appeal prevents the Director from becoming involved in certain Department decisions that are subject to appeal to the Director; and

WHEREAS, section 82-4-427, MCA, states that a contested case hearing requested under The Opencut Mining Act must be held within 30 days after the hearing is requested; and

WHEREAS, it is difficult for the Department to conduct a contested case hearing under that Act within 30 days after the hearing is requested; and

WHEREAS, certain revisions to statutes administered by the Department are necessary for clarity and consistency and to conform the statutes to current drafting style."

*Saving Clause:* Section 18, Ch. 79, L. 2001, was a saving clause.

### 82-4-141. Violation — penalty.

**Compiler's Comments**

*2005 Amendment:* Chapter 487 in (1) in second sentence in middle substituted "brought by the department" for "brought in the name of the state of Montana by the attorney general"; in (2) at beginning substituted "The department may bring" for "The attorney general shall, upon the request of the director, sue for the recovery of the penalties provided for in this section and bring"; in (3) near beginning substituted "purposely or knowingly" for "willfully"; inserted (4) relating to penalty factors; and made minor changes in style. Amendment effective January 1, 2006.

*Saving Clause:* Section 29, Ch. 487, L. 2005, was a saving clause.

*1995 Amendment:* Chapter 418 in (2) substituted "director" for "commissioner". Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

### 82-4-142. Mandamus to compel enforcement.

**Compiler's Comments**

*2021 Amendment:* Chapter 535 in (2) after "bring an action of mandamus" deleted "in the district court of the first judicial district of this state or". Amendment effective October 1, 2021.

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

## Part 2
## Coal and Uranium Mine Reclamation

**Part Compiler's Comments**

*Sections Amended and Created — Effective Date:* Chapter 550, L. 1979, amended 16 sections of this part and created one section for the purpose of bringing state law into compliance with federal law requiring reclamation of strip-mined lands. The effective date of Chapter 550 was delayed pending approval by the Secretary of the Interior of the state plan implementing the federal requirements. Section 19(1), Ch. 550, L. 1979, provided: "(1) This act does not become effective until the secretary of interior has conditionally or finally approved the state's permanent regulatory program under Public Law 95-87; however, rules pursuant to this act may be adopted pursuant to Title 2, chapter 4, prior to the effective date of this act and shall become effective only on the effective date of this act." Conditional approval of the state implementation plan was granted effective April 1, 1980. Sections amended were 82-4-202 through 82-4-205, 82-4-221 through 82-4-223, 82-4-225, 82-4-227, 82-4-231, 82-4-232, 82-4-235, 82-4-239, 82-4-251, 82-4-252, and 82-4-254. Section 82-4-228 was created.

*Temporary Provisions:* Section 19(2), Ch. 550, L. 1979, provided: "(2) Within 2 months of the secretary of interior's approval of the state's permanent regulatory program pursuant to section 503 of Public Law 95-87, as amended, each operator shall submit to the department a permit revision application to bring its permit into compliance with this act. The burden shall be on the applicant to demonstrate that the application complies with all the requirements of this act. The department shall make a written finding granting or denying the application within 5 months of its submittal. Eight months after the secretary of interior's approval of the state's permanent regulatory program, no operator may conduct strip- or underground-mining operations unless the operator's permit has been revised to conform to the requirements of this act and approved by the department. Eight months after the secretary of interior's approval of the state's regulatory program, all strip- or underground-mining operations must be conducted in accordance with Title 82, chapter 2, part 4, as amended by this act." Conditional approval of the state implementation plan was granted effective April 1, 1980.

Section 27, Ch. 325, L. 1973, read: "Every operator shall within ninety (90) days after the effective date of this act file with the department an application for a permit."

Section 28, Ch. 325, L. 1973, read: "Ninety (90) days after the effective date of this act, the state shall proceed to cancel, according to their terms, all existing contracts entered into pursuant to chapter 245, Laws of Montana, 1967. If the contract does not provide according to its terms, for the cancellation, it shall be terminated and void within two hundred seventy (270) days from the effective date of this act."

*Severability Clauses:* Section 20, Ch. 550, L. 1979, and sec. 25, Ch. 325, L. 1973, were severability clauses.

### Part Administrative Rules

Title 17, chapter 24, subchapters 3 through 13, ARM Rules governing The Montana Strip and Underground Mine Reclamation Act.

Title 24, chapter 30, subchapter 13, ARM Mine safety and health.

### Part Law Review Articles

Constitutional Challenges to the Surface Mining Control and Reclamation Act, Habein, 43 Mont. L. Rev. 235 (1982).

## 82-4-201. Short title.

### Attorney General's Opinions

*Application of Act to Indian Reservations:* The Montana Strip and Underground Mine Reclamation Act is not applicable to the prospecting for, mining by strip-mining methods, or removal of coal on lands within the Northern Cheyenne Indian Reservation covered by a coal lease from the Northern Cheyenne Tribe without the State of Montana acting under 25 U.S.C. § 1322 to obtain jurisdiction for enforcement of the Act upon Indian lands and the Northern Cheyenne Tribe granting the State of Montana jurisdiction to enforce the Act. 35 A.G. Op. 54 (1973).

## 82-4-202. Intent — policy — findings.

### Compiler's Comments

*2003 Amendments — Composite Section:* Chapter 204 in (3)(a) near beginning after "necessary to require" deleted "after March 16, 1973"; in (3)(b) near beginning after "constitution" deleted "as adopted June 6, 1972"; inserted (3)(c) through (3)(e) outlining additional legislative findings and declarations concerning coal mining reclamation; and made minor changes in style. Amendment effective January 1, 2004.

Chapter 361 inserted (1) relating to constitutional obligations and legislative intent; and made minor changes in style. Amendment effective April 16, 2003.

Style changes were slightly different in the chapters. In each case, the codifier chose appropriate text.

*Preamble:* The preamble attached to Ch. 361, L. 2003, provided: "WHEREAS, Article II, section 3, of the Montana Constitution enumerates certain inalienable individual rights, including the right to a clean and healthful environment, the right of pursuing life's basic necessities, the right of enjoying and defending an individual's life and liberty, the right of acquiring, possessing, and protecting property, and the right of seeking individual safety, health, and happiness in all lawful ways; and

WHEREAS, the constitutionally enumerated rights are by their very nature bound to result in competing interests in specific fact situations; and

WHEREAS, Article IX, section 1, of the Montana Constitution provides that the state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations and directs the Legislature to provide for the administration and enforcement of this duty and also directs the Legislature to provide adequate remedies for the protection of the environmental life support system from degradation and to provide adequate remedies to prevent unreasonable depletion and degradation of natural resources; and

WHEREAS, the Legislature has reviewed the intent of the framers of the 1972 Montana Constitution as evidenced in the verbatim transcripts of the constitutional convention; and

WHEREAS, there is no indication that one enumerated inalienable right is intended to supersede other inalienable rights, including the right to use property in all lawful means; and

WHEREAS, the Legislature, mindful of its constitutional obligation to provide for the administration and enforcement of the constitution, has enacted a comprehensive set of laws to accomplish the goals of the constitution, including the Montana Clean Indoor Air Act of 1979, Title 50, chapter 40, part 1, MCA; the Montana Environmental Policy Act, Title 75, chapter 1, parts 1 through 3, MCA; the Clean Air Act of Montana, Title 75, chapter 2, parts 1 through 4, MCA; water quality laws, Title 75, chapter 5, MCA; The Natural Streambed and Land Preservation Act of 1975, Title 75, chapter 7, part 1, MCA; The Montana Solid Waste Management Act, Title 75, chapter 10, part 2, MCA; The Montana Hazardous Waste Act, Title 75, chapter 10, part 4, MCA; the Comprehensive Environmental Cleanup and Responsibility Act, Title 75, chapter 10, part 7, MCA; the Montana Megalandfill Siting Act, sections 75-10-901 through 75-10-945, MCA; the Montana Underground Storage Tank Installer and Inspector Licensing and Permitting Act, Title 75, chapter 11, part 2, MCA; the Montana Underground Storage Tank Act, Title 75, chapter 11, part 5, MCA; the Montana Major Facility Siting Act, Title 75, chapter 20, MCA; the Open-Space Land and Voluntary Conservation Easement Act, Title 76, chapter 6, MCA; the Environmental Control Easement Act, Title 76, chapter 7, MCA; The Strip and Underground Mine Siting Act, Title 82, chapter 4, part 1, MCA; The Montana Strip and Underground Mine Reclamation Act, Title 82, chapter 4, part 2, MCA; The Opencut Mining Act, Title 82, chapter 4, part 4, MCA; and The Nongame and Endangered Species Conservation Act, Title 87, chapter 5, part 1, MCA."

*Severability:* Section 13, Ch. 204, L. 2003, was a severability clause.

Section 39, Ch. 361, L. 2003, was a severability clause.

*Saving Clause:* Section 14, Ch. 204, L. 2003, was a saving clause.

*Contingent Voidness:* Section 15, Ch. 204, L. 2003, provided: "(1) If any provision of [this act] is disapproved by the United States secretary of the interior pursuant to 30 CFR 732.17, then that portion of [this act] is void.

(2) Within 15 days of the effective date of the disapproval under subsection (1), the department of environmental quality shall notify the code commissioner, certifying that the disapproval under subsection (1) has occurred." Subsection (3)(d) concerning lands mined for coal and the phrase "and attainable" in former (3)(e) were disapproved February 16, 2005.

*Retroactive Applicability:* Section 41, Ch. 361, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to actions for judicial review or other causes of action challenging the issuance of a permit, petition for review, amendment, license, arbitration, action, certificate, or inspection that are pending but not yet decided on or after [the effective date of this act]." Effective April 16, 2003.

## Case Notes

*Mining Held to Be Precondition for Permit Renewal — Two-Year Extension Provision Applicable to Three-Year Term for Mining — Construction and Purpose of Statute:* In 1984, the Department of State Lands (now Department of Natural Resources and Conservation) issued Montco a 5-year mining permit. Montco performed no site preparation or other work during the first 3 years after the permit was issued, but Montco applied for and was granted a 2-year extension of the mining deadline. During the first 4 years of the permit, the permit was under challenge in administrative and judicial proceedings. As the 5-year term came to an end, Montco applied for a 5-year renewal, and renewal was granted by the Department. When 3 years of that 5-year period came to an end with Montco having accomplished no work at the site, Montco applied for and was granted another 2-year extension, although throughout this second 5-year period, there were no formal administrative or judicial proceedings challenging the permit. After Montco asked for another 5-year extension of the permit, it was denied by the Department, but the District Court granted summary judgment for Montco and against intervenors, requiring that another 5-year extension be granted. The Supreme Court followed the rules of statutory construction preventing part of a statute from having no effect, prohibiting a court from inserting omitted language, and prohibiting absurd results and held that: (1) the period for a 2-year renewal applies only to the first 3-year period for commencement of mining; (2) the 3-year period for commencement of mining must be renewed for 2 years if the permittee proves that mining was not commenced because the permit was being litigated; (3) renewal of the 5-year permit term may be accomplished only by an "operator", who is defined in 82-4-203 as a person "engaged in mining"; and (4) once a permit has expired after the initial 3-year period (if no extension of the time for commencement of mining is granted) or after the 2-year extension for the permittee to commence mining, the permit may not again be renewed because, in the words of 82-4-221(1), the permittee is no longer in compliance with the requirements of "this part" and the permit has therefore expired. The Supreme Court also held that an administrative rule adopted by the Department could not be construed to require a result contrary to the Supreme Court's interpretation of the statutes and that the District Court's interpretation, automatically granting a 3-year extension of the permit itself, not only made the "must expire" language of the statute meaningless but was also contrary to the purpose of the Montana Strip and Underground Mine Reclamation Act, which seeks an orderly development of coal resources while protecting a wide range of other interests and values. The Supreme Court reversed the District Court and ordered that summary judgment be granted against Montco and denied renewal of the permit. Montco v. Simonich, 285 M 280, 947 P2d 1047, 54 St. Rep. 1150 (1997).

**82-4-203. Definitions.**

**Compiler's Comments**

*2023 Amendments — Composite Section:* Section 2, Ch. 524, L. 2023, inserted definitions of amendment, incidental boundary revision, major revision, and minor revision; and made minor changes in style. Amendment effective October 1, 2023, and terminates on occurrence of contingency.

Section 2, Ch. 631, L. 2023, substituted current definition of material damage for former definition (see sec. 2, Ch. 631, Ch. 2023, for former text). Amendment effective May 19, 2023.

*Contingent Voidness:* Section 5, Ch. 631, L. 2023, provided: "(1) If the United States secretary of the interior disapproves any provision of [this act] pursuant to 30 CFR 732, then that portion of [this act] is void.

(2) The department of environmental quality shall notify the code commissioner of a disapproval under subsection (1) within 15 days of the effective date of the disapproval." The department of environmental quality notified the code commissioner in a written communication dated April 1, 2024, of disapproval under subsection (1).

*Retroactive Applicability:* Section 7, Ch. 631, L. 2023, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to actions for judicial review or other causes of action challenging the issuance of a permit petition for review, amendment, license, arbitration, action, certificate, or inspection that are pending but not yet decided on or after [the effective date of this act]." Effective May 19, 2023.

*Severability:* Section 4, Ch. 631, L. 2023, was a severability clause.

*2021 Amendment:* Chapter 337 inserted definition of affected drainage basin; and made minor changes in style. Amendment effective April 30, 2021.

*2011 Amendments — Code Commissioner Correction — Composite Section:* Chapter 398 inserted definitions of in situ coal gasification and recovery fluid; and made minor changes in style.

The Code Commissioner chose not to codify the amendment made to (4)(c), which inserted "as defined in 82-4-203" after "hydrologic balance", because it was unnecessary and was the apparent result of a drafting error. Amendment effective October 1, 2011.

Chapter 408 inserted definition of coal beneficiation plant; in definition of coal preparation plant in (a) in first sentence inserted "in connection with a strip mine or underground coal mine" and inserted (b) establishing exceptions; in definition of operation in (a)(i) near end inserted exception clause and inserted (b) establishing exceptions; in definition of operator inserted (b) establishing exception; in definition of strip mining in (b)(ii) inserted "operated in connection with a strip mine"; in definition of underground mining inserted (b)(ii) pertaining to coal preparation; and made minor changes in style. Amendment effective on occurrence of contingency.

*Saving Clause:* Section 6, Ch. 398, L. 2011, was a saving clause.

*Severability:* Section 7, Ch. 398, L. 2011, was a severability clause.

*Effective Date — Contingency:* Section 2, Ch. 408, L. 2011, provided: "(1) [This act] is effective on the date that the office of surface mining reclamation and enforcement publishes notice in the federal register that [this act] is approved pursuant to 30 CFR 732.17.

(2) The department of environmental quality shall provide a copy of the notice described in subsection (1) to the code commissioner." The amendments were not approved as documented in the February 14, 2013, Federal Register, Vol. 78, No. 31, page 10507.

*2003 Amendment:* Chapter 204 inserted definitions of adjacent area, approximate original contour, cropland, developed water resources, ephemeral drainageway, fish and wildlife habitat, forestry, grazing land, higher or better uses, hydrologic balance, industrial or commercial, intermittent stream, land use, material damage, pastureland, perennial stream, recreation, reference area, residential, restore or restoration, and wildlife habitat enhancement feature; in definition of reclamation near middle after "other work" substituted "conducted on lands" for "to restore an area of land" and at end after "department" inserted "to make those lands capable of supporting the uses that those lands were capable of supporting prior to any mining or to higher or better uses"; in definition of surface owner in (a) after "surface" deleted "and whose principal place of residence is on the land", in (b) near end after "income" deleted "if any", and inserted (d) providing that a surface owner includes the appropriate federal land management agency when the United States government owns the surface; and made minor changes in style. Amendment effective January 1, 2004.

*Severability:* Section 13, Ch. 204, L. 2003, was a severability clause.

*Saving Clause:* Section 14, Ch. 204, L. 2003, was a saving clause.

*Contingent Voidness:* Section 15, Ch. 204, L. 2003, provided: "(1) If any provision of [this act] is disapproved by the United States secretary of the interior pursuant to 30 CFR 732.17, then that portion of [this act] is void.

(2) Within 15 days of the effective date of the disapproval under subsection (1), the department of environmental quality shall notify the code commissioner, certifying that the disapproval under subsection (1) has occurred." In the definition of approximate original contour in (c) at end the phrase "as necessary to support postmining land uses within the area affected and the adjacent area" and in definition of hydrologic balance at end the phrase "as they relate to uses of land and water within the area affected by mining and the adjacent area" were disapproved February 16, 2005.

*1997 Amendment:* Chapter 196 in definition of operator inserted (d) concerning a person who is engaged in uranium mining using in situ methods; in definition of prospecting, in (a)(ii) before "mineral", deleted "natural"; and made minor changes in style. Amendment effective April 3, 1997.

*Severability:* Section 7, Ch. 196, L. 1997, was a severability clause.

*Retroactive Applicability:* Section 8, Ch. 196, L. 1997, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to underground coal mining operations that occurred after October 24, 1992."

*1995 Amendments — Composite Section:* Chapter 159 in definition of prospecting, after "means", deleted "the removal of overburden, core drilling, construction of roads, or any other disturbance of the surface for the purpose of determining the location, quantity, or quality of a natural mineral deposit" and inserted (a)(ii) concerning the location, quantity, or quality of a natural mineral deposit; and made minor changes in style.

Chapter 418 in definition of Board substituted "board of environmental review provided for in 2-15-3502" for "board of land commissioners as provided for in Article X, section 4, of the constitution of this state"; deleted definition of Commissioner that read: ""Commissioner" means the commissioner of state lands provided for in 2-15-3202"; in definition of Department substituted "department of environmental quality provided for in 2-15-3501" for "department of state lands provided for in Title 2, chapter 15, part 32"; substituted definition of prime farmland for former definition that read: ""Prime farmland" means that land previously prescribed by the United States secretary of agriculture on the basis of such factors as moisture availability, temperature regime, chemical balance, permeability, surface-layer composition, susceptibility to flooding, and erosion characteristics and which historically has been used for intensive agricultural purposes and as defined in the Federal Register"; and made minor changes in style. Amendment effective July 1, 1995.

A style change in the chapters was slightly different. The codifier chose the most appropriate.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1993 Amendment:* Chapter 225 in definition of prospecting, after "deposit", deleted "and, on areas designated unsuitable for coal mining pursuant to 82-4-227 and 82-4-228" and after "overburden" deleted "and coal"; and made minor changes in style.

*1991 Amendment:* In definition of prospecting, near middle after "mineral deposit", inserted "and, on areas designated unsuitable for coal mining pursuant to 82-4-227 and 82-4-228, the gathering of surface or subsurface geologic, physical, or chemical data by mapping, trenching, geophysical, or other techniques necessary to determine the quality and quantity of overburden and coal in an area and the gathering of environmental data to establish the conditions of an area before beginning strip- or underground-coal-mining and reclamation operations under this part".

*1987 Amendment:* Inserted definitions of coal preparation and coal preparation plant; in definition of operation inserted "including coal preparation plants"; in definition of operator, at end, inserted "or a person engaged in operating a coal preparation plant"; inserted definition of remining; and in definition of strip mining, at end, inserted two sentences stating what the term includes and does not include.

*1981 Amendment:* Substituted "minable" for "strippable" in (12).

**Case Notes**

*Mining Held to Be Precondition for Permit Renewal — Two-Year Extension Provision Applicable to Three-Year Term for Mining — Construction and Purpose of Statute:* In 1984, the Department of State Lands (now Department of Natural Resources and Conservation) issued Montco a 5-year mining permit. Montco performed no site preparation or other work during the first 3 years after the permit was issued, but Montco applied for and was granted a 2-year extension of the mining deadline. During the first 4 years of the permit, the permit was under challenge in administrative and judicial proceedings. As the 5-year term came to an end, Montco applied for a 5-year renewal, and renewal was granted by the Department. When 3 years of that 5-year period came to an end with Montco having accomplished no work at the site, Montco applied for and was granted another 2-year extension, although throughout this second 5-year period, there were no formal administrative or judicial proceedings challenging the permit. After Montco asked for another 5-year extension of the permit, it was denied by the Department, but the District Court granted summary judgment for Montco and against intervenors, requiring that another 5-year extension be granted. The Supreme Court followed the rules of statutory construction preventing part of a statute from having no effect, prohibiting a court from inserting omitted language, and prohibiting absurd results and held that: (1) the period for a 2-year renewal applies only to the first 3-year period for commencement of mining; (2) the 3-year period for commencement of mining must be renewed for 2 years if the permittee proves that mining was not commenced because the permit was being litigated; (3) renewal of the 5-year permit term may be accomplished only by an "operator", who is defined in this section as a person "engaged in mining"; and (4) once a permit has expired after the initial 3-year period (if no extension of the time for commencement of mining is granted) or after the 2-year extension for the permittee to commence mining, the permit may not again be renewed because, in the words of 82-4-221(1), the permittee is no longer in compliance with the requirements of "this part" and the permit has therefore expired. The Supreme Court also held that an administrative rule adopted by the Department could not be construed to require a result contrary to the Supreme Court's interpretation of the statutes and that the District Court's interpretation, automatically granting a 3-year extension of the permit itself, not only made the "must expire" language of the statute meaningless but was also contrary to the purpose of the Montana Strip and Underground Mine Reclamation Act, which seeks an orderly development of coal resources while protecting a wide range of other interests and values. The Supreme Court reversed the District Court and ordered that summary judgment be granted against Montco and denied renewal of the permit. Montco v. Simonich, 285 M 280, 947 P2d 1047, 54 St. Rep. 1150 (1997).

**82-4-205. Administration by department and board.**

**Compiler's Comments**

*2021 Amendment:* Chapter 324 inserted (1) providing the department with rulemaking authority pertaining to strip mining and to underground mining and to other procedural matters; in (2)(g) at end substituted "pursuant to this part" for "by the board"; and made minor changes in style. Amendment effective July 1, 2021.

*2001 Amendment:* Chapter 79 at beginning of (1)(b) after "shall" substituted "review for approval or disapproval" for "examine and pass upon"; at beginning of (1)(e) substituted "issue an order" for "issue, after opportunity for hearing, a final order" and after "notice of" substituted "violation" for "noncompliance"; in (1)(g) after "conduct" inserted "public"; deleted former (10) that read: "(10) may conduct hearings under the provisions of this part"; inserted (2) requiring the board to conduct contested case hearings under this part; and made minor changes in style. Amendment effective March 20, 2001.

*Preamble:* The preamble attached to Ch. 79, L. 2001, provided: "WHEREAS, certain environmental statutes administered by the Montana Department of Environmental Quality provide that a person aggrieved by a decision of the Department may appeal that decision to the Director of the Department; and

WHEREAS, the possibility of an appeal prevents the Director from becoming involved in certain Department decisions that are subject to appeal to the Director; and

WHEREAS, section 82-4-427, MCA, states that a contested case hearing requested under The Opencut Mining Act must be held within 30 days after the hearing is requested; and

WHEREAS, it is difficult for the Department to conduct a contested case hearing under that Act within 30 days after the hearing is requested; and

WHEREAS, certain revisions to statutes administered by the Department are necessary for clarity and consistency and to conform the statutes to current drafting style."

*Saving Clause:* Section 18, Ch. 79, L. 2001, was a saving clause.

*1997 Amendment:* Chapter 273 deleted former (10) that read: "(10) may adopt rules with respect to the filing of reports, the issuance of permits, monitoring, and other matters of procedure and administration"; and made minor changes in style. Amendment effective April 16, 1997.

*Saving Clause:* Section 6, Ch. 273, L. 1997, was a saving clause.

*1995 Amendment:* Chapter 418 inserted (3) concerning remedial measures; inserted (5) concerning final order revoking permit; inserted (7) concerning hearings; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

## 82-4-206. Procedure for contested case hearings.

### Compiler's Comments

*2005 Amendment:* Chapter 127 in (1) at beginning substituted "An applicant, permittee, or person with an interest that is or may be adversely affected" for "A person aggrieved by a final decision of the department under this part" and near middle after "board" inserted "on any of the following decisions of the department"; inserted (1)(a) through (1)(e) delineating various application approvals or denials for which a hearing may be requested; and made minor changes in style. Amendment effective March 30, 2005.

*Saving Clause:* Section 11, Ch. 127, L. 2005, was a saving clause.

*2001 Amendment:* Chapter 79 inserted (1) allowing an aggrieved person to request a hearing; in (2) substituted language applying the contested case provisions of the Montana Administrative Procedure Act to the hearing for former sentence that read: "All hearings and appeal procedures shall be in accordance with parts 6 and 7 of chapter 4, Title 2"; and made minor changes in style. Amendment effective March 20, 2001.

*Preamble:* The preamble attached to Ch. 79, L. 2001, provided: "WHEREAS, certain environmental statutes administered by the Montana Department of Environmental Quality provide that a person aggrieved by a decision of the Department may appeal that decision to the Director of the Department; and

WHEREAS, the possibility of an appeal prevents the Director from becoming involved in certain Department decisions that are subject to appeal to the Director; and

WHEREAS, section 82-4-427, MCA, states that a contested case hearing requested under The Opencut Mining Act must be held within 30 days after the hearing is requested; and

WHEREAS, it is difficult for the Department to conduct a contested case hearing under that Act within 30 days after the hearing is requested; and

WHEREAS, certain revisions to statutes administered by the Department are necessary for clarity and consistency and to conform the statutes to current drafting style."

*Saving Clause:* Section 18, Ch. 79, L. 2001, was a saving clause.

## 82-4-207. Rulemaking — in situ coal gasification.

### Compiler's Comments

*2021 Amendment:* Chapter 324 throughout section in three places substituted "department" for "board". Amendment effective July 1, 2021.

*Effective Date:* This section is effective October 1, 2011.

*Saving Clause:* Section 6, Ch. 398, L. 2011, was a saving clause.

*Severability:* Section 7, Ch. 398, L. 2011, was a severability clause.

### 82-4-221. Mining permit required.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 3, Ch. 524, L. 2023. Amendment effective October 1, 2023, and terminates on occurrence of contingency.

*2003 Amendment:* Chapter 204 in (3) at end of third sentence after "but" substituted "within 60 days, which may be extended by an additional 30 days by mutual agreement of the department and the applicant" for "in no case longer than 120 days". Amendment effective January 1, 2004.

*Severability:* Section 13, Ch. 204, L. 2003, was a severability clause.

*Saving Clause:* Section 14, Ch. 204, L. 2003, was a saving clause.

*Contingent Voidness:* Section 15, Ch. 204, L. 2003, provided: "(1) If any provision of [this act] is disapproved by the United States secretary of the interior pursuant to 30 CFR 732.17, then that portion of [this act] is void.

(2) Within 15 days of the effective date of the disapproval under subsection (1), the department of environmental quality shall notify the code commissioner, certifying that the disapproval under subsection (1) has occurred." Pursuant to action by the secretary of the interior on February 16, 2005, none of the provisions of this section were disapproved.

*1995 Amendment:* Chapter 159 in fourth sentence of (1) extended time for permit renewal from at least 120 but not more than 150 days prior to the renewal date to at least 240 but not more than 300 days prior to the renewal date; and made minor changes in style.

*1981 Amendment:* In (1) extended the time period for application for renewal of a permit from between 30 and 60 days prior to renewal date to between 120 and 150 days prior to renewal date.

**Case Notes**

*Mining Held to Be Precondition for Permit Renewal — Two-Year Extension Provision Applicable to Three-Year Term for Mining — Construction and Purpose of Statute:* In 1984, the Department of State Lands (now Department of Natural Resources and Conservation) issued Montco a 5-year mining permit. Montco performed no site preparation or other work during the first 3 years after the permit was issued, but Montco applied for and was granted a 2-year extension of the mining deadline. During the first 4 years of the permit, the permit was under challenge in administrative and judicial proceedings. As the 5-year term came to an end, Montco applied for a 5-year renewal, and renewal was granted by the Department. When 3 years of that 5-year period came to an end with Montco having accomplished no work at the site, Montco applied for and was granted another 2-year extension, although throughout this second 5-year period, there were no formal administrative or judicial proceedings challenging the permit. After Montco asked for another 5-year extension of the permit, it was denied by the Department, but the District Court granted summary judgment for Montco and against intervenors, requiring that another 5-year extension be granted. The Supreme Court followed the rules of statutory construction preventing part of a statute from having no effect, prohibiting a court from inserting omitted language, and prohibiting absurd results and held that: (1) the period for a 2-year renewal applies only to the first 3-year period for commencement of mining; (2) the 3-year period for commencement of mining must be renewed for 2 years if the permittee proves that mining was not commenced because the permit was being litigated; (3) renewal of the 5-year permit term may be accomplished only by an "operator", who is defined in 82-4-203 as a person "engaged in mining"; and (4) once a permit has expired after the initial 3-year period (if no extension of the time for commencement of mining is granted) or after the 2-year extension for the permittee to commence mining, the permit may not again be renewed because, in the words of subsection (1) of this section, the permittee is no longer in compliance with the requirements of "this part" and the permit has therefore expired. The Supreme Court also held that an administrative rule adopted by the Department could not be construed to require a result contrary to the Supreme Court's interpretation of the statutes and that the District Court's interpretation, automatically granting a 3-year extension of the permit itself, not only made the "must expire" language of the statute meaningless but was also contrary to the purpose of the Montana Strip and Underground Mine Reclamation Act, which seeks an orderly development of coal resources while protecting a wide range of other interests and values. The Supreme Court reversed the District Court and ordered that summary judgment be granted against Montco and denied renewal of the permit. Montco v. Simonich, 285 M 280, 947 P2d 1047, 54 St. Rep. 1150 (1997).

### 82-4-222. Permit application — application revisions.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 3, Ch. 631, L. 2023. Amendment effective May 19, 2023.

*Contingent Voidness:* Section 5, Ch. 631, L. 2023, provided: "(1) If the United States secretary of the interior disapproves any provision of [this act] pursuant to 30 CFR 732, then that portion of [this act] is void.

(2) The department of environmental quality shall notify the code commissioner of a disapproval under subsection (1) within 15 days of the effective date of the disapproval." The department of environmental quality notified the code commissioner in a written communication dated April 1, 2024, of disapproval under subsection (1).

*Retroactive Applicability:* Section 7, Ch. 631, L. 2023, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to actions for judicial review or other causes of action challenging the issuance of a permit petition for review, amendment, license, arbitration, action, certificate, or inspection that are pending but not yet decided on or after [the effective date of this act]." Effective May 19, 2023.

*Severability:* Section 4, Ch. 631, L. 2023, was a severability clause.

*2019 Amendment:* Chapter 484 in (1)(g)(i) inserted last sentence regarding a change in the parties as a result of bankruptcy or reorganization; inserted (1)(g)(iii) regarding evidence of bonding or other financial assurances, including obligations for employee pensions and the reclamation of property without passing the costs for employee pensions on to purchasers. Amendment effective May 13, 2019.

*Preamble:* The preamble attached to Ch. 484, L. 2019, provided: "WHEREAS, the State of Montana has an interest in ensuring that private pension plans remain in good standing and that employees who have earned benefits under those plans receive them;

WHEREAS, it is imperative that private employers not backtrack on pension plans, shifting the burden to the State of Montana; and

WHEREAS, if private pension plans fail to provide earned benefits, the State of Montana may be burdened with additional responsibilities and demands for Medicaid coverage, the Supplemental Nutrition Assistance Program, Temporary Assistance for Needy Families, Low Income Home Energy Assistance Programs, and multiple other government programs."

*Severability:* Section 3, Ch. 484, L. 2019, was a severability clause.

*2013 Amendments — Composite Section:* Chapter 96 in (2)(m) in second sentence after "signed" deleted "and notarized" and in third sentence inserted "by the signed certification". Amendment effective October 1, 2013. The amendment by Ch. 98 rendered the amendment by Ch. 96 void.

Chapter 98 in (1)(k) in second sentence after "application must contain" deleted "two copies each of"; in (1)(l) at beginning substituted "name of a newspaper" for "name and date of a daily newspaper", after "circulation" substituted "in the locality of the proposed activity" for "within the county", and added second sentence pertaining to requirements when newspaper not published in Montana; in (2) in introductory clause after "accompanied by" deleted "two copies of all"; in (2)(l) in three places substituted "species" for "varieties" or "variety" and at end substituted "various species of plants" for "various kinds and varieties of plants, including but not limited to grasses, shrubs, legumes, forbs, and trees"; deleted former (2)(m) that read: "(m) be certified as follows: "I, the undersigned, hereby certify that this map is correct and shows to the best of my knowledge and belief all the information required by the mining laws of this state." The certification must be signed and notarized. The department may reject a map as incomplete if its accuracy is not attested"; inserted (2)(m) referring to professional engineer or land surveyor; in (8) at end inserted "or at another accessible public office or facility approved by the department"; and made minor changes in style. Amendment effective October 1, 2013.

*2007 Amendment:* Chapter 44 in (2) at end of first sentence of introductory clause after "through" substituted "(2)(n)" for "(2)(q)". Amendment effective October 1, 2007.

*2003 Amendment:* Chapter 204 in (1)(m) inserted fourth sentence providing that a determination of probable hydrologic consequences must include certain findings; inserted (1)(n) requiring that an application include a plan for monitoring ground water and surface water; inserted (1)(o) requiring that an application include a map depicting the projected postmining topography; inserted (1)(p) requiring that an application include the condition of the land to be covered by the permit prior to any mining; in (2) at end of first sentence extended reference from subsection (2)(n) to subsection (2)(q); inserted (6) allowing an applicant to revise an application for a permit, a permit amendment, or a permit revision in order to incorporate the provisions of Title 82, chapter 4, part 2; inserted (7) allowing a permittee to apply to revise a reclamation plan to incorporate the provisions of Title 82, chapter 4, part 2; and made minor changes in style. Amendment effective January 1, 2004.

*Severability:* Section 13, Ch. 204, L. 2003, was a severability clause.

*Saving Clause:* Section 14, Ch. 204, L. 2003, was a saving clause.

*Contingent Voidness:* Section 15, Ch. 204, L. 2003, provided: "(1) If any provision of [this act] is disapproved by the United States secretary of the interior pursuant to 30 CFR 732.17, then that portion of [this act] is void.

(2) Within 15 days of the effective date of the disapproval under subsection (1), the department of environmental quality shall notify the code commissioner, certifying that the disapproval under subsection (1) has occurred." Pursuant to action by the secretary of the interior on February 16, 2005, none of the provisions of this section were disapproved.

*1991 Amendment:* In (1)(i), (3), and two places in (5), after "strip-", inserted "mining"; in (1)(m), after "surface", inserted "water"; and made minor changes in style.

*1987 Amendment:* Inserted (1)(h) referring to record of outstanding reclamation fees.

*1983 Amendment:* In (1)(b) twice and in (1)(c), after "owners of record" inserted "and any purchasers under contracts for deed".

*1981 Amendment:* Deleted "federal" after "has received" in the last sentence of (3).

## 82-4-223. Surety bond.

**Compiler's Comments**

*2021 Amendment:* Chapter 324 in (1) at end of first sentence substituted "department" for "board". Amendment effective July 1, 2021.

*2005 Amendment:* Chapter 127 deleted former (1) that read: "(1) An application fee of $100 shall be paid before the permit required in this part shall be issued"; in (1) near beginning of first sentence after "department in" substituted "an amount" for "the penal sum"; and made minor changes in style. Amendment effective March 30, 2005.

*Saving Clause:* Section 11, Ch. 127, L. 2005, was a saving clause.

*1995 Amendment:* Chapter 418 in two places in (2) and in (3) substituted "department" for "board"; and in (2), in first sentence after "determined by the", substituted "department" for "board, on the recommendation of the commissioner". Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1987 Amendment:* In (1) increased fee from $50 to $100.

## 82-4-225. Application for permit amendment.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 4, Ch. 524, L. 2023. Amendment effective October 1, 2023, and terminates on occurrence of contingency.

*2005 Amendment:* Chapter 127 in third sentence near middle after "part and" deleted "shall pay an application fee of $50 and"; and made minor changes in style. Amendment effective March 30, 2005.

*Saving Clause:* Section 11, Ch. 127, L. 2005, was a saving clause.

## 82-4-226. Prospecting permit.

**Compiler's Comments**

*2021 Amendment:* Chapter 324 in (7)(a) in middle of third sentence and in (8)(a)(vi) at end substituted references to department for references to board. Amendment effective July 1, 2021.

*2013 Amendment:* Chapter 98 in (2) at beginning deleted "Except for an application filed pursuant to subsection (8)", after "permit" inserted "filed pursuant to subsection (1)", and after "department" deleted "in duplicate"; in (7)(a) deleted former second sentence that read: "In addition, coal prospecting that is conducted to determine the location, quality, or quantity of a mineral deposit outside an area designated unsuitable, that does not remove more than 250 tons of coal, and that does not substantially disturb the natural land surface is not subject to subsections (1) through (6)" and after "However" deleted "except for a prospecting operation for which a permit is required by subsection (7)(b)"; in (7)(b)(i) after "permit" inserted "that does not substantially disturb the land surface" and after "coal" inserted "is not subject to subsections (1) and (2) but"; inserted (7)(b)(ii) pertaining to activities not constituting substantial disturbance; and made minor changes in style. Amendment effective October 1, 2013.

*2011 Amendment:* Chapter 407 in (1) near beginning substituted "subsection (7)" for "subsection (8)"; in (2) at beginning inserted exception clause; in (7)(a) in second sentence before "prospecting" inserted "coal" and in third sentence near beginning inserted exception clause; inserted (7)(b) pertaining to prospecting outside area designated unsuitable; inserted (8) establishing requirements and procedures for applications for certain coal prospecting permits; and made minor changes in style. Amendment effective May 13, 2011.

*Applicability:* Section 3, Ch. 407, L. 2011, provided: "[This act] applies to applications for prospecting permits pursuant to 82-4-226 submitted to the department of environmental quality on or after [the effective date of this act]." Effective May 13, 2011.

*2005 Amendment:* Chapter 127 deleted former (3) that read: "(3) The application must be accompanied by a fee of $100. This fee must be used as a credit toward the strip-mining or underground-mining permit fee provided by this part if the area covered by the prospecting permit becomes covered by a valid surface-mining or underground-mining permit obtained before or at the time the prospecting permit expires"; and made minor changes in style. Amendment effective March 30, 2005.

*Saving Clause:* Section 11, Ch. 127, L. 2005, was a saving clause.

*1997 Amendment:* Chapter 196 in (8), in first sentence before "mineral", deleted "natural" and after "deposit" inserted "and that does not remove more than 250 tons of coal" and in second sentence, before "mineral", deleted "natural" and after "deposit" inserted "outside an area designated unsuitable, that does not remove more than 250 tons of coal"; and made minor changes in style. Amendment effective April 3, 1997.

*Severability:* Section 7, Ch. 196, L. 1997, was a severability clause.

*Retroactive Applicability:* Section 8, Ch. 196, L. 1997, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to underground coal mining operations that occurred after October 24, 1992."

*1995 Amendments:* Chapter 159 in (8) inserted second sentence concerning exemption for prospecting that does not disturb natural land surface; and made minor changes in style.

Chapter 418 in (8), in fourth sentence, substituted "board's" for "department's". Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1993 Amendment:* Chapter 225 in (1), at beginning, substituted "Except as provided in subsection (8)" for "On and after March 16, 1973"; inserted (8) relating to prospecting that is not conducted in an area designated unsuitable for coal mining and not conducted to determine the location, quality, or quantity of a natural mineral deposit; and made minor changes in style.

### 82-4-227. Refusal of permit — applicant violator system.

**Compiler's Comments**

*2013 Amendment:* Chapter 98 inserted (14) providing procedure to contest control listing on department's applicant violator system; and made minor changes in style. Amendment effective October 1, 2013.

*2005 Amendment:* Chapter 127 in (13)(a) near beginning after "preservation system" inserted "the national system of trails" and near end after "Rivers Act" inserted "or study rivers or study river corridors established in any guidelines issued under that act"; inserted (13)(b) prohibiting coal-mining operations on certain federal lands; and made minor changes in style. Amendment effective March 30, 2005.

*Saving Clause:* Section 11, Ch. 127, L. 2005, was a saving clause.

*1995 Amendment:* Chapter 418 in (3)(b)(i) substituted "department" for "regulatory authority"; in (4), in second sentence, substituted "director of the department" for "commissioner"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1993 Amendment:* Chapter 225 in (11), near beginning after "applicant", inserted "or by any person who owns or controls the applicant"; near end of (11) and near beginning of (12) substituted "amendment, other than an incidental boundary revision" for "major revision"; in (13), before "lands", deleted "private"; and made minor changes in style.

*Federal Statute:* Public Law 95-87 relating to surface mining control and reclamation is codified at 30 U.S.C. 1201, et seq.

### 82-4-229. Minor revisions — application — exemptions.

**Compiler's Comments**

*Effective Date:* This section is effective October 1, 2023.

**82-4-231. Submission of and action on reclamation plan.**

**Compiler's Comments**

*2021 Amendment:* Chapter 324 in (1) in middle of second sentence and in (10)(h) at end substituted "department" for "board". Amendment effective July 1, 2021.

*2005 Amendments — Composite Section:* Chapter 127 in (9) in third sentence after "must be" substituted "started" for "held", in fourth sentence after "hearing, the" substituted "board or its hearings officer" for "department", and in fifth sentence at beginning substituted "board" for "department"; and made minor changes in style. Amendment effective March 30, 2005.

Chapter 337 near beginning of (8)(d) and (8)(f) in exception clause inserted "75-1-205(4) and". Amendment effective April 21, 2005.

*Saving Clause:* Section 11, Ch. 127, L. 2005, was a saving clause.

*Applicability:* Section 22, Ch. 337, L. 2005, provided: "[This act] applies to environmental impact statements on which the agency responsible for preparation commenced preparation after December 31, 2004."

*2003 Amendment:* Chapter 204 in (10)(k) near beginning of introductory clause before "areas" substituted "adjacent" for "associated offsite" and at end after "reclamation" inserted "as necessary to support postmining land uses and to prevent material damage to the hydrologic balance in the adjacent area"; inserted (10)(k)(vii) concerning designing and constructing reclaimed channels of intermittent streams and perennial streams; in (10)(k)(viii) near beginning after "prescribe" inserted "to protect the hydrologic balance as necessary to support postmining land uses within the area affected and to prevent material damage to the hydrologic balance in adjacent areas"; and made minor changes in style. Amendment effective January 1, 2004.

*Severability:* Section 13, Ch. 204, L. 2003, was a severability clause.

*Saving Clause:* Section 14, Ch. 204, L. 2003, was a saving clause.

*Contingent Voidness:* Section 15, Ch. 204, L. 2003, provided: "(1) If any provision of [this act] is disapproved by the United States secretary of the interior pursuant to 30 CFR 732.17, then that portion of [this act] is void.

(2) Within 15 days of the effective date of the disapproval under subsection (1), the department of environmental quality shall notify the code commissioner, certifying that the disapproval under subsection (1) has occurred." In (10)(k) at end the phrase "as necessary to support postmining land uses and to prevent material damage to the hydrologic balance in the adjacent area" and in (10)(k)(viii) at end the phrase "to protect the hydrologic balance as necessary to support postmining land uses within the area affected and to prevent material damage to the hydrologic balance in adjacent areas" were disapproved February 16, 2005.

*2001 Amendments — Composite Section:* Chapter 82 in (8)(c) at end substituted "at least 15 days prior to the date of issuance of the written findings pursuant to subsection (8)(f)" for "within 365 days of the date of notice provided pursuant to subsection (5)"; in (8)(f) at end of first sentence after "acceptable" deleted "or from the publication of the final environmental impact statement, whichever occurs later"; and made minor changes in style. Amendment effective March 20, 2001.

Chapter 299 in (8)(d) at beginning of first sentence and at beginning of fourth sentence and in (8)(f) at beginning inserted exception clause; and made minor changes in style. Amendment effective October 1, 2001.

Style changes were slightly different in the chapters. In each case, the codifier chose appropriate text.

*Preamble:* The preamble attached to Ch. 82, L. 2001, provided: "WHEREAS, The Montana Strip and Underground Mine Reclamation Act now requires the Department of Environmental Quality to complete and publish a final environmental impact statement within 365 days of notifying the applicant that the application for a permit or a major permit amendment is administratively complete; and

WHEREAS, applications that are administratively complete may be revised significantly because of substantive deficiencies under The Montana Strip and Underground Mine Reclamation Act discovered by the Department in its subsequent acceptability review of the application; and

WHEREAS, the preparation of an environmental impact statement prior to the Department's acceptability review is inefficient; and

WHEREAS, completion of the environmental impact statement 15 days prior to the Department's written findings will allow efficient preparation of the environmental impact statement and will not delay the decision on the application."

*Applicability:* Section 16, Ch. 299, L. 2001, provided: "[This act] applies to environmental reviews that are begun after [the effective date of this act]." Effective October 1, 2001.

*1995 Amendment:* Chapter 418 in (9), at end of first sentence, deleted "by the board" and in third and fourth sentences substituted "department" for "board"; in (10)(f), in two places, substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1985 Amendment:* Renumbered former second sentence of (2) as (3); inserted (4) providing criteria for determining an application to be administratively complete; inserted (5) providing for notification of environmental impact statement, if required; inserted first sentence of (6) concerning publication and near end of (6), after "proposed operation", deleted "after adequate public notice" and inserted "within 30 days of receipt of the request. The department shall notify the applicant and all parties to the informal conference of its decision and the reasons therefor within 60 days of the informal conference"; in (7) substituted "The filing of written objections or a request for an informal conference shall not preclude the department from proceeding with its review of the application as specified in subsection (8)" for former text that read: "The department shall notify the applicant by certified or registered mail within 120 days after receipt of the complete application if it is or is not acceptable. The department may extend the 120 days an additional 120 days upon notification of the operator in writing. The department shall make written findings granting or denying the permit or revision application in whole or in part. If the application is not acceptable, the department shall set forth the reasons why it is not acceptable, and it may propose modifications, delete areas, or reject the entire application. A landowner, operator, or any person with an interest that is or may be adversely affected may by written notice request a hearing by the board. The hearing shall be held within 30 days of the request. No person who presided at the informal conference may either preside at the hearing or participate in the decision thereon. For purposes of the hearing, the board may order site inspections of the area pertinent to the application. The board shall notify the person by certified or registered mail and all other persons by regular mail within 20 days after the hearing of its decision. Every reclamation plan shall be subject to annual review and modification"; inserted (8) referring to Department's review and determination of acceptability of applications; and inserted (9) referring to request for hearing and hearing by the Board.

## 82-4-232. Area mining required — bond — alternative plan.

### Compiler's Comments

*2021 Amendments — Composite Section:* Chapter 324 in (1)(a)(iii), in (2) in first sentence, in (3) in introductory clause, and in (5) in first sentence substituted "department" for "board". Amendment effective July 1, 2021.

Chapter 337 in (6)(k) at beginning inserted "At the request of the permittee, and for a designated area within the permit boundary within or across affected drainage basins" and after "release the bond in whole or in part if" deleted "it is satisfied"; in (6)(k)(i) at end substituted "designated area within the permit boundary" for "applicable permit area"; in (6)(k)(ii) substituted current text concerning releasing a portion of a bond sufficient to cover the cost of replacing the soil for former text (see 2021 Session Law for former text); in (6)(k)(iii) substituted current text concerning the release of the bond's remaining total to establish vegetation for former text that read: "(iii) When the permittee has successfully completed all prospecting, mining, and reclamation activities, the department shall release the remaining portion of the bond, but not before the expiration of the period specified for responsibility and not until all reclamation requirements of this part are fully met"; inserted (6)(k)(iv) concerning the department's retention of a portion of the bond sufficient for a third party to fully satisfy remaining permit conditions; inserted (6)(k)(v) concerning the department's release of all final bonds; and made minor changes in style. Amendment effective April 30, 2021.

*Contingent Voidness:* Section 2, Ch. 425, L. 2007, provided: "(1) If the provisions of [this act] are disapproved by the United States secretary of the interior pursuant to 30 CFR 732.17, then [this act] is void.

(2) Within 15 days of the effective date of a disapproval pursuant to subsection (1), the department of environmental quality shall notify the code commissioner certifying that the disapproval has occurred." The Secretary of the Interior approved the changes made by Ch. 425, L. 2007, as documented in the January 9, 2009, Federal Register at page 217. Therefore, the contingency that would have occurred if the changes had been "disapproved" will never occur; thus, changes made by Ch. 425, L. 2007, are not void and are reflected in the text of this section.

*2007 Amendment:* Chapter 425 in (6)(k) substituted "shall" for "may"; substituted (6)(l)(i) requiring the department to provide to the permittee detailed written findings demonstrating that the reclamation covered by the bond was not accomplished as required and recommending corrective action for "notify the permittee, in writing, stating the reasons for disapproval"; and made minor changes in style. Amendment effective October 1, 2007.

*2005 Amendment:* Chapter 127 in (6)(a) in first sentence after "file" substituted "an application" for "a request" and at end after "bond" deleted "or deposit", deleted former second sentence that read: "Within 30 days after any application for bond or deposit release has been filed with the department, the permittee shall submit a copy of an advertisement notice placed at least once a week for 4 successive weeks in a newspaper of general circulation in the locality of the prospecting or mining operation", and at beginning of second sentence after "The" deleted "notice is considered part of any bond release", after "contain a" substituted "proposed public notice" for "notification", and near middle after "acres" inserted "for which bond release is sought"; inserted (6)(b) through (6)(g) regarding application requirements, completeness, and administration; in (6)(h) at beginning of first sentence deleted "Upon receipt of the request and copies of the notification made under subsection (6)(a)" and after "30 days" inserted "of determining that the application is administratively complete or as soon as weather permits" and deleted former third sentence that read: "The department shall notify the permittee in writing of its decision to release or not to release all or part of the performance bond within 60 days of the filing of the request if a public hearing is not held pursuant to subsection (6)(f) or, if a public hearing is held pursuant to that subsection, within 30 days after the hearing"; inserted (6)(i) and (6)(j) concerning department procedure regarding a completed application; in (6)(k) in three places after "bond" deleted "or deposit"; in (6)(k)(ii) in third sentence after "bond" deleted "or deposit"; in (6)(m) near middle after "municipality" inserted "or county"; deleted former (6)(f) through (6)(h) that read: "(f) Any person with a valid legal interest that might be adversely affected by release of the bond or the responsible officer or head of any federal, state, or local governmental agency that has jurisdiction by law or special expertise with respect to any environmental, social, or economic impact involved in the operation or is authorized to develop and enforce environmental standards with respect to the operations has the right to file written objections to the proposed release from bond to the department within 30 days after the last publication of the notice provided for in subsection (6)(a). If written objections are filed and a hearing is requested, the department shall inform all the interested parties of the time and place of the hearing and, within 30 days of the request for the hearing, hold a public hearing in the locality of the operation proposed for bond release. The date, time, and location of the public hearing must be advertised by the department in a newspaper of general circulation in the locality for 2 consecutive weeks, and the hearing must be held in the locality of the operation proposed for bond release or at the state capital, at the option of the objector, within 30 days of the request for the hearing.

(g) Without prejudice to the rights of the objectors or the permittee or the responsibilities of the department pursuant to this section, the department may establish an informal conference to resolve written objections.

(h) For the purpose of the hearing under subsection (6)(f), the department may administer oaths; subpoena witnesses or written or printed materials; compel the attendance of witnesses or the production of materials; and take evidence, including but not limited to site inspections of the land affected and other operations carried on by the permittee in the general vicinity. A verbatim record of each public hearing required by this section must be made, and a transcript must be made available on the motion of any party or by order of the department"; in (8)(a)(i), (8)(a)(ii), and (8)(a)(iii) substituted "alternative" for "alternate"; and made minor changes in style. Amendment effective March 30, 2005.

*Saving Clause:* Section 11, Ch. 127, L. 2005, was a saving clause.

*2003 Amendment:* Chapter 204 in (1)(a) deleted former second, third, and fourth sentences that read: "All highwalls must be reduced and the steepest slope of the reduced highwall may be no greater than 20 degrees from the horizontal. Highwall reduction must be commenced at or beyond the top of the highwall and sloped to the graded spoil bank. Reduction, backfilling, and grading must eliminate all highwalls and spoil peaks" and in second sentence after "must be" substituted "backfilled and graded" for "restored"; inserted (1)(a)(i) through (1)(a)(iv) concerning reclaimed topography; inserted (1)(b) providing that spoil from the first cut is not required to be transported to the last cut if highwalls are eliminated, box cut spoils are graded to blend in with the surrounding terrain, and the approximate original contour of the land is achieved; in (1)(c) deleted former second sentence that read: "Additional restoration work may be required by the department according to rules adopted by the board"; inserted (7) providing that all disturbed areas must be reclaimed in a timely manner to conditions that are capable of supporting the land uses that they were capable of supporting prior to any mining or to higher or better uses; in (8)(a) near beginning after "may propose" substituted "a higher or better use as an alternative postmining land use. If the landowner is not the operator, the operator shall submit written documentation of the concurrence of the landowner or the land management agency with jurisdiction over the land. The department may approve the proposed alternative postmining land use only if it meets all of the following criteria:

(i) There is a reasonable likelihood for achievement of the alternate land use.

(ii) The alternate land use does not present any actual or probable hazard to the public health or safety or any threat of water diminution or pollution.

(iii) The alternate land use will not:

(A) be impractical or unreasonable;

(B) be inconsistent with applicable land use policies or plans;

(C) involve unreasonable delay in implementation; or

(D) cause or contribute to violation of federal, state, or local law" for "alternative plans other than backfilling, grading, highwall reduction, topsoiling, or seeding to a permanent diverse vegetative cover if the restoration will be consistent with the purpose of this part. These plans must be submitted to the department, and after consultation with the landowner, if the plans are approved by the department and complied with within the time limits determined by the department as being reasonable for carrying out the plans, the backfilling, grading, highwall reduction, topsoiling, or revegetation requirements of this part may be modified by the department. An operator who proposes alternative plans that will affect an existing permit shall comply with the notice requirement of 82-4-222(1)(l)"; deleted former (8) that read: "(8) If alternate revegetation is proposed, a management plan must be submitted showing how the area will be used and any data necessary to show that the alternate postmining land use can be achieved. Any plan must require the operation at a minimum to:

(a) restore the land affected to a condition capable of supporting the use that it was capable of supporting prior to any mining operation or to a higher or better use of which there is a reasonable likelihood, if the use or uses do not present any actual or probable threat of water diminution or pollution, and if the permit applicant's proposed land use following reclamation is not determined to be impractical, unreasonable, or inconsistent with applicable land use policies and plans, would not involve unreasonable delay in implementation, and would not violate federal, state, or local law; and

(b) prevent soil erosion to the extent achieved prior to mining"; inserted (8)(b) defining landowner; inserted (9) requiring the reclamation plan to incorporate appropriate wildlife habitat enhancement features; inserted (10) providing that facilities existing prior to mining, including but not limited to public roads, utility lines, railroads, or pipelines, may be replaced as part of the reclamation plan; and made minor changes in style. Amendment effective January 1, 2004.

*Severability:* Section 13, Ch. 204, L. 2003, was a severability clause.

*Saving Clause:* Section 14, Ch. 204, L. 2003, was a saving clause.

*Contingent Voidness:* Section 15, Ch. 204, L. 2003, provided: "(1) If any provision of [this act] is disapproved by the United States secretary of the interior pursuant to 30 CFR 732.17, then that portion of [this act] is void.

(2) Within 15 days of the effective date of the disapproval under subsection (1), the department of environmental quality shall notify the code commissioner, certifying that the disapproval under subsection (1) has occurred." Pursuant to action by the secretary of the interior on February 16, 2005, none of the provisions of this section were disapproved.

*1997 Amendment:* Chapter 42 in (7), at end, substituted "82-4-222(1)(l)" for "82-4-222(1)(k)"; and made minor changes in style. Amendment effective March 12, 1997.

*1995 Amendment:* Chapter 418 in (7), in three places, substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1987 Amendment:* At end of (6)(c)(ii)(A) changed "82-4-231(3)(k)" to "82-4-231(10)(k)".

*1985 Amendment:* In (6) substituted language establishing procedures for release of performance bond or deposit for former text that read: "When the backfilling, grading, subsidence stabilization, water controls, and topsoiling have been completed and approved by the department, the commissioner, after public notice and opportunity for hearing, may release so much of the bond which was filed for that portion of the operation as the commissioner may determine, provided that no less than $200 per acre shall be retained by the department until such time as the planting and revegetation is done according to law and approved by the department, at which time the commissioner shall release the bond in the remaining amount. No part of the bond or deposit may be released under this subsection so long as the lands to which the release would be applicable are contributing suspended solids to streamflow or runoff outside the permit area in excess of the requirements set by this part or until soil productivity for prime farmlands mined for coal has returned to equivalent levels of yield as nonmined land of the same soil type in the surrounding area under equivalent management practices as determined from the soil survey performed pursuant to this part. Where a silt dam is to be retained as a permanent impoundment, the portion of bond pertaining thereto may be released under this subsection so long as provisions for sound future maintenance by the operator or the landowner have been made with the department. Any person with a valid legal interest that might be adversely affected by release of the bond or the responsible head of any federal, state, or local governmental agency that has jurisdiction by law or special expertise with respect to any environmental, social, or economic impact involved in the operation or is authorized to develop and enforce environmental standards with respect to such operations shall have the right to file written objections to the proposed release with the department within 30 days of public notice. The hearing shall be held at the state capital or, if an objector so requests, in the locality of the proposed bond release. For purposes of the hearing, the board may order site inspections of the area for which bond release is sought and other strip- or underground-mining operations carried on by the applicant in the area. Without prejudice to the rights of the objectors or the applicant or to the responsibilities of the department, the department may establish an informal conference to resolve written objections."

*Source:* Chapter 288, L. 1985, is based on the bond release provisions of the Surface Mining Control and Reclamation Act of 1977, the applicable provisions of which are found at 30 U.S.C. § 1269(c).

## 82-4-233. Planting of vegetation following grading of disturbed area.

### Compiler's Comments

*2005 Amendment:* Chapter 127 deleted former (5) that read: "(5) For land that was mined, disturbed, or redisturbed after May 2, 1978, and that was seeded prior to January 1, 1984, using a seed mix that was approved by the department and on which the reclaimed vegetation otherwise meets the requirements of subsections (1) and (2) and applicable state and federal seed and vegetation laws and rules, introduced species are considered desirable and necessary to achieve the postmining land use and may compose a major or dominant component of the reclaimed vegetation." Amendment effective March 30, 2005.

*Saving Clause:* Section 11, Ch. 127, L. 2005, was a saving clause.

*2003 Amendment:* Chapter 204 substituted (1) requiring an operator to establish an approved vegetative cover for former (1) that read: "(1) Except as provided in subsection (4), after the operation has been backfilled, graded, topsoiled, and approved by the department, the operator shall prepare the soil and plant the legumes, grasses, shrubs, and trees that are necessary to establish on the regraded areas and all other lands affected a diverse, effective, and permanent vegetative cover of the same seasonal variety native to the area of land to be affected and capable of self-regeneration and plant succession at least equal in extent of cover to the natural vegetation of the area except that introduced species may be used in the revegetation process where desirable and necessary to achieve the approved postmining land use plan. The vegetative cover must be capable of:

(a) feeding and withstanding grazing pressure from a quantity and mixture of wildlife and livestock at least comparable to that which the land could have sustained prior to the operation;

(b) regenerating under the natural conditions prevailing at the site, including occasional drought, heavy snowfalls, and strong winds; and

(c) preventing soil erosion to the extent achieved prior to the operation"; substituted (2) concerning reestablished plant species for former (2) that read: "(2) The seed or plant mixtures, quantities, method of planting, type and amount of lime or fertilizer, mulching, irrigation, fencing, and any other measures necessary to provide a suitable permanent diverse vegetative cover must be defined by rules of the board"; inserted (3) concerning reestablished vegetation; in (5) near beginning after "department" deleted "pursuant to subsection (2)" and after "requirements of" substituted "subsections (1) and (2)" for "subsection (1)"; and made minor changes in style. Amendment effective January 1, 2004.

*Severability:* Section 13, Ch. 204, L. 2003, was a severability clause.

*Saving Clause:* Section 14, Ch. 204, L. 2003, was a saving clause.

*Contingent Voidness:* Section 15, Ch. 204, L. 2003, provided: "(1) If any provision of [this act] is disapproved by the United States secretary of the interior pursuant to 30 CFR 732.17, then that portion of [this act] is void.

(2) Within 15 days of the effective date of the disapproval under subsection (1), the department of environmental quality shall notify the code commissioner, certifying that the disapproval under subsection (1) has occurred." Pursuant to action by the secretary of the interior on February 16, 2005, none of the provisions of this section were disapproved.

*1997 Amendment:* Chapter 196 in (1), at beginning, inserted exception clause; inserted (4) considering introduced species as desirable and necessary to achieve postmining land use; and made minor changes in style. Amendment effective on occurrence of contingency.

*Severability:* Section 7, Ch. 196, L. 1997, was a severability clause.

*Retroactive Applicability:* Section 8, Ch. 196, L. 1997, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to underground coal mining operations that occurred after October 24, 1992."

*Contingent Effective Date:* Section 9(2), Ch. 196, L. 1997, provided: "[Section 4] [amending 82-4-233] is effective on the date that it is approved by the secretary of the United States department of the interior pursuant to 30 U.S.C. 1253." A final rule approving the amendment was made by the secretary of the interior and is found at Volume 66 of the Federal Register, pages 31530 through 31533.

## 82-4-234. Commencement of reclamation.

### Compiler's Comments

*2021 Amendment:* Chapter 324 in last sentence in middle after "rules of the" substituted "department" for "board". Amendment effective July 1, 2021.

*2003 Amendment:* Chapter 204 deleted former third sentence that read: "A permittee may not, without department approval, disturb any area that has been seeded pursuant to 82-4-233"; and made minor changes in style. Amendment effective January 1, 2004.

*Severability:* Section 13, Ch. 204, L. 2003, was a severability clause.

*Saving Clause:* Section 14, Ch. 204, L. 2003, was a saving clause.

*Contingent Voidness:* Section 15, Ch. 204, L. 2003, provided: "(1) If any provision of [this act] is disapproved by the United States secretary of the interior pursuant to 30 CFR 732.17, then that portion of [this act] is void.

(2) Within 15 days of the effective date of the disapproval under subsection (1), the department of environmental quality shall notify the code commissioner, certifying that the disapproval under subsection (1) has occurred." Pursuant to action by the secretary of the interior on February 16, 2005, none of the provisions of this section were disapproved.

## 82-4-235. Determination of successful revegetation — final bond release.

### Compiler's Comments

*2021 Amendment:* Chapter 324 in (1)(a) at end substituted "department" for "board". Amendment effective July 1, 2021.

*2011 Amendment:* Chapter 84 in (3)(a) near end after "support facilities include" deleted "but are not limited to" and at end substituted "and access roads" for "access roads, segments of haul roads, and electrical substations". Amendment effective March 30, 2011.

*Contingent Voidness Repealed:* Section 2, Ch. 84, L. 2011, repealed sec. 2, Ch. 72, L. 2009, a contingent voidness provision.

*2009 Amendment:* Chapter 72 in temporary version in (2) at beginning of third sentence inserted exception clause; inserted (3) providing that limited vegetative cover of water management facilities and other support facilities in a strip mine operation is eligible for early bond release if the cover meets reclamation standards; in (4)(a) near beginning substituted "provisions of subsections (2) and (3)" for "provision in subsection (2)"; and made minor changes in style. Amendment effective October 1, 2009.

*2005 Amendment:* Chapter 127 in (3)(a) near middle after "1978" inserted "pursuant to a permit issued by the department under this part". Amendment effective March 30, 2005.

*Saving Clause:* Section 11, Ch. 127, L. 2005, was a saving clause.

*2003 Amendment:* Chapter 204 inserted (1) concerning determination of the success of revegetation; in (2) in first sentence after "evaluation" substituted "of reclaimed" for "for permanent diverse" and in second sentence after "satisfactory" deleted "permanent diverse"; in (3)(a)(ii)(D) after "standards of" substituted "82-4-232" for "82-4-232(8)"; and made minor changes in style. Amendment effective January 1, 2004.

*Severability:* Section 13, Ch. 204, L. 2003, was a severability clause.

*Saving Clause:* Section 14, Ch. 204, L. 2003, was a saving clause.

*Contingent Voidness:* Section 15, Ch. 204, L. 2003, provided: "(1) If any provision of [this act] is disapproved by the United States secretary of the interior pursuant to 30 CFR 732.17, then that portion of [this act] is void.

(2) Within 15 days of the effective date of the disapproval under subsection (1), the department of environmental quality shall notify the code commissioner, certifying that the disapproval under subsection (1) has occurred." Former subsection (1)(d) concerning diverse reestablished vegetation and the phrase "are introduced species that have become naturalized" in former (1)(g) were disapproved February 16, 2005.

*1997 Amendment:* (Version effective on occurrence of contingency) Chapter 196 in (1) deleted former third sentence that read: "For land that was seeded using a seed mix that included a substantial component of introduced species approved by the department pursuant to 82-4-233(2) and on which reclaimed vegetation otherwise meets the requirements of 82-4-233(1), approval of reclaimed vegetation for release of bond may not be withheld on the basis that introduced species compose a major or dominant component" and at beginning of third sentence deleted "Except as provided in subsection (2)(b)"; and made minor changes in style. Amendment effective April 3, 1997.

*Severability:* Section 7, Ch. 196, L. 1997, was a severability clause.

*Retroactive Applicability:* Section 8, Ch. 196, L. 1997, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to underground coal mining operations that occurred after October 24, 1992."

*1995 Amendment:* (Version effective on occurrence of contingency) Chapter 193 in first sentence of (1), after "possible", inserted "following an application for final bond release", inserted third sentence prohibiting withholding of approval of reclaimed vegetation bond on reclaimed land meeting requirements and using introduced species approved by Department, and at beginning of fourth sentence inserted exception clause and substituted "May 2" for "February 2"; inserted (2)(a) providing criteria for approval to release a bond on land upon which coal was removed prior to May 2, 1978; inserted (2)(b) authorizing interseeding or supplemental planting without liability on land meeting criteria; and made minor changes in style.

*1995 Statement of Intent:* The statement of intent attached to Ch. 193, L. 1995, provided: "This bill is intended to provide criteria for approving as successful reclamation reclaimed vegetation seeded in the 1970s and early 1980s using seed mixes that included grass species approved by the department of state lands [functions now transferred to department of environmental quality]. At that time, availability of native grass seed was very limited and introduced species in combination with native species were routinely approved. Because introduced grass species can be aggressive competitors, many of these lands are now dominated by introduced species. Current standards require dominance by native species as a condition for release of bond, and hence, mine operators might be required to plow and reseed, restarting the 10-year bond liability period. Reclaimed vegetation dominated by introduced species has demonstrated its ability to withstand climatic extremes, support grazing of livestock, provide habitat for wildlife, and control erosion. The date of May 3, 1978, is the date on which reclamation performance standards of the federal Surface Mining Control and Reclamation Act of 1977 became effective on existing coal mining operations in Montana."

*Contingent Effective Date:* Section 2, Ch. 193, L. 1995, provided: "[This act] is effective on the date that it is approved by the secretary of the United States department of the interior pursuant to 30 U.S.C. 1253. If the secretary disapproves any portion of [this act], those provisions that are approved become effective on the date of approval." A final rule approving the amendment was made by the secretary of the interior and is found at Volume 66 of the Federal Register, pages 31530 through 31533.

## 82-4-236. Vegetation as property of landowner.

### Compiler's Comments

*2003 Amendment:* Chapter 204 at beginning after "All" substituted "vegetation" for "legumes, grasses, shrubs, and trees"; and made minor changes in style. Amendment effective January 1, 2004.

*Severability:* Section 13, Ch. 204, L. 2003, was a severability clause.

*Saving Clause:* Section 14, Ch. 204, L. 2003, was a saving clause.

*Contingent Voidness:* Section 15, Ch. 204, L. 2003, provided: "(1) If any provision of [this act] is disapproved by the United States secretary of the interior pursuant to 30 CFR 732.17, then that portion of [this act] is void.

(2) Within 15 days of the effective date of the disapproval under subsection (1), the department of environmental quality shall notify the code commissioner, certifying that the disapproval under subsection (1) has occurred." Pursuant to action by the secretary of the interior on February 16, 2005, none of the provisions of this section were disapproved.

### 82-4-237. Operator to file annual reports.

**Compiler's Comments**

*2013 Amendment:* Chapter 98 in (1) in first sentence after first "department" deleted "within 30 days of the anniversary date of each permit. In lieu of an annual report for each permit, the department may allow the operator to file an annual report for each operation"; in (1)(b) after "planted" deleted "the extent to which expectations and predictions made in the original application have been fulfilled and any deviation therefrom"; deleted former (1)(c) that read: "(c) a revised schedule or timetable of operations and reclamation and an estimate of the number of acres to be affected during the next 1-year period"; in (2) before "request" deleted "make further inquiry and"; and made minor changes in style. Amendment effective October 1, 2013.

*1983 Amendment:* In (1), inserted second sentence authorizing Department to allow annual report for each operation in lieu of annual report on each permit; in third sentence of (1), substituted "an annual" for "this"; and at end of (1)(a), inserted "or numbers".

*Statement of Intent:* The statement of intent attached to HB 214 (Ch. 68, L. 1983) provided: "This bill grants the department discretionary authority to allow mine operators under the Strip and Underground Mine Reclamation Act to file one report for each operation rather than a separate report for each permit. A statement of intent is necessary because the department will be required to amend its present rules concerning annual reports and provide a procedure for determining when the operator is required to file the report. It is the intent of the Legislature to facilitate department review of annual reports and ease the burden of filing reports on operators with more than one permit."

### 82-4-238. Successor operator.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 82-4-239. Reclamation.

**Compiler's Comments**

*2021 Amendment:* Chapter 324 in (1) near beginning of last sentence substituted "department" for "board". Amendment effective July 1, 2021.

*2009 Amendment:* Chapter 78 in (6) inserted second sentence requiring approval of a gift or purchase by the board of land commissioners. Amendment effective March 25, 2009.

*2003 Amendment:* Chapter 361 in (3) inserted last sentence relating to venue; and made minor changes in style. Amendment effective April 16, 2003.

*Preamble:* The preamble attached to Ch. 361, L. 2003, provided: "WHEREAS, Article II, section 3, of the Montana Constitution enumerates certain inalienable individual rights, including the right to a clean and healthful environment, the right of pursuing life's basic necessities, the right of enjoying and defending an individual's life and liberty, the right of acquiring, possessing, and protecting property, and the right of seeking individual safety, health, and happiness in all lawful ways; and

WHEREAS, the constitutionally enumerated rights are by their very nature bound to result in competing interests in specific fact situations; and

WHEREAS, Article IX, section 1, of the Montana Constitution provides that the state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations and directs the Legislature to provide for the administration and enforcement of this duty and also directs the Legislature to provide adequate remedies for the protection of the environmental life support system from degradation and to provide adequate remedies to prevent unreasonable depletion and degradation of natural resources; and

WHEREAS, the Legislature has reviewed the intent of the framers of the 1972 Montana Constitution as evidenced in the verbatim transcripts of the constitutional convention; and

WHEREAS, there is no indication that one enumerated inalienable right is intended to supersede other inalienable rights, including the right to use property in all lawful means; and

WHEREAS, the Legislature, mindful of its constitutional obligation to provide for the administration and enforcement of the constitution, has enacted a comprehensive set of laws to accomplish the goals of the constitution, including the Montana Clean Indoor Air Act of 1979, Title

50, chapter 40, part 1, MCA; the Montana Environmental Policy Act, Title 75, chapter 1, parts 1 through 3, MCA; the Clean Air Act of Montana, Title 75, chapter 2, parts 1 through 4, MCA; water quality laws, Title 75, chapter 5, MCA; The Natural Streambed and Land Preservation Act of 1975, Title 75, chapter 7, part 1, MCA; The Montana Solid Waste Management Act, Title 75, chapter 10, part 2, MCA; The Montana Hazardous Waste Act, Title 75, chapter 10, part 4, MCA; the Comprehensive Environmental Cleanup and Responsibility Act, Title 75, chapter 10, part 7, MCA; the Montana Megalandfill Siting Act, sections 75-10-901 through 75-10-945, MCA; the Montana Underground Storage Tank Installer and Inspector Licensing and Permitting Act, Title 75, chapter 11, part 2, MCA; the Montana Underground Storage Tank Act, Title 75, chapter 11, part 5, MCA; the Montana Major Facility Siting Act, Title 75, chapter 20, MCA; the Open-Space Land and Voluntary Conservation Easement Act, Title 76, chapter 6, MCA; the Environmental Control Easement Act, Title 76, chapter 7, MCA; The Strip and Underground Mine Siting Act, Title 82, chapter 4, part 1, MCA; The Montana Strip and Underground Mine Reclamation Act, Title 82, chapter 4, part 2, MCA; The Opencut Mining Act, Title 82, chapter 4, part 4, MCA; and The Nongame and Endangered Species Conservation Act, Title 87, chapter 5, part 1, MCA."

*Severability:* Section 39, Ch. 361, L. 2003, was a severability clause.

*Retroactive Applicability:* Section 41, Ch. 361, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to actions for judicial review or other causes of action challenging the issuance of a permit, petition for review, amendment, license, arbitration, action, certificate, or inspection that are pending but not yet decided on or after [the effective date of this act]." Effective April 16, 2003.

*1995 Amendment:* Chapter 418 in (1), in two places in (2), and in (6) substituted "department" for "board"; in (3), in second sentence, substituted "director of the department" for "commissioner"; near beginning of (4)(a) inserted "shall take the actions described in subsection (4)(b)"; at beginning of (4)(c) substituted "Action taken under subsection (4)(b)" for "This act"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1983 Amendment:* In second paragraph of (4)(c), after "if known" inserted "and any purchaser under contract for deed, if known"; and after "if" substituted "neither is" for "not".

## 82-4-240. Reclamation of lands after bond forfeited.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 substituted "department" for "board". Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1981 Amendment:* Deleted "and use moneys appropriated from the mining and reclamation fund for such purposes" from end of section.

## 82-4-241. Receipts paid into general fund — disposition of bond forfeiture money.

**Compiler's Comments**

*2001 Amendment:* Chapter 338 inserted (2) concerning use of bond forfeiture money; inserted (3) concerning deposit of certain funds in environmental rehabilitation and response account; and made minor changes in style. Amendment effective July 1, 2001.

*Severability:* Section 8, Ch. 338, L. 2001, was a severability clause.

*1981 Amendment:* Substituted "general fund" for language dealing with a special agency account, the mining and reclamation fund, and its administration and substituted "penalties" for "forfeit funds".

## 82-4-242. Funds received by department.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 substituted "department" for "board". Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

## 82-4-243. Subsidence.

**Compiler's Comments**

*Severability:* Section 7, Ch. 196, L. 1997, was a severability clause.

*Retroactive Applicability:* Section 8, Ch. 196, L. 1997, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to underground coal mining operations that occurred after October 24, 1992."

*Effective Date:* Section 9(1), Ch. 196, L. 1997, provided: "Except as provided in subsection (2) [providing a separate effective date for the 1997 amendment to 82-4-233], [this act] is effective on passage and approval." Approved April 3, 1997.

## 82-4-244. Coal and uranium mine permitting and reclamation program account.

**Compiler's Comments**

*Effective Date:* Section 4, Ch. 280, L. 2007, provided that this section is effective July 1, 2007.

*Applicability:* Section 5, Ch. 280, L. 2007, provided: "[This act] applies to severance tax collections from coal produced after June 30, 2007."

## 82-4-250. Operating permit revocation — permit transfer.

**Compiler's Comments**

*Deletion of Contingent Termination Provision:* Section 136, Ch. 114, L. 2003, amended sec. 5, Ch. 522, L. 2001, to delete the contingent termination provision for this section.

*Termination Provision Repealed:* Section 1, Ch. 275, L. 2003, repealed sec. 5, Ch. 522, L. 2001, which terminated this section October 1, 2005, or on occurrence of contingency.

*Effective Date:* Section 3, Ch. 522, L. 2001, provided that this section is effective on passage and approval. Approved May 1, 2001.

*Applicability:* Section 4, Ch. 522, L. 2001, provided: "[Section 1] [82-4-250] applies to mine operating permits that are in effect as of [the effective date of this act] [effective May 1, 2001] and applies retroactively, within the meaning of 1-2-109, to permits that were revoked no more than 5 years before [the effective date of this act]."

*Termination — Contingent Termination Date:* Section 5, Ch. 522, L. 2001, provided: "(1) Except as provided in subsection (2), [this act] [82-4-250] terminates October 1, 2005.

(2) If the office of surface mining of the United States department of the interior disapproves the changes to Montana's program that are provided in [this act] [82-4-250], then [this act] [82-4-250] terminates 60 days after the department of environmental quality receives notification of that disapproval. The department of environmental quality shall provide a copy of the document that disapproves the changes to Montana's program to the Montana code commissioner."

## 82-4-251. Noncompliance — suspension of permits.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 2, Ch. 472, L. 2023. Amendment effective May 8, 2023.

*Applicability:* Section 7, Ch. 472, L. 2023, provided: "[This act] applies to court actions filed on or after [the effective date of this act]." Effective May 8, 2023.

*Severability:* Section 5, Ch. 472, L. 2023, was a severability clause.

*2005 Amendment:* Chapter 127 in (3) inserted fourth through sixth sentences regarding a contested case hearing; in (5) in fifth sentence near middle after "unless" substituted "an informal" for "a", after "hearing" inserted "if requested by the person to whom the notice or order was issued", and at end after "course of" substituted "the" for "public" and inserted sixth sentence extending the period for holding a public hearing requested 21 days after service of the notice or order; in (6) near beginning of first sentence after "pursuant to" substituted "subsection (1) or (2)" for "this section", near middle after "order" inserted "issued pursuant to subsection (1) or (2)", and after "order may" substituted "request a hearing before the board on" for "apply to the department for review of", deleted former second and third sentences that read: "Upon receipt of the application, the department shall make an investigation. The investigation must provide an opportunity for public hearing at the request of the applicant or the person who has an interest who is or may be adversely affected to enable the applicant or the person to present information relating to the issuance and continuance of the notice or order or the modification, vacation, or termination of it", and in third sentence at beginning substituted "board" for "department"; and made minor changes in style. Amendment effective March 30, 2005.

*Saving Clause:* Section 11, Ch. 127, L. 2005, was a saving clause.

*1995 Amendment:* Chapter 418 throughout section substituted "director of the department" or "director" for "commissioner"; in (3), in fourth sentence, and in (4), in second sentence, substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1983 Amendment:* Deleted last sentence of (4), which read: "The department may not issue any additional permits to an operator who has repeatedly been in noncompliance or violation of this part."

*1981 Amendment:* Substituted "the operation" for "strip- or underground-coal-mining and reclamation operations" in two places in (1); substituted "the operation" for "strip or underground mining and reclamation" in (2); substituted "the operation" for "strip or underground mining and reclamation" in (3); deleted "strip or underground mining or reclamation" in first sentence of (5); substituted "A person" for "An operator" at the beginning of (6); substituted "cessation" for "abatement" in the first sentence of (6).

## 82-4-252. Mandamus.

### Compiler's Comments

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 3, Ch. 472, L. 2023. Amendment effective May 8, 2023.

*Applicability:* Section 7, Ch. 472, L. 2023, provided: "[This act] applies to court actions filed on or after [the effective date of this act]." Effective May 8, 2023.

*Severability:* Section 5, Ch. 472, L. 2023, was a severability clause.

*2003 Amendment:* Chapter 361 in (2) after "mandamus" deleted "in the district court of the first judicial district of this state, in and for the county of Lewis and Clark, or"; and made minor changes in style. Amendment effective April 16, 2003.

*Preamble:* The preamble attached to Ch. 361, L. 2003, provided: "WHEREAS, Article II, section 3, of the Montana Constitution enumerates certain inalienable individual rights, including the right to a clean and healthful environment, the right of pursuing life's basic necessities, the right of enjoying and defending an individual's life and liberty, the right of acquiring, possessing, and protecting property, and the right of seeking individual safety, health, and happiness in all lawful ways; and

WHEREAS, the constitutionally enumerated rights are by their very nature bound to result in competing interests in specific fact situations; and

WHEREAS, Article IX, section 1, of the Montana Constitution provides that the state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations and directs the Legislature to provide for the administration and enforcement of this duty and also directs the Legislature to provide adequate remedies for the protection of the environmental life support system from degradation and to provide adequate remedies to prevent unreasonable depletion and degradation of natural resources; and

WHEREAS, the Legislature has reviewed the intent of the framers of the 1972 Montana Constitution as evidenced in the verbatim transcripts of the constitutional convention; and

WHEREAS, there is no indication that one enumerated inalienable right is intended to supersede other inalienable rights, including the right to use property in all lawful means; and

WHEREAS, the Legislature, mindful of its constitutional obligation to provide for the administration and enforcement of the constitution, has enacted a comprehensive set of laws to accomplish the goals of the constitution, including the Montana Clean Indoor Air Act of 1979, Title 50, chapter 40, part 1, MCA; the Montana Environmental Policy Act, Title 75, chapter 1, parts 1 through 3, MCA; the Clean Air Act of Montana, Title 75, chapter 2, parts 1 through 4, MCA; water quality laws, Title 75, chapter 5, MCA; The Natural Streambed and Land Preservation Act of 1975, Title 75, chapter 7, part 1, MCA; The Montana Solid Waste Management Act, Title 75, chapter 10, part 2, MCA; The Montana Hazardous Waste Act, Title 75, chapter 10, part 4, MCA; the Comprehensive Environmental Cleanup and Responsibility Act, Title 75, chapter 10, part 7, MCA; the Montana Megalandfill Siting Act, sections 75-10-901 through 75-10-945, MCA; the Montana Underground Storage Tank Installer and Inspector Licensing and Permitting Act, Title 75, chapter 11, part 2, MCA; the Montana Underground Storage Tank Act, Title 75, chapter 11, part 5, MCA; the Montana Major Facility Siting Act, Title 75, chapter 20, MCA; the Open-Space Land and Voluntary Conservation Easement Act, Title 76, chapter 6, MCA; the Environmental Control Easement Act, Title 76, chapter 7, MCA; The Strip and Underground Mine Siting Act, Title 82, chapter 4, part 1, MCA; The Montana Strip and Underground Mine Reclamation Act, Title 82, chapter 4, part 2, MCA; The Opencut Mining Act, Title 82, chapter 4, part 4, MCA; and The Nongame and Endangered Species Conservation Act, Title 87, chapter 5, part 1, MCA."

*Severability:* Section 39, Ch. 361, L. 2003, was a severability clause.

*Retroactive Applicability:* Section 41, Ch. 361, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to actions for judicial review or other causes of action challenging the issuance of a permit, petition for review, amendment, license, arbitration, action, certificate, or inspection that are pending but not yet decided on or after [the effective date of this act]." Effective April 16, 2003.

*1981 Amendment:* Substituted "or" for "in" before "any rule" in (3)(b).

## **82-4-253. Suit for damage to water supply.**

### **Compiler's Comments**

*2013 Amendment:* Chapter 98 in (3)(d) at end substituted "strip-mining or underground-coal-mining operation" for "surface coal mining operation". Amendment effective October 1, 2013.

*1997 Amendment:* Chapter 42 in (2), in first sentence, substituted "section" for "subsection"; and made minor changes in style. Amendment effective March 12, 1997.

## **82-4-254. Violation — penalty — waiver.**

### **Compiler's Comments**

*2021 Amendments — Composite Section:* Chapter 324 in (1)(a) in middle of last sentence after "rule" deleted "of the board"; and in (2) near beginning of last sentence substituted "department" for "board". Amendment effective July 1, 2021.

Chapter 535 in (3)(c) near middle after "filed in the district court" deleted "of the first judicial district, Lewis and Clark County, if mutually agreed on by the parties in the action, or in the district court" and at end inserted "or in the first judicial district if no other district court has jurisdiction". Amendment effective October 1, 2021.

*Repeal of Contingencies:* Section 1, Ch. 79, L. 2009, repealed section 6, Ch. 486, L. 2005, and section 30, Ch. 487, L. 2005, which established certain contingencies related to this section regarding violations, penalties, and waivers under the coal and uranium mine and reclamation laws. Effective October 1, 2009.

*Contingent Voidness:* Section 6, Ch. 486, L. 2005, provided: "(1) If any portion of [section 1] [amending 82-4-254] is disapproved by the United States secretary of the interior pursuant to 30 CFR 732.17, then [section 1] [amending 82-4-254] is void.

(2) Within 15 days of the effective date of the disapproval under subsection (1), the department of environmental quality shall notify the code commissioner, certifying that the disapproval under subsection (1) has occurred."

*Contingent Voidness:* Section 30, Ch. 487, L. 2005, was a contingent voidness provision that provided: "If any portion of [section 3] [82-4-1001] is disapproved by the United States secretary of the interior pursuant to 30 CFR 732.17, then [section 25] [amending 82-4-254] and the reference in [section 3(4)] [82-4-1001(4)] to 82-4-254 are void."

*2005 Amendments — Composite Section:* (Temporary version) Chapter 486 in (1)(a) in first sentence near beginning substituted "rules adopted or orders issued" for "rules or orders adopted" and near middle in two places substituted "administrative penalty" for "civil penalty"; in (2) in first sentence near beginning before "penalty" deleted "civil" and near middle substituted "a rule adopted or an order issued" for "a rule or order adopted" and inserted second sentence relating to waiving a penalty if the violation is not abated; in (3)(a) at beginning substituted "To assess an administrative penalty under this section, the department shall issue a notice of violation and penalty order to the person or operator, unless the penalty is waived pursuant to subsection (2). The notice and order must specify the provision of this part, rule adopted or order issued under this part, or term or condition of a permit that is violated and must contain findings of fact, conclusions of law, and a statement of the proposed administrative penalty. The notice and order must be served personally or by certified mail. Service by mail is complete 3 business days after the date of mailing. The notice and order become final unless, within 30 days after the order is served, the person or operator to whom the order was issued requests a hearing before the board" for "The department shall notify the person or operator of the violation", in sixth sentence at beginning substituted "By submitting to the board" for "By filing" and substituted "30 days of service" for "20 days of receipt", deleted former seventh sentence that read: "The department shall issue a statement of proposed penalty no more than 10 days after issuing the notice of violation", inserted seventh sentence relating to scheduling a hearing on request, in eighth sentence at end inserted "the amount of the penalty warranted" and in last sentence near middle after "hearing request" deleted "the department shall make the findings of fact and issue the written decision and order" and at end substituted "expiration of the period for requesting a hearing" for "order"; in (3)(b) near beginning of first sentence inserted "to whom a final order is issued under subsection (3)(a)", near middle substituted "assessment" for "order", and near middle after "submit with" inserted "any assessed" and in last sentence inserted reference to subsection (3)(a), after "fails to pay" substituted "any" for "the", and near end after "violation" substituted "and" for "or"; in (3)(c) in first sentence at end substituted "by the department" for "in the name of the state of Montana by the attorney general"; in (4) in first sentence at beginning substituted "The department may" for "The attorney general shall, upon request of the director of the department, sue for the recovery of the penalties provided for in this section and"; in (6) in first sentence near beginning after "order" substituted "issued" for "adopted"; inserted (10) relating to issuance of a written release of civil liability; and made minor changes in style. Amendment effective October 1, 2005.

(Temporary version) Chapter 487 in (1) substituted "purposely or knowingly" for "willfully"; inserted (1)(b) relating to penalty factors; in (3)(c) substituted "brought by the department" for "brought in the name of the state of Montana by the attorney general" and near end inserted "if mutually agreed on by the parties in the action"; in (4) at beginning substituted "The department may bring" for "The attorney general shall, upon request of the director of the department, sue for the recovery of the penalties provided for in this section and bring"; in (6) in first sentence near middle substituted "purposely or knowingly" for "willfully"; in (8) near beginning substituted "purposely or knowingly" for "willfully"; and made minor changes in style. Amendment effective January 1, 2006.

*Saving Clause:* Section 5, Ch. 486, L. 2005, was a saving clause.

Section 29, Ch. 487, L. 2005, was a saving clause.

*2001 Amendment:* Chapter 79 in (3) in second sentence after "violation" inserted "stating the reason for the request" and after "hearing" inserted "before the board under 82-4-206", in third sentence after "10 days after" inserted "issuing the", in fourth sentence after "hearing" substituted "the board" for "or after the time for requesting a hearing has expired, the department" and after "violation and" inserted "if the board finds that the violation has occurred", and inserted fifth sentence regarding department action if the time for requesting a hearing expires; in (4) near beginning after "director of" substituted "the department" for "environmental quality"; and made minor changes in style. Amendment effective March 20, 2001.

*Preamble:* The preamble attached to Ch. 79, L. 2001, provided: "WHEREAS, certain environmental statutes administered by the Montana Department of Environmental Quality provide that a person aggrieved by a decision of the Department may appeal that decision to the Director of the Department; and

WHEREAS, the possibility of an appeal prevents the Director from becoming involved in certain Department decisions that are subject to appeal to the Director; and

WHEREAS, section 82-4-427, MCA, states that a contested case hearing requested under The Opencut Mining Act must be held within 30 days after the hearing is requested; and

WHEREAS, it is difficult for the Department to conduct a contested case hearing under that Act within 30 days after the hearing is requested; and

WHEREAS, certain revisions to statutes administered by the Department are necessary for clarity and consistency and to conform the statutes to current drafting style."

*Saving Clause:* Section 18, Ch. 79, L. 2001, was a saving clause.

*1997 Amendment:* Chapter 42 in (4), in introductory clause, substituted "director of environmental quality" for "commissioner"; and made minor changes in style. Amendment effective March 12, 1997.

*1995 Amendment:* Chapter 418 in (1), in second sentence after "board", deleted "or department" and after "order of the" substituted "department" for "commissioner"; in (2), in second sentence after "board", deleted "of land commissioners"; in (3), in fourth sentence after "expired, the", substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1985 Amendments:* Chapter 24 in (2) near end of first sentence, before "the administration", changed "or impairs" to "and does not impair".

Chapter 217 in (1) near middle of subsection, after "$750 for each day", inserted "up to 30 days" and inserted last sentence referring to actions Department may take in cases of continued failure to abate.

*Source:* Chapter 217, L. 1985, is based on language contained in 30 C.F.R. 845.15(b)(2), a rule adopted by the Office of Surface Mining in 1982. The language of subsection (1) imposing a $750 penalty per day is based on the penalty provisions of the Surface Mining Control and Reclamation Act of 1977, found at 30 U.S.C. 1268(h).

*1983 Amendment:* At beginning of (1), inserted exception clause; and inserted (2) referring to waiver of penalty.

*Statement of Intent:* The statement of intent attached to HB 615 (Ch. 499, L. 1983) provided: "A statement of intent is required for this bill because it grants rulemaking authority to the Board of Land Commissioners [functions now transferred to Board of Environmental Review] for the issuance of waivers of civil penalties for minor violations of the Strip and Underground Mine Reclamation Act.

Section 1 of the bill allows the Board to adopt rules concerning the issuance of waivers for civil penalties if the underlying violation does not pose potential harm to public health, public safety, or the environment or impair administration of the Act. It is the legislature's intent that the Board's rules prescribe specific criteria that will be used by the Department of State Lands [functions now transferred to Department of Environmental Quality] in determining whether or not a violation poses potential harm to the public health, public safety, or the environment or threatens to impair the administration of the Strip and Underground Mine Reclamation Act. The rules must also establish a procedure for the issuance of waivers, which must include a requirement that the Department of State Lands [functions now transferred to Department of Environmental Quality] give notice of the violation and waiver to the permittee and place such notice in the permittee's file kept by the department."

*1981 Amendment:* Reworded the language of subsection (1) to clarify that "term or condition" refers to a permit.

### 82-4-255. Equal application of court costs.

**Compiler's Comments**

*Effective Date:* Section 6, Ch. 472, L. 2023, provided: "[This act] is effective on passage and approval." Approved May 8, 2023.

*Applicability:* Section 7, Ch. 472, L. 2023, provided: "[This act] applies to court actions filed on or after [the effective date of this act]." Effective May 8, 2023.

*Severability:* Section 5, Ch. 472, L. 2023, was a severability clause.

## Part 3
## Metal Mine Reclamation

**Part Compiler's Comments**

*Severability Clause:* Section 25, Ch. 252, L. 1971, read: "The provisions of this act are severable, and if any part or provision thereof shall be held void in decision of the court so holding shall not affect or impair any of the remaining parts of the provisions of this act that are severable from the invalid applications."

**Part Administrative Rules**

Title 17, chapter 24, subchapter 1, ARM Rules governing Montana hard-rock mining reclamation law.

**Part Case Notes**

*Environmental Group Precluded From Relitigating Similar Claims — Collateral Estoppel — Mine Reclamation:* In 2011, the plaintiff, an environmental group, sued the defendants, the Department of Environmental Quality and a mining company, relating to a proposed open pit mine. The group argued that the Department's plan to reclaim the pit violated Art. IX, sec. 2, Mont. Const., because it did not require the natural resources to be "fully reclaimed" to their previous condition. The District Court ruled in favor of the Department and the mining company in a final order, and there was no appeal. In 2014, the plaintiff sued the defendants again regarding a similar open pit and reclamation plan. The plaintiff made the same constitutional argument as in the 2011 action, in addition to alleging that the plan violated the Montana Metal Mine Reclamation Act (MMRA). The District Court concluded that the plaintiff was collaterally estopped from relitigating the issue. On appeal, the Supreme Court affirmed, concluding that although the plan involved a different pit and MMRA theory, the factual differences were of no legal significance. Mont. Envtl. Information Center. v. Dept. of Environmental Quality, 2016 MT 9, 382 Mont. 102, 365 P.3d 454.

*Motion for Written Undertaking Properly Denied Absent Active Industrial Operation or Activity:* Defendant mining company moved for a written undertaking pursuant to 27-19-306 based on its reclamation activities, even though the company was no longer engaged in mining. The motion was denied, and on appeal, the Supreme Court affirmed. The express purpose of an undertaking is to protect employees of the party enjoined from loss of wages, salaries, and benefits during the period that operations are enjoined. The injunction at issue in this case did not restrain the company from engaging in an industrial operation or activity, but rather required sequestration of proceeds from the sale of company assets. Therefore, 27-19-306 was inapplicable, and a written undertaking was not required. Shammel v. Canyon Resources Corp., 2003 MT 372, 319 M 132, 82 P3d 912 (2003).

*Mining Permit Not Required Prior to Condemnation:* Plaintiff contends that since 70-30-111 requires the use for condemned property to be "authorized by law" before condemnation is allowed, the obtaining of a valid mining permit is a condition precedent to condemnation. Section 70-30-102 declares mining to be a public use. It is unquestioned that the Anaconda Co. is engaged in mining operations. To find that a mining permit must be obtained prior to condemnation would be inconsistent with statutory authority and contrary to the public policy of providing expediency in eminent domain proceedings. Schara v. The Anaconda Co., 187 M 377, 610 P2d 132, 37 St. Rep. 790 (1980).

**Part Law Review Articles**

Re-claiming Butte: The Doctrine of Subjacent Support, McCarthy, 49 Mont. L. Rev. 267 (1988).

**Part Collateral References**

Metal Mine Bonding in Montana: Status and Policy Considerations, Staff Report to the Environmental Quality Council, Mont. Leg. Serv. Div. (2004), https://leg.mt.gov/content/committees/interim/2003_2004/environmental_quality_council/minutes/eqc09132004_ex18.pdf.

**82-4-301. Legislative intent and findings.**

**Compiler's Comments**

*2021 Amendment:* Chapter 152 inserted (4) concerning reasons for the legislative finding that mining of certain rock products not containing sulfides is subject to fewer permitting requirements than other minerals. Amendment effective October 1, 2021.

*2015 Amendment:* Chapter 399 inserted (2)(b) and (2)(c) regarding tailings storage facilities; in (3) in third sentence substituted "the specifications for reclamation and tailings storage facilities" for "reclamation specifications" and in last sentence after "land reclamation" inserted "and tailings storage"; and made minor changes in style. Amendment effective October 1, 2015.

*Applicability:* Section 16, Ch. 399, L. 2015, provided: "[This act] applies to:

(1) operators producing or milling ore under an existing operating permit on or after [the effective date of this act];

(2) applicants who submit an application for an operating permit after [the effective date of this act]; and

(3) a tailings storage facility constructed after [the effective date of this act]." Effective October 1, 2015.

*2003 Amendment:* Chapter 361 inserted (1) relating to constitutional obligations and legislative intent; and made minor changes in style. Amendment effective April 16, 2003.

*Preamble:* The preamble attached to Ch. 361, L. 2003, provided: "WHEREAS, Article II, section 3, of the Montana Constitution enumerates certain inalienable individual rights, including the right to a clean and healthful environment, the right of pursuing life's basic necessities, the right of enjoying and defending an individual's life and liberty, the right of acquiring, possessing, and protecting property, and the right of seeking individual safety, health, and happiness in all lawful ways; and

WHEREAS, the constitutionally enumerated rights are by their very nature bound to result in competing interests in specific fact situations; and

WHEREAS, Article IX, section 1, of the Montana Constitution provides that the state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations and directs the Legislature to provide for the administration and enforcement of this duty and also directs the Legislature to provide adequate remedies for the protection of the environmental life support system from degradation and to provide adequate remedies to prevent unreasonable depletion and degradation of natural resources; and

WHEREAS, the Legislature has reviewed the intent of the framers of the 1972 Montana Constitution as evidenced in the verbatim transcripts of the constitutional convention; and

WHEREAS, there is no indication that one enumerated inalienable right is intended to supersede other inalienable rights, including the right to use property in all lawful means; and

WHEREAS, the Legislature, mindful of its constitutional obligation to provide for the administration and enforcement of the constitution, has enacted a comprehensive set of laws to accomplish the goals of the constitution, including the Montana Clean Indoor Air Act of 1979, Title 50, chapter 40, part 1, MCA; the Montana Environmental Policy Act, Title 75, chapter 1, parts 1 through 3, MCA; the Clean Air Act of Montana, Title 75, chapter 2, parts 1 through 4, MCA; water quality laws, Title 75, chapter 5, MCA; The Natural Streambed and Land Preservation Act of 1975, Title 75, chapter 7, part 1, MCA; The Montana Solid Waste Management Act, Title 75, chapter 10, part 2, MCA; The Montana Hazardous Waste Act, Title 75, chapter 10, part 4, MCA; the Comprehensive Environmental Cleanup and Responsibility Act, Title 75, chapter 10, part 7, MCA; the Montana Megalandfill Siting Act, sections 75-10-901 through 75-10-945, MCA; the Montana Underground Storage Tank Installer and Inspector Licensing and Permitting Act, Title 75, chapter 11, part 2, MCA; the Montana Underground Storage Tank Act, Title 75, chapter 11, part 5, MCA; the Montana Major Facility Siting Act, Title 75, chapter 20, MCA; the Open-Space Land and Voluntary Conservation Easement Act, Title 76, chapter 6, MCA; the Environmental Control Easement Act, Title 76, chapter 7, MCA; The Strip and Underground Mine Siting Act, Title 82, chapter 4, part 1, MCA; The Montana Strip and Underground Mine Reclamation Act, Title 82, chapter 4, part 2, MCA; The Opencut Mining Act, Title 82, chapter 4, part 4, MCA; and The Nongame and Endangered Species Conservation Act, Title 87, chapter 5, part 1, MCA."

*Severability:* Section 39, Ch. 361, L. 2003, was a severability clause.

*Retroactive Applicability:* Section 41, Ch. 361, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to actions for judicial review or other causes of action challenging the issuance of a permit, petition for review, amendment, license, arbitration, action, certificate, or inspection that are pending but not yet decided on or after [the effective date of this act]." Effective April 16, 2003.

## 82-4-302. Purpose.

### Compiler's Comments

*2000 Amendment:* Chapter 7 substituted (1)(a) through (1)(h) enumerating purposes of part for former text that read: "(a) that the usefulness, productivity, and scenic values of all lands and surface waters involved in mining and mining exploration within the boundaries and lawful jurisdiction of the state will receive the greatest reasonable degree of protection and reclamation to beneficial use;

(b) authority for cooperation between private and governmental entities in carrying this part into effect;

(c) for the recognition of the recreational and aesthetic values of land as a benefit to the state of Montana; and

(d) priorities and values to the aesthetics of our landscape, waters, and ground cover"; and made minor changes in style. Amendment effective May 18, 2000.

*Applicability:* Section 4, Ch. 7, Sp. L. May 2000, provided: "(1) Except as provided in subsections (2) and (3), [this act] applies retroactively, within the meaning of 1-2-109, to permits and permit amendments approved by the department after September 30, 1995.

(2) Section 82-4-336(9)(b)(ii) and (9)(b)(iii) do not apply to any reclamation plan approved by the department for a mine at which mining operations have permanently ceased on [the effective date of this act] [effective May 18, 2000].

(3) Section 82-4-336(9)(c) does not alter or abrogate any backfilling requirement imposed or approved by the department prior to [the effective date of this act]." Effective May 18, 2000.

## 82-4-303. Definitions.

### Compiler's Comments

*2021 Amendment:* Chapter 152 in definition of rock products in (a) at end inserted "that do not contain sulfides with the potential to produce acid, toxic, or otherwise pollutive solutions" and inserted (b) providing exceptions; in definition of small miner in (a) near end substituted "under 82-4-343 or 82-4-335 except for a permit issued under 82-4-335(2) or an operating permit" for "under 82-4-335 except for a permit issued under 82-4-335(3) or a permit"; and made minor changes in style. Amendment effective October 1, 2021.

*2015 Amendment:* Chapter 399 inserted definitions of certification, constructor, engineer of record, expansion, independent review engineer, material deviation, maximum credible earthquake, observational method, operator, panel, practicable, professional engineer, qualified engineer, tailings, and tailings storage facility; and made minor changes in style. Amendment effective October 1, 2015.

*Applicability:* Section 16, Ch. 399, L. 2015, provided: "[This act] applies to:

(1) operators producing or milling ore under an existing operating permit on or after [the effective date of this act];

(2) applicants who submit an application for an operating permit after [the effective date of this act]; and

(3) a tailings storage facility constructed after [the effective date of this act]." Effective October 1, 2015.

*2011 Amendment:* Chapter 410 inserted definition of completeness; and made minor changes in style. Amendment effective October 1, 2011.

*Preamble:* The preamble attached to Ch. 410, L. 2011, provided: "WHEREAS, the metal mine reclamation laws provide substantive requirements for the permitting of metal mines in Montana; and

WHEREAS, the Montana Environmental Policy Act provides procedures for environmental assessment with respect to decisions of state agencies; and

WHEREAS, coordination of review of permit applications for compliance with substantive requirements of mine permitting statutes and environmental assessment of permit decisions would create efficiency, reduce burdens on state government, and require permit applicants to more fully bear the burden of providing complete permit applications that meet all requirements of the metal mine reclamation laws and other laws of the state related to mine permitting in a timely fashion; and

WHEREAS, completion of the requirements of the Montana Environmental Policy Act within the timeframes required can be facilitated by an initial determination of compliance with applicable permitting laws and regulations."

*2005 Amendment:* Chapter 63 inserted definition of rock products; in definition of small miner near end of (a) substituted "82-4-335(3)" for "82-4-335(2)"; and made minor changes in style. Amendment effective March 24, 2005.

*2003 Amendment:* Chapter 365 in definition of reclamation plan at end of (a) inserted "which may include use of the land as an industrial site not necessarily related to mining"; and made minor changes in style. Amendment effective April 16, 2003.

*Preamble:* The preamble attached to Ch. 365, L. 2003, provided: "WHEREAS, metal mine operators typically construct ancillary industrial facilities in conjunction with the operation of metal mines; and

WHEREAS, facilities may include office buildings, shop buildings, electrical transmission lines, electrical power substations, electronic communication lines and facilities, water lines, water treatment plants, septic systems, roads, parking lots, fencing, security stations, and environmental monitoring sites; and

WHEREAS, these facilities may have significant value when the operator discontinues the mining operations; and

WHEREAS, the continued availability of these facilities may provide economic development opportunities for the residents of the county where the facilities are located and to the people of Montana generally; and

WHEREAS, the metal mine reclamation laws do not include provisions that encourage or require the Department of Environmental Quality or the mine operator to consider the feasibility of a postmining use of these facilities for other industrial purposes instead of simply removing the facilities; and

WHEREAS, the Legislature believes that future beneficial use provisions could be provided for in the metal mine reclamation laws without significantly increasing the cost to the state or to the operator of obtaining and maintaining a mine operating permit.

THEREFORE, the Legislature finds that it is beneficial and appropriate to create these provisions."

*2001 Amendment:* Chapter 488 in definition of disturbed land in second sentence near middle after "roads, conveyor systems" inserted "load-out facilities". Amendment effective May 1, 2001.

*Saving Clause:* Section 12, Ch. 488, L. 2001, was a saving clause.

*Severability:* Section 13, Ch. 488, L. 2001, was a severability clause.

*Applicability:* Section 15, Ch. 488, L. 2001, provided: "Sections 82-4-303(6) and 82-4-338(8) apply to licenses and permits issued after [the effective date of this act] [effective May 1, 2001] and to permits issued before [the effective date of this act] [effective May 1, 2001] that are in effect on [1 year after the effective date of this act] [effective May 1, 2002]."

*1999 Amendment:* Chapter 507 in definition of mineral after "gravel" substituted "peat, soil materials" for "phosphate rock"; in definition of placer deposit in (a) after "in" substituted "gravel, glacial, eolian, colluvial, or alluvial deposits" for "gravel or alluvium" and inserted (b) expanding definition to include all forms of deposit except veins of quartz and other rock in place; in definition of small miner after "engages in" inserted "mining activity that is not exempt from this part pursuant to 82-4-310, that engages in" and after "business of" deleted "mining or"; in definition of surface mining in (b) after "gravel" substituted "peat, soil materials" for "phosphate rock"; and made minor changes in style. Amendment effective April 28, 1999.

*Saving Clause:* Section 20, Ch. 507, L. 1999, was a saving clause.

*Severability:* Section 21, Ch. 507, L. 1999, was a severability clause.

*Applicability:* Section 23(1), Ch. 507, L. 1999, provided: "[Section 1(8)] [82-4-303(8)] and [section 9(6)] [82-4-403(6)] apply to operations conducted after July 31, 1999, except that the department of environmental quality may accept small miner exclusions and issue licenses and permits to implement these provisions at any time after [the effective date of this act] [effective April 28, 1999]. [Section 1(8)] [82-4-303(8)] and [section 9(6)] [82-4-403(6)] apply to those operations upon filing of the exclusion or issuance of the license or permit."

*1997 Amendment:* Chapter 272 in definition of small miner, in (a) near middle after "waste materials", substituted "or, except as provided in 82-4-310, that knowingly allows other persons to engage in mining activities on land owned or controlled by the person, firm, or corporation" for "that does not remove from the earth during any calendar year material in excess of 36,500 tons in the aggregate", after "82-4-335(2)" inserted "or a permit that meets the criteria of subsection (15)(c)", deleted (a)(i)(C) that read: "(C) not operated simultaneously except during seasonal transitional periods, not to exceed 30 days", inserted (b)(ii) requiring exclusion of access roads in computing mining area, and inserted (c) limiting area disturbance to 100 acres; inserted definition of soil materials; and made minor changes in style. Amendment effective April 16, 1997.

*Applicability:* Section 4(1), Ch. 272, L. 1997, provided: "[Section 1(15)] [amending the definition of small miner in 82-4-303] applies to operations conducted after [the effective date of this act]." Effective April 16, 1997.

*1995 Amendment:* Chapter 418 in definition of Board substituted "board of environmental review provided for in 2-15-3502" for "board of land commissioners or a state employee or state agency as may succeed to its powers and duties under this part"; deleted definition of Commissioner that read: ""Commissioner" means the commissioner of state lands provided for in 2-15-3202"; in definition of Department substituted "department of environmental quality provided for in 2-15-3501" for "department of state lands"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1993 Amendment:* Chapter 472 inserted definition of amendment; and made minor changes in style. Amendment effective April 21, 1993.

*Saving Clause:* Section 8, Ch. 472, L. 1993, was a saving clause.

*Severability:* Section 9, Ch. 472, L. 1993, was a severability clause.

*1991 Amendments:* Chapter 283 inserted definition of Commissioner. Amendment effective July 1, 1991.

Chapter 637 inserted definition of Commissioner. Amendment effective July 1, 1991.

*1989 Amendments:* Chapter 93 near end of definition of exploration deleted reference to 82-4-305; and in definition of small miner, in (a)(i), substituted "an operation" for "operations". Amendment effective October 1, 1989.

Chapter 346 inserted definitions of placer deposit and placer or dredge mining; and made minor changes in phraseology. Amendment effective July 1, 1989.

Chapter 347 inserted definition of cyanide ore-processing reagent; in definition of small miner, near end of (a) after "82-4-335", inserted "except for a permit issued under 82-4-335(2)"; and made minor changes in phraseology. Amendment effective July 1, 1989.

*1989 Statement of Intent:* The statement of intent attached to Ch. 93, L. 1989, provided: "A statement of intent is required for this bill because it delegates rulemaking authority to the board of land commissioners [functions now transferred to board of environmental review]. Under the provisions of this bill, the board of land commissioners [functions now transferred to board of environmental review] shall adopt rules to implement and administer a procedure for waiver of a minor violation from the civil penalty provisions provided in [section 5] [82-4-361].

It is the intent of the legislature that the waiver be allowed only if a violation does not represent potential harm to the public health, public safety, or the environment and does not otherwise impair administration of the provisions of Title 84, chapter 4, part 3."

*1989 Statement of Intent:* The statement of intent attached to Ch. 347, L. 1989, provided: "A statement of intent is provided for this bill to elaborate on the type and extent of review that the department of state lands [functions now transferred to department of environmental quality] shall give to a small-miner application for an operating permit for a cyanide ore-processing facility. Moreover, the legislature anticipates that implementation of this bill will require rulemaking by the board of land commissioners [functions now transferred to board of environmental review].

While an operating permit is required for these operations, the legislature intends that, because of the size and limited scope of the operation, the application requirements in general may be substantially less rigorous than the requirements for larger proposed mine operations not under the small-miner exclusion. The department of state lands [functions now transferred to department of environmental quality] shall also attempt to review these applications in a shorter timeframe than currently needed to review operating permit applications for larger mines.

To encourage expedited review, the department of state lands [functions now transferred to department of environmental quality] shall provide clear guidance to permit applicants concerning requirements for a complete application. In particular, the guidance must help applicants prepare adequate operating and reclamation plans. While the legislature recognizes plan requirements may vary with the site and characteristics of the proposed operation, the department shall attempt to guide the applicant in a manner that minimizes applicant costs while also meeting metal mine reclamation requirements.

Finally, [section 4 of this act] [see compiler's comment to 82-4-335] exempts an existing cyanide ore-processing facility if the operator registers the facility by January 1, 1990. In order to provide ample notice to existing operators, the legislature intends that the department shall prepare the form and notify affected small miners of the form's availability and purpose as soon as possible by mail or publication, or both."

*Applicability Date:* Section 4, Ch. 346, L. 1989, provided: "[This act] applies to any placer or dredge mining operation for which a small-miner exemption has not been obtained before July 1, 1989."

*1985 Amendments:* Chapter 386 in definition of small miner acreage computation near end, after "mining", deleted "or exploration".

Chapter 453 in definition of disturbed land after "overburden", inserted "tailings, waste materials"; inserted definition of ore processing; in definition of person after "exploration for", deleted "or development" and after "earth", inserted "reprocessing of tailings or waste materials, or operation of a hard-rock mill"; in definition of small miner after "business of mining", inserted "or reprocessing of tailings or waste materials".

**Case Notes**

*Deficient Application for Permit — Effect:* Because the application for permit was deficient under the hard-rock mining law, the present mining operations on the 500 acres covered by Permit 41A cannot be continued until an adequate application is made and a valid permit pursuant to the hard-rock mining law is issued. Kadillak v. The Anaconda Co., 184 M 127, 602 P2d 147 (1979).

**82-4-304. Exemption — works performed prior to promulgation of rules.**

**Compiler's Comments**

*2021 Amendment:* Chapter 324 in middle of first sentence and near end of second sentence substituted "initial rules" for "board's rules" and near beginning of last sentence before "rules" inserted "initial". Amendment effective July 1, 2021.

*1995 Amendment:* Chapter 204 near end of third sentence, after "mill", inserted "that does not use cyanide ore-processing reagent and"; and made minor changes in style. Amendment effective March 23, 1995.

*1985 Amendment:* At end of first sentence, after "82-4-321", inserted "relating to exploration and mining"; inserted second sentence referring to reprocessing of tailings or waste rock; and inserted third sentence referring to mills not located at a mine site.

**82-4-305. Exemption — small miners — written agreement.**

**Compiler's Comments**

*2015 Amendment:* Chapter 399 in (7) and (8)(b) substituted "82-4-303(30)(a)(i) and (30)(a)(ii)" for "82-4-303(17)(a)(i) and (17)(a)(ii)". Amendment effective October 1, 2015.

*Applicability:* Section 16, Ch. 399, L. 2015, provided: "[This act] applies to:

(1) operators producing or milling ore under an existing operating permit on or after [the effective date of this act];

(2) applicants who submit an application for an operating permit after [the effective date of this act]; and

(3) a tailings storage facility constructed after [the effective date of this act]." Effective October 1, 2015.

*2011 Amendment:* Chapter 410 in (7) and (8)(b) substituted "82-4-303(17)(a)(i) and (17)(a)(ii)" for "82-4-303(16)(a)(i) and (16)(a)(ii)". Amendment effective October 1, 2011.

*Preamble:* The preamble attached to Ch. 410, L. 2011, provided: "WHEREAS, the metal mine reclamation laws provide substantive requirements for the permitting of metal mines in Montana; and

WHEREAS, the Montana Environmental Policy Act provides procedures for environmental assessment with respect to decisions of state agencies; and

WHEREAS, coordination of review of permit applications for compliance with substantive requirements of mine permitting statutes and environmental assessment of permit decisions would create efficiency, reduce burdens on state government, and require permit applicants to more fully bear the burden of providing complete permit applications that meet all requirements of the metal mine reclamation laws and other laws of the state related to mine permitting in a timely fashion; and

WHEREAS, completion of the requirements of the Montana Environmental Policy Act within the timeframes required can be facilitated by an initial determination of compliance with applicable permitting laws and regulations."

*2005 Amendments — Composite Section:* Chapter 63 in (7) at end of second sentence substituted "82-4-303(16)(a)(i) and (16)(a)(ii)" for "82-4-303(15)(a)(i) and (15)(a)(ii)". Amendment effective March 24, 2005.

Chapter 505 inserted (8) requiring certain small miners who intend to use an impoundment to store waste from ore processing to obtain approval for the design, construction, operation, and reclamation of the impoundment; and made minor changes in style. Amendment effective April 28, 2005.

*1999 Amendment:* Chapter 507 in (7) in first sentence in two places after "reagent" inserted "or other metal leaching solvents or reagents" and in second sentence after "by the" inserted "operation using" and after "cyanide" substituted "ore-processing reagents or other metal leaching solvents or reagents" for "ore-processing operation"; inserted (10) prohibiting use of mercury by small miner except in contained facility; and made minor changes in style. Amendment effective April 28, 1999.

*Saving Clause:* Section 20, Ch. 507, L. 1999, was a saving clause.

*Severability:* Section 21, Ch. 507, L. 1999, was a severability clause.

*Applicability:* Section 23(2), Ch. 507, L. 1999, provided: "[Section 2(7)] [82-4-305(7)] applies to operations for which a valid small miner exclusion had not been filed before May 1, 1999."

*1997 Amendment:* Chapter 272 in (1)(d), after "small miner", inserted "shall salvage and protect all soil materials for use in reclamation of that site and"; in (3), in first sentence after "state's", substituted "documented cost estimate" for "actual cost" and after "exceed" substituted "$10,000" for "$5,000"; in (7) inserted last sentence excluding disturbed acreage from the statutory 5-acre limit; and made minor changes in style. Amendment effective April 16, 1997.

*Applicability:* Section 4(2), Ch. 272, L. 1997, provided: "[Section 2(1)(d)] [amending 82-4-305(1)(d)] applies to lands initially disturbed after May 15, 1997." Section 4(3), Ch. 272, L. 1997, provided: "[Section 2(3)] [amending 82-4-305(3)] applies to operations for which a bond was not posted prior to May 15, 1997."

*1995 Amendment:* Chapter 329 in (2)(a) substituted "an individual" for "a natural person"; inserted (9)(c) relating to area subject to remediation of contamination or pollution by a public agency; and made minor changes in style. Amendment effective April 5, 1995.

*1993 Amendment:* Chapter 598 inserted (8)(b) through (8)(d) adding additional exceptions to the small miner exemption for persons who have not paid a penalty, posted a reclamation bond, or complied with an abatement order; and made minor changes in style.

*1991 Amendment:* In (1) extended subsection references; and inserted (9) providing that the exemption pertaining to small miner with annual written agreement does not apply to area under permit pursuant to 82-4-335 or to area permitted pursuant to 82-4-335 and reclaimed by permittee, Department, or other state or federal agency. Amendment effective July 1, 1991.

*1989 Amendments:* Chapter 93 inserted (8) disallowing the exemption of certain persons unless the provisions of 82-4-360 are met; and made minor changes in phraseology and form. Amendment effective October 1, 1989.

Chapter 346 at beginning of (1) inserted exception clause; inserted (1)(d) relating to reclamation of placer or dredge mining operations; inserted (3) requiring posting of a performance bond; inserted (4) establishing liability for failure to reclaim placer or dredge operations; inserted (5) regarding notification of Department reclamation; inserted (6) relating to collection of additional reclamation costs; and made minor changes in phraseology. Amendment effective July 1, 1989.

Chapter 347 at beginning of (1) inserted exception clause; inserted (7) requiring an operating permit for cyanide ore-processing reagent operations; and made minor changes in phraseology. Amendment effective July 1, 1989.

*1989 Statement of Intent:* The statement of intent attached to Ch. 93, L. 1989, provided: "A statement of intent is required for this bill because it delegates rulemaking authority to the board of land commissioners [functions now transferred to board of environmental review]. Under the provisions of this bill, the board of land commissioners [functions now transferred to board of environmental review] shall adopt rules to implement and administer a procedure for waiver of a minor violation from the civil penalty provisions provided in [section 5] [82-4-361].

It is the intent of the legislature that the waiver be allowed only if a violation does not represent potential harm to the public health, public safety, or the environment and does not otherwise impair administration of the provisions of Title 84, chapter 4, part 3."

*1989 Statement of Intent:* The statement of intent attached to Ch. 347, L. 1989, provided: "A statement of intent is provided for this bill to elaborate on the type and extent of review that the department of state lands [functions now transferred to department of environmental quality] shall give to a small-miner application for an operating permit for a cyanide ore-processing facility. Moreover, the legislature anticipates that implementation of this bill will require rulemaking by the board of land commissioners [functions now transferred to board of environmental review].

While an operating permit is required for these operations, the legislature intends that, because of the size and limited scope of the operation, the application requirements in general may be substantially less rigorous than the requirements for larger proposed mine operations not under the small-miner exclusion. The department of state lands [functions now transferred to department of environmental quality] shall also attempt to review these applications in a shorter timeframe than currently needed to review operating permit applications for larger mines.

To encourage expedited review, the department of state lands [functions now transferred to department of environmental quality] shall provide clear guidance to permit applicants concerning requirements for a complete application. In particular, the guidance must help applicants prepare adequate operating and reclamation plans. While the legislature recognizes plan requirements may vary with the site and characteristics of the proposed operation, the department shall attempt to guide the applicant in a manner that minimizes applicant costs while also meeting metal mine reclamation requirements.

Finally, [section 4 of this act] [see compiler's comment to 82-4-335] exempts an existing cyanide ore-processing facility if the operator registers the facility by January 1, 1990. In order to provide ample notice to existing operators, the legislature intends that the department shall prepare the form and notify affected small miners of the form's availability and purpose as soon as possible by mail or publication, or both."

*Applicability Date:* Section 4, Ch. 346, L. 1989, provided: "[This act] applies to any placer or dredge mining operation for which a small-miner exemption has not been obtained before July 1, 1989."

*1985 Amendment:* In (2) substituted language providing requirements to obtain or continue an exemption for small-miner exemptions obtained after September 30, 1985, for former text that read: "Failure to comply with the regulations stipulated in this section will constitute a misdemeanor, and this offense will subject the owners or operators of said project to a fine of not less than $10 or more than $100, payable to the department of revenue of the state of Montana or any board, commission, or person authorized to collect said fine."

## 82-4-306. Confidentiality of application information.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 in (1), in first sentence near beginning, substituted "the department from" for "the board or by the director or his staff by virtue of" and after "between the" substituted "department" for "board"; in (2) substituted "department" for "director, the board, appeals board"; in (3), after "obtained by", substituted "department" for "board, the commissioner, or department staff", after "small miners" substituted "and that is related to" for "for", and after "federal lands" substituted "when the information" for "that"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1991 Amendment:* At beginning of (1) inserted exception clause; at beginning of (2) deleted "It is further provided that", after "information" substituted "referenced in subsection (1)" for "obtained by the board or by the director or his staff by virtue of such applications", and near end, after "rules", inserted "adopted under this part"; inserted (3) authorizing Department to disclose information obtained from license applications and for exploration or mining on state and federal lands that identifies exploration and mining activities locations and describes surface disturbance but prohibiting disclosure of proprietary geological information; and made minor changes in style. Amendment effective July 1, 1991.

*1981 Amendment:* Substituted "an operating permit" for "a development or an operating permit" at the end of the first sentence.

**Attorney General's Opinions**

*Confidential Information Versus Right to Know:* Confidential information contained in an application to the Department for a hard-rock mining permit cannot be made public through an environmental impact statement because the merits of public disclosure are outweighed by the need for privacy. 35 A.G. Op. 19 (1973).

## 82-4-308. Release by waiver.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 before "department" deleted "board and". Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

## 82-4-309. Exemption — operations on federal lands.

**Compiler's Comments**

*2021 Amendment:* Chapter 324 in two places substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 2021.

## 82-4-310. Exemption — scale and type of activity.

**Compiler's Comments**

*2003 Amendment:* Chapter 468 in (2)(c)(ii) after "75-5-402" inserted reference to payment of applicable fee. Amendment effective April 23, 2003.

*1999 Amendment:* Chapter 507 inserted (1)(e) regarding use of mercury in operations except in contained facility; inserted (1)(f) regarding use of cyanide ore-processing reagent or other metal leaching solvents or reagents; substituted (2) outlining when person is exempt from part when engaging in mining activity using a suction dredge for former (1)(e) and (1)(f) that read: "(e) use a suction dredge with an intake of more than 4 inches in diameter; or

(f) operate a suction dredge beyond the area of the stream bed that is naturally under water at the time of operation"; and made minor changes in style. Amendment effective April 28, 1999.

*Saving Clause:* Section 20, Ch. 507, L. 1999, was a saving clause.

*Severability:* Section 21, Ch. 507, L. 1999, was a severability clause.

*1997 Amendment:* Chapter 272 substituted (1) and (2) concerning activities to which part does not apply for former section that read: "This part shall not be applicable to any person or persons collecting rock samples as a hobby or when the collection of rocks and minerals is offered for sale in any amount not exceeding $100 per year." Amendment effective April 16, 1997.

## 82-4-311. Disposition of fees, fines, penalties, and other uncleared money.

**Compiler's Comments**

*2001 Amendment:* Chapter 338 at end of first sentence substituted "in the environmental rehabilitation and response account in the state special revenue fund provided for in 75-1-110" for "in the state special revenue fund in the state treasury and credited to a special account that is designated as the hard-rock mining and reclamation account", inserted second sentence concerning funds held as bond or as a result of bond forfeiture being deposited in the environmental rehabilitation and response account, and deleted former second and third sentences relating to the hard-rock mining and reclamation account that read: "This account is available to the department by appropriation and may be expended for the research, reclamation, and revegetation of land and the rehabilitation of water affected by any mining operations. Any unencumbered and any unexpended balance of this account remaining at the end of a fiscal year does not lapse but must be carried forward for the purposes of this section until expended or until appropriated by subsequent legislative action." Amendment effective July 1, 2001.

The amendment to this section made by Ch. 488, L. 2001, was rendered void by sec. 11, Ch. 488, L. 2001, a coordination instruction.

*Severability:* Section 8, Ch. 338, L. 2001, was a severability clause.

*1995 Amendment:* Chapter 418 in first sentence, after "department", deleted "of state lands"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1983 Amendment:* Substituted reference to state special revenue fund for reference to earmarked revenue fund.

## 82-4-312. Hard-rock mining reclamation debt service fund.

**Compiler's Comments**

*Effective Date:* Section 9, Ch. 460, L. 2001, provided: "[This act] is effective July 1, 2002."

## 82-4-313. Hard-rock mining reclamation bonds.

**Compiler's Comments**

*Effective Date:* Section 9, Ch. 460, L. 2001, provided: "[This act] is effective July 1, 2002."

## 82-4-314. Authorization for sale of hard-rock mining reclamation bonds.

**Compiler's Comments**

*Effective Date:* Section 9, Ch. 460, L. 2001, provided: "[This act] is effective July 1, 2002."

## 82-4-315. Hard-rock mining reclamation special revenue account.

**Compiler's Comments**

*Effective Date:* Section 9, Ch. 460, L. 2001, provided: "[This act] is effective July 1, 2002."

## 82-4-321. Administration.

**Compiler's Comments**

*2021 Amendment:* Chapter 324 substituted current text in first sentence concerning administration of the part and adoption of rules by the department for former second sentence that read: "In order to implement its terms and provisions, the board shall from time to time promulgate such rules as the board shall deem necessary." Amendment effective July 1, 2021.

*1995 Amendment:* Chapter 418 near beginning of first and second sentences substituted "department" for "board"; and deleted former second sentence that read: "The board may delegate such powers, duties, and functions to the department as it deems necessary for the performance of its duties as administrator of this part." Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*Statement of Intent:* The statement of intent attached to Ch. 453, L. 1985, provided: "The purpose of the extension of the rulemaking authority of the department of state lands [functions now transferred to department of environmental quality] and board of land commissioners [functions now transferred to board of environmental review] is to allow the existing rules to be amended to include ore processing and reprocessing and extraction of old tailings and waste rock. In addition, the board and department may provide special rules eliminating application and performance standards irrelevant to reprocessing operations or milling operations."

## 82-4-322. Investigations, research, and experiments.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 near beginning substituted "department" for "board". Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

## 82-4-323. Interagency cooperation — receipt and expenditure of funds.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 in three places substituted "department" for "board". Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

## 82-4-331. Exploration license required — employees included — limitation.

**Compiler's Comments**

*2001 Amendment:* Chapter 488 in third sentence at end after "accompanied by payment of a" substituted "$25 renewal fee" for "fee as required for a new license"; in (3)(a) near beginning after "that person's failure" inserted "or the failure of any firm or business association of which that person was a principal or controlling member" and near middle after "this part has resulted in" substituted "either the receipt of bond proceeds by the department or the completion of reclamation by the person's surety or by the department" for "the forfeiture of a bond"; in (3)(c) after "required by 82-4-305" deleted "unless the department has certified that the area for which the bond should have been posted has been reclaimed by that person or reclaimed by the department and the person has reimbursed the department for the cost of the reclamation"; and made minor changes in style. Amendment effective May 1, 2001.

*Saving Clause:* Section 12, Ch. 488, L. 2001, was a saving clause.

*Severability:* Section 13, Ch. 488, L. 2001, was a severability clause.

*1995 Amendment:* Chapter 418 in (1), in first sentence, substituted "department" for "board". Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1993 Amendment:* Chapter 598 inserted (3)(b) through (3)(d) adding additional exceptions to the exploration licensing provision for persons who have not paid a penalty, posted a reclamation bond, or complied with an abatement order.

*1989 Amendment:* At beginning of fourth sentence of (1) inserted "A license may not be renewed if", after "renewal is" deleted "not then held by the board to be", and at end of sentence substituted "part" for "law"; inserted (3) disallowing the issuance of an exploration license unless the provisions of 82-4-360 are met; and made minor changes in phraseology.

*1989 Statement of Intent:* The statement of intent attached to Ch. 93, L. 1989, provided: "A statement of intent is required for this bill because it delegates rulemaking authority to the board of land commissioners [functions now transferred to board of environmental review]. Under the provisions of this bill, the board of land commissioners [functions now transferred to board of environmental review] shall adopt rules to implement and administer a procedure for waiver of a minor violation from the civil penalty provisions provided in [section 5] [82-4-361].

It is the intent of the legislature that the waiver be allowed only if a violation does not represent potential harm to the public health, public safety, or the environment and does not otherwise impair administration of the provisions of Title 84, chapter 4, part 3."

## 82-4-332. Exploration license.

**Compiler's Comments**

*2021 Amendment:* Chapter 324 in (2) near beginning of third sentence substituted "department" for "board". Amendment effective July 1, 2021.

*2001 Amendment:* Chapter 488 in (1)(a) increased license fee from $5 to $100; and made minor changes in style. Amendment effective May 1, 2001.

*Saving Clause:* Section 12, Ch. 488, L. 2001, was a saving clause.

*Severability:* Section 13, Ch. 488, L. 2001, was a severability clause.

*1995 Amendment:* Chapter 418 in (1)(a) and (1)(b) substituted "department" for "board"; and in (2), in third sentence, substituted "board" for "department". Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1991 Amendment:* Deleted former (3) that read: "(3) Upon filing of any certificate of claim location as permitted by federal and state mining laws and regulations, the locator shall provide copies of the certificate to the board".

## 82-4-334. Exception — geological phenomena.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 near beginning substituted "department" for "board". Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

## 82-4-335. Operating permit — limitation — fees.

**Compiler's Comments**

*2021 Amendments — Composite Section:* Chapter 152 in (1) in last sentence substituted "82-4-343" for "subsection (2)"; deleted former (2) (see 2021 Session Law for former text); and made minor changes in style. Amendment effective October 1, 2021.

Chapter 324 in (3)(a) near beginning of third sentence substituted "department" for "board". Amendment effective July 1, 2021.

*2015 Amendment:* Chapter 399 in (5)(a) after "the operator" inserted "the engineer of record if applicable"; in (5)(l) and (5)(n) inserted second sentence regarding tailings storage facilities; and made minor changes in style. Amendment effective October 1, 2015.

*Applicability:* Section 16, Ch. 399, L. 2015, provided: "[This act] applies to:

(1) operators producing or milling ore under an existing operating permit on or after [the effective date of this act];

(2) applicants who submit an application for an operating permit after [the effective date of this act]; and

(3) a tailings storage facility constructed after [the effective date of this act]." Effective October 1, 2015.

*2011 Amendments — Composite Section:* Chapter 145 inserted (4)(b) relating to the direct invoicing of an applicant; and made minor changes in style. Amendment effective April 7, 2011.

Chapter 410 in (1) in two places before "operating permit" inserted "final"; and made minor changes in style. Amendment effective October 1, 2011.

*Preamble:* The preamble attached to Ch. 410, L. 2011, provided: "WHEREAS, the metal mine reclamation laws provide substantive requirements for the permitting of metal mines in Montana; and

WHEREAS, the Montana Environmental Policy Act provides procedures for environmental assessment with respect to decisions of state agencies; and

WHEREAS, coordination of review of permit applications for compliance with substantive requirements of mine permitting statutes and environmental assessment of permit decisions would create efficiency, reduce burdens on state government, and require permit applicants to more fully bear the burden of providing complete permit applications that meet all requirements of the metal mine reclamation laws and other laws of the state related to mine permitting in a timely fashion; and

WHEREAS, completion of the requirements of the Montana Environmental Policy Act within the timeframes required can be facilitated by an initial determination of compliance with applicable permitting laws and regulations."

*2005 Amendment:* Chapter 63 in (1) at beginning of second sentence inserted exception clause; inserted (2) allowing an operating permit for multiple sites under certain conditions and clarifying permittee responsibility; and made minor changes in style. Amendment effective March 24, 2005.

*2003 Amendment:* Chapter 365 inserted (4)(o) requiring application to include assessment of potential for postmining use of mine-related facilities for other industrial purposes; and made minor changes in style. Amendment effective April 16, 2003.

*Preamble:* The preamble attached to Ch. 365, L. 2003, provided: "WHEREAS, metal mine operators typically construct ancillary industrial facilities in conjunction with the operation of metal mines; and

WHEREAS, facilities may include office buildings, shop buildings, electrical transmission lines, electrical power substations, electronic communication lines and facilities, water lines, water treatment plants, septic systems, roads, parking lots, fencing, security stations, and environmental monitoring sites; and

WHEREAS, these facilities may have significant value when the operator discontinues the mining operations; and

WHEREAS, the continued availability of these facilities may provide economic development opportunities for the residents of the county where the facilities are located and to the people of Montana generally; and

WHEREAS, the metal mine reclamation laws do not include provisions that encourage or require the Department of Environmental Quality or the mine operator to consider the feasibility of a postmining use of these facilities for other industrial purposes instead of simply removing the facilities; and

WHEREAS, the Legislature believes that future beneficial use provisions could be provided for in the metal mine reclamation laws without significantly increasing the cost to the state or to the operator of obtaining and maintaining a mine operating permit.

THEREFORE, the Legislature finds that it is beneficial and appropriate to create these provisions."

*2001 Amendment:* Chapter 488 in (3) at end of first sentence increased basic permit fee from $25 to $500; in (8)(a) near beginning after "that person's failure" inserted "or the failure of any firm or business association of which that person was a principal or controlling member" and at end after "this part has resulted in" substituted "either the receipt of bond proceeds by the department or the completion of reclamation by the person's surety or by the department" for "the forfeiture of a bond"; in (8)(c) at end after "bond required by 82-4-305" deleted "unless the department has certified that the area for which the bond should have been posted has been reclaimed by that person or reclaimed by the department and the person has reimbursed the department for the cost of the reclamation"; and made minor changes in style. Amendment effective May 1, 2001.

*Saving Clause:* Section 12, Ch. 488, L. 2001, was a saving clause.

*Severability:* Section 13, Ch. 488, L. 2001, was a severability clause.

*1999 Amendment:* Chapter 507 in middle of first sentence in (1) and in two places in (2) after "reagent" or "reagents" inserted "or other metal leaching solvent or reagents"; and made minor changes in style. Amendment effective April 28, 1999.

*Saving Clause:* Section 20, Ch. 507, L. 1999, was a saving clause.

*Severability:* Section 21, Ch. 507, L. 1999, was a severability clause.

*1995 Amendment:* Chapter 418 in (1), two places in (3), (4), (5), and three places in (6) substituted "department" for "board". Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1993 Amendment:* Chapter 598 inserted (8)(b) through (8)(d) adding additional exceptions to the operating permit provisions for persons who have not paid a penalty, posted a reclamation bond, or complied with an abatement order; and made minor changes in style.

*1991 Amendments:* Chapter 227 in (6) changed subsection reference to 90-6-302. Amendment effective March 29, 1991.

Chapter 403 in (3)(f), after "addresses of the", substituted remainder of subsection relating to owners of record and purchasers under contract for deed of the surface of the land for "surface and mineral owners of all lands within the mining area, to the extent known to the applicant"; inserted (3)(g) concerning owners of record and purchasers under contract for deed of minerals; inserted (3)(h) concerning source of applicant's legal right to mine; and made minor changes in style.

Chapter 637 in (3) inserted last five sentences authorizing Department to charge additional fee for permit not to exceed normal departmental operating expenses, including environmental review, authorizing Department to define expenses by rule, requiring Department to notify applicant and provide itemized expense estimate if fee will exceed $5,000, allowing applicant opportunity to review estimated expenses, and authorizing applicant to indicate duplicative or excessive expenses; at beginning of (4) inserted "The person"; in (4)(a), after "its", deleted "principal" and after "officers" inserted "directors, owners of 10% or more of any class of voting stock"; in (5) changed subsection reference; inserted (9) prohibiting issuance of permit unless certain current information is provided; and made minor changes in style. Amendment effective July 1, 1991.

*1991 Statement of Intent:* The statement of intent attached to Ch. 637, L. 1991, provided: "A statement of intent is required for this bill to provide guidance to the department of state lands [functions now transferred to department of environmental quality] concerning the adoption of rules to define the types of department expenses that applicants for hard-rock mine operating permits will be required to pay through increased permit application fees. Section 82-4-335(3) of the bill allows the department to increase the permit application review fee to fund expenses that are beyond the department's normal operating expenses and that are reasonably necessary in order for the department to provide a timely and adequate review, including any environmental review that is conducted pursuant to the requirements of the Montana Environmental Policy Act. The department's rules should authorize the use of the money collected from increased permit application fees for expenses, such as the hiring of temporary employees and contracted consultants and data collection and analysis when, due to workload considerations and statutory deadlines, the department cannot otherwise perform an adequate review."

*1989 Amendments:* Chapter 93 inserted (7) disallowing issuance of an operating permit to certain persons unless the provisions of 82-4-360 are met; and made minor changes in phraseology. Amendment effective October 1, 1989.

Chapter 347 near middle of (1), after "hard-rock mill", inserted "use cyanide ore-processing reagents"; inserted (2) requiring an operating permit for cyanide ore-processing reagent operations; in (4) corrected internal reference; and made minor changes in phraseology. Amendment effective July 1, 1989.

*1989 Statement of Intent:* The statement of intent attached to Ch. 93, L. 1989, provided: "A statement of intent is required for this bill because it delegates rulemaking authority to the board of land commissioners [functions now transferred to board of environmental review]. Under the provisions of this bill, the board of land commissioners [functions now transferred to board of environmental review]. shall adopt rules to implement and administer a procedure for waiver of a minor violation from the civil penalty provisions provided in [section 5] [82-4-361].

It is the intent of the legislature that the waiver be allowed only if a violation does not represent potential harm to the public health, public safety, or the environment and does not otherwise impair administration of the provisions of Title 84, chapter 4, part 3."

The statement of intent attached to Ch. 347, L. 1989, provided: "A statement of intent is provided for this bill to elaborate on the type and extent of review that the department of state lands [functions now transferred to department of environmental quality] shall give to a small-miner application for an operating permit for a cyanide ore-processing facility. Moreover, the legislature anticipates that implementation of this bill will require rulemaking by the board of land commissioners [functions now transferred to board of environmental review].

While an operating permit is required for these operations, the legislature intends that, because of the size and limited scope of the operation, the application requirements in general may be substantially less rigorous than the requirements for larger proposed mine operations not under the small-miner exclusion. The department of state lands [functions now transferred to department of environmental quality] shall also attempt to review these applications in a shorter timeframe than currently needed to review operating permit applications for larger mines.

To encourage expedited review, the department of state lands [functions now transferred to department of environmental quality] shall provide clear guidance to permit applicants concerning requirements for a complete application. In particular, the guidance must help applicants prepare adequate operating and reclamation plans. While the legislature recognizes plan requirements may vary with the site and characteristics of the proposed operation, the department shall attempt to guide the applicant in a manner that minimizes applicant costs while also meeting metal mine reclamation requirements.

Finally, [section 4 of this act] [see compiler's comment to 82-4-335] exempts an existing cyanide ore-processing facility if the operator registers the facility by January 1, 1990. In order to provide ample notice to existing operators, the legislature intends that the department shall prepare the form and notify affected small miners of the form's availability and purpose as soon as possible by mail or publication, or both."

*Registration of Cyanide Ore-Processing Operations — Temporary Applicability:* Section 4, Ch. 347, L. 1989, provided: "An existing facility that uses a cyanide ore-processing reagent and was not, prior to July 1, 1989, required to obtain an operating permit for the facility or to include the facility in an operating permit is not subject to [this act] if the facility is registered by January 1, 1990, by the owner or operator, on a form provided by the department." See statement of intent to Ch. 347, L. 1989.

*1987 Amendment:* In (2), in two places in first sentence, substituted reference to approval of impact plan under 90-6-307 for reference to approval by the Hard-Rock Mining Impact Board.

*1985 Amendments:* Chapter 345 inserted (1)(h) referring to ground and surface water hydrologic data; inserted (1)(i) referring to tailings impoundments and water reservoirs; inserted (1)(j) referring to control and mitigation of discharges to surface or ground water; and inserted (1)(k) referring to expected life and expansion of tailings impoundment or waste site.

Chapter 453 in (1) near beginning, after "engage in mining", inserted "ore processing, or reprocessing of tailings or waste material or construct or operate a hard-rock mill" and after "anticipation of", substituted "those activities" for "mining"; at end of second sentence of (1) substituted "complex" for "mine complex"; at end of (1)(d) substituted "operations" for "mining"; in (1)(g) after "plan" deleted "of mining" and after "completion of", substituted "the operation" for "mining and associated land disturbances".

Chapter 582 in (2) changed "subsection (3)" to "subsection (4)"; and inserted (3) referring to compliance with hard-rock mining impact review and implementation requirements by a permittee who becomes a large-scale mineral developer.

*1983 Amendment:* Near beginning of (2), substituted "activities under the permit" for "mining".

*1981 Amendment:* Inserted (2) referring to permit for large-scale mineral development; and inserted (3) exempting small samples from impact plan requirement.

*Severability:* Section 15, Ch. 617, L. 1981, was a severability section.

**Case Notes**

*No Requirement for Agency to Consider Impacts of Full-Scale Mining Operation When Analyzing Exploratory License:* In 2017, the Department of Environmental Quality approved a license for a mining company to conduct exploratory activities in Emigrant Gulch after issuing an environmental assessment concluding that the proposal posed no significant environmental impact. Environmental groups sued the Department, alleging failures to comply with the Montana Environmental Policy Act (MEPA). The District Court voided the exploration license on several grounds, including a conclusion that the Department had failed to adequately evaluate potential secondary impacts of the exploratory activities leading to full-scale mining operations in the future. The Supreme Court upheld the voiding of the exploration license but reversed the District Court's finding that the Department should have considered the secondary impacts of a potential future full-scale mining operation. The Supreme Court concluded that the Department's granting of the exploration license did not set in motion a chain of events that would inevitably and irreversibly lead to a full-scale mining operation; the mining company would be required to obtain another operating permit under 82-4-335 in order to conduct full-scale mining operations, and that permit review process would also be subject to MEPA. Park County Envtl. Council v. Dept. of Environmental Quality, 2020 MT 303, 402 Mont. 168, 477 P.3d 288.

*Failure to Actively Pursue Administrative Mining Permitting Process — Mineral Lease Properly Terminated:* Plaintiffs had an operating permit pending for a cyanide leach pit gold mine when voters passed Initiative Measure No. 137 (I-137) that prohibited cyanide mining in Montana. Plaintiffs then filed a legal challenge to I-137, but failed to pursue any administrative actions in pursuit of the permitting process. The state Department of Environmental Quality (DEQ) subsequently terminated plaintiffs' mineral leases prior to resolution of the legal challenge on grounds that plaintiffs had not actively pursued permitting until requesting an administrative hearing 2 weeks after the leases expired, and the District Court upheld the agency's decision. Plaintiffs contended on appeal that the leases were improperly terminated, but the Supreme Court affirmed. Challenging the validity of a voter-passed initiative, without more, did not constitute an administrative act of pursuing a permit. The DEQ was not obligated to extend the primary terms of the leases to include the time necessary for plaintiffs to seek invalidation of I-137, and because plaintiffs did not pursue the administrative process during the legal challenge, the leases were properly terminated. Seven Up Pete Venture v. St., 2005 MT 146, 327 M 306, 114 P3d 1009 (2005).

*Initiative Banning Cyanide Mining Not Unconstitutional Taking or Impairment of Contract — Opportunity to Apply for Mining Permit Not Property Right:* Plaintiffs had an operating permit pending for a cyanide leach pit gold mine when voters passed Initiative Measure No. 137 (I-137) that prohibited cyanide mining in Montana. Plaintiffs sued on grounds that I-137 interfered with their property right in the permit, constituted an unconstitutional regulatory taking for which they should be compensated, and violated the contract clause in Art. II, sec. 31, Mont. Const. The District Court found for the state on all issues, and plaintiffs appealed, but the Supreme Court affirmed. Plaintiffs' mere opportunity to seek a mining permit did not constitute a property right, given the state's wide discretion to reject the application even without the passage of I-137.

Further, I-137 did not constitute a taking because plaintiffs had not yet obtained a right to mine that the initiative took away. Moreover, even though the District Court incorrectly held that plaintiffs' corporate mining agreement was not substantially impaired by I-137, the court nonetheless correctly concluded that there was no contract clause violation because I-137 was reasonably related to the legitimate and significant public purpose of protecting the environment. Seven Up Pete Venture v. St., 2005 MT 146, 327 M 306, 114 P3d 1009 (2005).

*Deficient Application for Permit — Effect:* Because the application for permit was deficient under the hard-rock mining law, the present mining operations on the 500 acres covered by Permit 41A cannot be continued until an adequate application is made and a valid permit pursuant to the hard-rock mining law is issued. Kadillak v. The Anaconda Co., 184 M 127, 602 P2d 147 (1979).

*Environmental Impact Statement Not Required:* An environmental impact statement (EIS) was not required before granting a permit under the hard-rock mining law because the 60-day period was a woefully inadequate period for the preparation of a proper EIS, the same reason that an EIS was not required in Flint Ridge Dev. Co. v. Scenic Rivers Ass'n, 426 US 776 (1976). Furthermore, the statutory requirement of an EIS was not given constitutional status by the enactment of Art. II, sec. 3, and Art. IX, sec. 1, Mont. Const., subsequent to the Montana Environmental Policy Act and the hard-rock mining law. Kadillak v. The Anaconda Co., 184 M 127, 602 P2d 147 (1979).

## 82-4-336. Reclamation plan and specific reclamation requirements.

**Compiler's Comments**

*2015 Amendment:* Chapter 399 inserted (13) regarding postclosure monitoring of tailings storage facilities. Amendment effective October 1, 2015.

*Applicability:* Section 16, Ch. 399, L. 2015, provided: "[This act] applies to:

(1) operators producing or milling ore under an existing operating permit on or after [the effective date of this act];

(2) applicants who submit an application for an operating permit after [the effective date of this act]; and

(3) a tailings storage facility constructed after [the effective date of this act]." Effective October 1, 2015.

*2003 Amendments — Composite Section:* Chapter 365 in middle of (1) inserted "including the postmining use of the mine site"; in (9)(a) inserted second and third sentences prohibiting application of standard to require removal of mine-related facilities valuable for postmining use and providing for applicability if plan provides for nonremoval of mine-related facilities or when permittee will not reclaim disturbed land associated with facilities; inserted (9)(a)(i) requiring department approval of postmining use of mine-related facilities; inserted (9)(a)(ii) requiring compliance with reclamation requirements and plan for facilities previously identified as valuable for postmining use if plan provides for nonremoval of facilities or no reclamation by permittee; and made minor changes in style. Amendment effective April 16, 2003.

Chapter 459 in (9)(b) after "provide" inserted "sufficient measures"; inserted (9)(b)(iv) pertaining to mitigation or prevention of undesirable offsite environmental impacts; substituted (9)(c) relating to use of backfilling as appropriate reclamation measure based on department's decision for former (9)(c) that read: "(c) The reclamation of open pits and rock faces does not require backfilling, in whole or in part, except and only to the extent necessary to meet the requirements of the applicable provisions of Title 75, chapters 2 and 5"; in (12) near middle after "areas" inserted "that are to be graded, covered, or vegetated"; and made minor changes in style. Amendment effective April 21, 2003.

The amendment to this section made by Ch. 247, L. 2003, was rendered void by sec. 2, Ch. 247, L. 2003, a coordination section.

*Preamble:* The preamble attached to Ch. 365, L. 2003, provided: "WHEREAS, metal mine operators typically construct ancillary industrial facilities in conjunction with the operation of metal mines; and

WHEREAS, facilities may include office buildings, shop buildings, electrical transmission lines, electrical power substations, electronic communication lines and facilities, water lines, water treatment plants, septic systems, roads, parking lots, fencing, security stations, and environmental monitoring sites; and

WHEREAS, these facilities may have significant value when the operator discontinues the mining operations; and

WHEREAS, the continued availability of these facilities may provide economic development opportunities for the residents of the county where the facilities are located and to the people of Montana generally; and

WHEREAS, the metal mine reclamation laws do not include provisions that encourage or require the Department of Environmental Quality or the mine operator to consider the feasibility of a postmining use of these facilities for other industrial purposes instead of simply removing the facilities; and

WHEREAS, the Legislature believes that future beneficial use provisions could be provided for in the metal mine reclamation laws without significantly increasing the cost to the state or to the operator of obtaining and maintaining a mine operating permit.

THEREFORE, the Legislature finds that it is beneficial and appropriate to create these provisions."

*Severability:* Section 2, Ch. 459, L. 2003, was a severability clause.

*Retroactive Applicability:* Section 4, Ch. 459, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to permits and permit amendments approved by the department of environmental quality after September 30, 1995."

*2000 Amendment:* Chapter 7 inserted (1) concerning site-specific conditions and circumstances; at end of (5) substituted "development area to the extent that it serves as a host or breeding ground for mosquitoes or other disease-bearing or noxious insect life" for "mined area"; in (7)(a) after "covering" substituted "the faces" for "to a depth of 2 feet or more" and at end inserted "in order to mitigate the generation of objectionable effluents"; in (9)(a) at beginning inserted "With regard to disturbed land other than open pits and rock faces", after "disturbed land" deleted "Proposed reclamation must provide for the reclamation of disturbed land", and at end deleted "except for open pits and rock faces that may not be feasible to reclaim in the same fashion as other disturbed lands"; in (9)(b)(ii) after "affords" inserted "some" and at end substituted "or the environment" for "and the surrounding natural system to the extent feasible"; substituted (9)(b)(iii) concerning mitigation of visual contrasts for "blends with the appearance of the surrounding area to the extent feasible"; inserted (9)(c) concerning backfilling; at end of (11) substituted "requirements and standards set forth in this section" for "activities specified in this section"; and made minor changes in style. Amendment effective May 18, 2000.

*Applicability:* Section 4, Ch. 7, Sp. L. May 2000, provided: "(1) Except as provided in subsections (2) and (3), [this act] applies retroactively, within the meaning of 1-2-109, to permits and permit amendments approved by the department after September 30, 1995.

(2) Section 82-4-336(9)(b)(ii) and (9)(b)(iii) do not apply to any reclamation plan approved by the department for a mine at which mining operations have permanently ceased on [the effective date of this act] [effective May 18, 2000].

(3) Section 82-4-336(9)(c) does not alter or abrogate any backfilling requirement imposed or approved by the department prior to [the effective date of this act]." Effective May 18, 2000.

*1995 Amendments — Composite Section:* Chapter 418 in (1), (4), (5)(b), (5)(c), (5)(e), (8), and (9) substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995. The amendment in (8) was rendered void by Ch. 464.

Chapter 464 in (3), after "in the mined area", deleted "which may serve as a host or breeding ground for mosquitoes or other disease-bearing or noxious insect life"; in (7), at end of first sentence, inserted "in the same fashion as other disturbed lands" and substituted "In the case of open pits and rock faces, the reclamation plan must provide for reclamation to a condition" for "In such excepted cases"; inserted (7)(a) through (7)(c) regarding conditions for reclamation; in (8) substituted "The reclamation plan must provide" for "the board shall require"; and made minor changes in style.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1995 Statement of Intent:* The statement of intent attached to Ch. 464, L. 1995, provided: "In this bill, the legislature is implementing, with regard to open pits and rock faces that are the result of metal mining, the duty imposed upon it by Article IX, section 2(1), of the Montana constitution, which provides that "All lands disturbed by the taking of natural resources shall be reclaimed. The legislature shall provide effective requirements and standards for the reclamation of lands disturbed."

The drafters of this provision of the constitution expressly decided not to impose a constitutional requirement for a specified level of reclamation for all disturbed lands in all locations under all circumstances. Rather, they delegated to the legislature the duty to more specifically define reclamation in the public interest.

The legislature expects, and this bill requires, that miners will prepare and submit to the state reclamation plans for open pits and rock faces. This bill requires that these plans must, at a minimum, provide for return of these lands to structural stability and that the plans must be protective of air and water quality as provided elsewhere in the metal mine reclamation laws. These requirements and standards will prevent risks to public health and safety and the environment and will thereby adequately protect the environmental life support system from degradation.

In order to prevent unreasonable depletion and degradation of natural resources, the legislature finds that further reclamation of open pits and rock faces to provide functional uses and to blend with surrounding areas should be accomplished whenever feasible.

In determining feasibility of further reclamation, the legislature directs the department of state lands [functions now transferred to department of environmental quality] to consider and give effect to each of the following objectives:

(1) to encourage mining as an activity beneficial to the economy of our state;

(2) to encourage the production of minerals to meet the needs of society and the economic demands of the marketplace;

(3) to encourage reclamation to a condition that is aesthetically unobtrusive;

(4) to encourage reclamation to functional use;

(5) to discourage requirements that may foreclose future access to mineral resources not fully developed by current mining operations;

(6) to discourage requirements that will generate undesirable offsite environmental impacts.

The legislature finds that functional postreclamation uses include but are not limited to livestock grazing, agriculture, timber, recreation, wildlife habitat or other wildlife use, or other industrial use, including remining.

The legislature finds that when reclamation has been accomplished in accordance with an approved reclamation plan, the economic and social benefits of mining outweigh the scenic and other impacts associated with open-pit mining."

*1985 Amendments:* Chapter 345 in (6) inserted second sentence referring to noxious weed control standards; in (7) substituted "shall provide for the reclamation of disturbed land to comparable utility and stability as that of adjacent areas, except for open pits and rock faces which may not be feasible to reclaim. In such excepted cases, the board shall require sufficient measures to insure public safety and to prevent the pollution of air or water and the degradation of adjacent lands" for "need not reclaim the areas to a better condition or different use than that which existed prior to development or mining"; and inserted (9) referring to landscaping and contouring and postmining ground water discharges.

Chapter 453 throughout (1) substituted "the operation" for "mining"; at end of first sentence of (1), after "disturbance", deleted "by the mining operation"; and in middle of first sentence and at end of (1), substituted "the complex" for "mine complex".

## 82-4-337. Inspection — issuance of operating permit — modification, amendment, or revision.

### Compiler's Comments

*2021 Amendment:* Chapter 152 inserted (1)(a)(i) concerning timing for department response to applications and responses to notices of deficiencies for rock products; in (1)(a)(ii) at beginning inserted "for all other applications not covered under subsection (1)(a)(i)"; in (1)(b) substituted "The department's initial notice" for "The initial notice"; in (1)(h)(ii) substituted "82-4-335(9)" for "82-4-335(10)"; in (1)(h)(iii) substituted "82-4-335(8)" for "82-4-335(9)"; and made minor changes in style. Amendment effective October 1, 2021.

*2015 Amendment:* Chapter 399 inserted (1)(d)(iii) regarding applications with a tailings storage facility; and made minor changes in style. Amendment effective October 1, 2015.

*Applicability:* Section 16, Ch. 399, L. 2015, provided: "[This act] applies to:

(1) operators producing or milling ore under an existing operating permit on or after [the effective date of this act];

(2) applicants who submit an application for an operating permit after [the effective date of this act]; and

(3) a tailings storage facility constructed after [the effective date of this act]." Effective October 1, 2015.

*2011 Amendment:* Chapter 410 in (1)(a) in first sentence substituted "and compliance with the requirements of this part and rules adopted pursuant to this part within 90 days" for "within 60 days", in second sentence before first two instances of "notice" deleted "completeness", deleted former third sentence that read: "The department may, however, raise any deficiency during the adequacy review pursuant to subsection (1)(b)", in third sentence after "completeness" inserted "and compliance", and in fourth sentence after "complete" inserted "and compliant" and before "deficiencies" deleted "any"; deleted former (1)(b) that read: "(b) Except as provided in 75-1-205(4) and 75-1-208(4)(b), unless the review period is extended as provided in this section, the department shall review the adequacy of the proposed reclamation plan and plan of operation within 30 days of the determination that the application is complete or within 60 days of receipt of the application if the department does not notify the applicant of any deficiencies in the application"; inserted (1)(b) through (1)(f) relating to limited review, notice of deficiencies, action when application is complete and compliant, inspection prior to draft permit issuance, and status of issued draft permit; in (1)(g) in first sentence substituted " that there are deficiencies or inadequacies in the application or that the application is compliant within the time period required by subsection (1)(a), the final operating permit" for "of deficiencies or inadequacies in the proposed reclamation plan and plan of operation within the time period, the operating permit" and inserted last sentence relating to responding to deficiency notification; in (1)(h) at beginning inserted exception clause and before "permit" inserted "final"; inserted (1)(h)(iv) relating to completion of review; inserted (1)(h)(v) relating to determination of meeting substantive requirements; deleted former (1)(d)(i) through (1)(d)(iii) that read: "(d) (i) Prior to issuance of a permit, the department shall inspect the site, unless the department has failed to act on the application within the time prescribed in subsection (1)(b). If the site is not accessible because of extended adverse weather conditions, the department may extend the time period prescribed in subsection (1)(b) by not more than 180 days to allow inspection of the site and reasonable review. The department shall serve written notice of extension upon the applicant in person or by certified mail, and any extension is subject to appeal to the board in accordance with the Montana Administrative Procedure Act.

(ii) Except as provided in 75-1-208(4)(b), if the department determines that additional time is needed for analysis to determine whether a detailed environmental impact statement is necessary under 75-1-201, the department and the applicant shall negotiate to extend the period prescribed in subsection (1)(b) of this section by not more than 75 days to permit reasonable analysis. The applicant may by written waiver extend this period.

(iii) Except as provided in 75-1-208(4)(b), if the department determines that additional time is needed to review the application and reclamation plan for a major operation, the department and the applicant shall negotiate to extend the period prescribed in subsection (1)(b) of this section by not more than 365 days in order to permit reasonable review. The applicant may by written waiver extend this time period"; deleted former (1)(d)(v) that read: "(v) Failure of the department to act upon a complete application within the extension period constitutes approval of the application, and the permit must be issued promptly upon receipt of the bond as required in 82-4-338"; inserted (2) relating to action after issuance of draft permit but before issuance of final permit; in (3) and (4) near beginning before "operating permit" inserted "final"; in (4)(c) substituted "situations not permitted under the terms of regulatory permits held by the permittee are revealed by field inspection and the department has the authority to address them under the provisions of this part" for "situations are revealed by field inspection"; in (5)(a) in first sentence before "operating" inserted "final", in second sentence substituted "comply with" for "conform to", and at end deleted "including any environmental analysis required by Title 75, chapter 1, part 2"; deleted former (5) through (8) that read: "(5) During the term of an operating permit, an operator may apply for an amendment or revision to the permit. The operator may not apply for an amendment to delete disturbed acreage from the permit.

(6) Applications for major amendments must be processed in the same manner as applications for new permits.

(7) Major amendments are those that may significantly affect the environment. Minor amendments are those that will not significantly affect the environment. The board may by rule establish criteria for classification of amendments as major or minor. The rules must establish requirements for the content of applications for amendments and revisions and procedures for processing of minor amendments.

(8) If the department demonstrates that a revision may result in a significant environmental impact that was not previously and substantially evaluated in an environmental impact statement, the application must be processed in the same manner as is provided for new permits. Except as provided in 75-1-208(4)(b), applications for minor amendments and other revisions

must be processed within 30 days of receipt of an application"; and made minor changes in style. Amendment effective October 1, 2011.

*Preamble:* The preamble attached to Ch. 410, L. 2011, provided: "WHEREAS, the metal mine reclamation laws provide substantive requirements for the permitting of metal mines in Montana; and

WHEREAS, the Montana Environmental Policy Act provides procedures for environmental assessment with respect to decisions of state agencies; and

WHEREAS, coordination of review of permit applications for compliance with substantive requirements of mine permitting statutes and environmental assessment of permit decisions would create efficiency, reduce burdens on state government, and require permit applicants to more fully bear the burden of providing complete permit applications that meet all requirements of the metal mine reclamation laws and other laws of the state related to mine permitting in a timely fashion; and

WHEREAS, completion of the requirements of the Montana Environmental Policy Act within the timeframes required can be facilitated by an initial determination of compliance with applicable permitting laws and regulations."

*2005 Amendments — Composite Section:* Chapter 63 in (1)(c)(ii) at end substituted "82-4-335(10)" for "82-4-335(9)"; in (1)(c)(iii) at end substituted "82-4-335(9)" for "82-4-335(8)"; and made minor changes in style. Amendment effective March 24, 2005.

Chapter 337 near beginning of (1)(b) in exception clause inserted "75-1-205(4) and". Amendment effective April 21, 2005.

*Applicability:* Section 22, Ch. 337, L. 2005, provided: "[This act] applies to environmental impact statements on which the agency responsible for preparation commenced preparation after December 31, 2004."

*2003 Amendment:* Chapter 287 inserted (4) providing that the modification of an operating permit may be a major or minor amendment or a revision, referencing the procedures for processing a modification, and providing that a mine reclamation bond may not be increased until permit modification is complete; and made minor changes in style. Amendment effective April 11, 2003.

*Retroactive Applicability:* Section 3, Ch. 287, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to permits and permit amendments that were approved by the department of environmental quality after September 30, 1995."

*2001 Amendment:* Chapter 299 in (1)(b), (1)(d)(ii), (1)(d)(iii) at beginning, and (7) at beginning of second sentence inserted exception clause; and made minor changes in style. Amendment effective October 1, 2001.

*Applicability:* Section 16, Ch. 299, L. 2001, provided: "[This act] applies to environmental reviews that are begun after [the effective date of this act]." Effective October 1, 2001.

*1997 Amendment:* Chapter 42 in (1)(c)(iii) substituted "82-4-341(7)" for "82-4-341(6)". Amendment effective March 12, 1997.

*1995 Amendments:* Chapter 204 inserted (1)(d)(ii) authorizing the Department to negotiate to extend analysis time by up to 75 days and authorizing applicant to extend time period by written waiver; in (1)(d)(iii) inserted last sentence authorizing written waiver; and made minor changes in style.

Chapter 418 in (1)(a), in two places, (1)(b), in two places, (1)(d)(v), (2), and (3) substituted "department" for "board"; in (3), before "after timely notice", deleted "department"; and in (6), in third sentence, substituted "board" for "department". Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1993 Amendments — Composite Section:* Chapter 472 in (1)(a), in first sentence before "30 days", inserted "60 days of receipt of the initial application and within" and at end, after "receipt", inserted "of responses to notices of deficiencies", inserted second and third sentences relating to deficiency issues, and in last sentence, at end, substituted "the appropriate review period" for "30 days of receipt"; inserted (1)(d)(iii) concerning contract to prepare EIS; and made minor changes in style. Amendment effective April 21, 1993.

Chapter 598 in (1)(a), in first sentence before "30 days", inserted "60 days of receipt of the initial application and within" and at end, after "receipt", inserted "of responses to notices of deficiencies" and in last sentence, at end, substituted "the appropriate review period" for "30 days of receipt"; inserted (4) through (7) regarding amendment or revision of operating permits; and made minor changes in style.

A style change in (1)(b) was slightly different in the two chapters. The codifier chose the more appropriate of the two.

*Saving Clause:* Section 8, Ch. 472, L. 1993, was a saving clause.

*Severability:* Section 9, Ch. 472, L. 1993, was a severability clause.

*1991 Amendment:* In (1)(b), at end of second sentence after "82-4-338", inserted "and pursuant to the requirements of subsection (1)(c)"; inserted (1)(c)(ii) prohibiting issuance of permit until information and certification have been submitted pursuant to 82-4-335(9); inserted (1)(c)(iii) prohibiting issuance of permit until Department has found issuance not prohibited by 82-4-335(8) or 82-4-341(6); and made minor changes in style. Amendment effective July 1, 1991.

*1985 Amendment:* In (1)(b) in two places, substituted "plan of operation" for "plan of mining"; in (2) after "period required to", substituted "complete the operation" for "mine the land covered by the plan" and after "until the", substituted "operation" for "surface or underground mining".

**Case Notes**

*Mandate Proper Remedy:* Writ of Mandate is a proper remedy for return of a mining application and voidance of permit because the Department of State Lands (functions now transferred to Department of Environmental Quality) had a clear legal duty to return the permit application as incomplete and inadequate. Because the application was not returned, Permit 41A was void, and the Anaconda Company may not continue mining activities on the Permit 41A area until a valid permit is granted by the Department. Kadillak v. The Anaconda Co., 184 M 127, 602 P2d 147 (1979).

*Specific Statute to Control:* The well-settled principle of statutory construction that a specific statute will control a general one requires that the 60-day period in 82-4-337 controls the general provisions of 75-1-201(2)(c). Kadillak v. The Anaconda Co., 184 M 127, 602 P2d 147 (1979).

## 82-4-338. Performance bond.

**Compiler's Comments**

*Termination Provision Repealed:* Section 2, Ch. 566, L. 2023, repealed sec. 6, Ch. 458, L. 2019, which terminated the 2019 amendment to this section June 30, 2026. Effective May 18, 2023.

*2021 Amendments — Composite Section:* Chapter 152 in (5) near middle of first sentence inserted "or 82-4-343". Amendment effective October 1, 2021.

Chapter 324 in (1)(a) near end of first sentence substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 2021.

*2019 Amendment:* Chapter 458 in (1)(a) at end inserted "during a suspension authorized pursuant to 82-4-341(8)(b)(ii) or". Amendment effective July 1, 2019, and terminates June 30, 2026.

*2007 Amendment:* Chapter 269 in (6) at beginning inserted exception clause; inserted (7) and (8) relating to amended reclamation plans and temporary bonds; and made minor changes in style. Amendment effective April 26, 2007.

*Applicability:* Section 3, Ch. 269, L. 2007, provided: "[This act] does not apply to a reclamation plan amendment for backfill of a pit required by or as a result of a court judgment entered prior to January 1, 2007, or by a subsequent judgment requiring backfill of the same pit at the same facility."

*2005 Amendment:* Chapter 32 inserted (1)(d) concerning exploration license or operating permit for activities on federal land, provisions that must be included in the bond, and restrictions on agreements; and made minor changes in style. Amendment effective March 18, 2005.

*2001 Amendments — Composite Section:* Chapter 79 in (1) at beginning of first sentence after "applicant" inserted "for an exploration license or operating permit"; in (3)(b) in first sentence after "contested case hearing" inserted "before the board", after "Act" inserted "Title 2, chapter 4, part 6", and at end after "hearing" inserted "stating the reason for the request"; and made minor changes in style. Amendment effective March 20, 2001.

Chapter 488 in (1) in second sentence near end after "a certificate of deposit" inserted "an irrevocable letter of credit" and in third sentence near middle after "to ensure compliance with" inserted "Title 75, chapters 2 and 5"; inserted (2) regarding third-party contractors; in (3)(a) in fourth sentence after "department" substituted "shall" for "may", inserted fifth sentence regarding preliminary and proposed bond determinations, in sixth sentence near beginning after "The department shall" deleted "make written findings", after "a copy of the" substituted "bond calculations that form the basis for the proposed bond determination" for "findings", and after "publish notice of the" substituted "proposed bond determination" for "findings", and inserted seventh through ninth sentences regarding issuance of final bond determination and 30-day extension of time to post bond; in (3)(b) in first sentence near middle after "Montana Administrative

Procedure Act on the" substituted "final bond determination" for "adjusted bond level" and near end after "within 30 days of the" substituted "issuance of the final bond determination" for "notice" and inserted remainder of (3)(b) regarding request for hearing, board's determination after hearing, and extension of time to post bond; inserted (3)(c) regarding failure to post bond; in (6) inserted last sentence regarding bond calculations; inserted (8) regarding violations of law, forfeiture of bond, and abatement of danger; inserted (9) regarding termination of bond and suspension of license or permit; and made minor changes in style. Amendment effective May 1, 2001.

*Preamble:* The preamble attached to Ch. 79, L. 2001, provided: "WHEREAS, certain environmental statutes administered by the Montana Department of Environmental Quality provide that a person aggrieved by a decision of the Department may appeal that decision to the Director of the Department; and

WHEREAS, the possibility of an appeal prevents the Director from becoming involved in certain Department decisions that are subject to appeal to the Director; and

WHEREAS, section 82-4-427, MCA, states that a contested case hearing requested under The Opencut Mining Act must be held within 30 days after the hearing is requested; and

WHEREAS, it is difficult for the Department to conduct a contested case hearing under that Act within 30 days after the hearing is requested; and

WHEREAS, certain revisions to statutes administered by the Department are necessary for clarity and consistency and to conform the statutes to current drafting style."

*Saving Clause:* Section 18, Ch. 79, L. 2001, was a saving clause.

Section 12, Ch. 488, L. 2001, was a saving clause.

*Severability:* Section 13, Ch. 488, L. 2001, was a severability clause.

*Applicability:* Section 15, Ch. 488, L. 2001, provided: "Sections 82-4-303(6) and 82-4-338(8) apply to licenses and permits issued after [the effective date of this act] [effective May 1, 2001] and to permits issued before [the effective date of this act] [effective May 1, 2001] that are in effect on [1 year after the effective date of this act] [effective May 1, 2002]."

*1999 Amendment:* Chapter 507 in first sentence in (1) after "$200" deleted "or more than $2,500" and after "disturbed" substituted "land" for "area", in second sentence after "file" substituted "with the department" for "with the board", at beginning of third sentence deleted "Regardless of the limits in this subsection" and after "permit" inserted "including the potential cost of department management, operation, and maintenance of the site upon temporary or permanent operator insolvency or abandonment, until full bond liquidation can be effected", and at end of fifth sentence substituted "department" for "board"; in (2) in first sentence after "shall" substituted "conduct an overview of" for "review", after "bond" substituted "annually" for "at least every 5 years", and after second "shall" inserted "conduct a comprehensive bond review at least every 5 years" and inserted second sentence authorizing department to conduct additional comprehensive bond reviews after modification, overview, or inspection if department determines bond increase may be necessary; in first sentence in (4) after "released" inserted "or decreased" and after "hearing" inserted "and a hearing has been held if requested" and inserted second sentence requiring department to provide reasonable statewide and local notice of hearing opportunity; and made minor changes in style. Amendment effective April 28, 1999.

*Saving Clause:* Section 20, Ch. 507, L. 1999, was a saving clause.

*Severability:* Section 21, Ch. 507, L. 1999, was a severability clause.

*1995 Amendments:* Chapter 395 inserted (5) concerning the types of activities for which bonds may be required; and inserted (6) concerning the posting of unobligated bonds.

Chapter 418 in (1), at end of second sentence, substituted "department" for "board". Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1993 Amendment:* Chapter 598 at end of first sentence of (1), after "board", inserted "and the permit" and at end of third sentence substituted "ensure compliance with this part, the rules, and the permit" for "complete the reclamation of the disturbed land"; near middle of second sentence of (2), after "present costs of", substituted "compliance with this part, the rules, and the permit" for "reclamation"; near end of (3) substituted "the permit" for "this reclamation plan"; and made minor changes in style.

*1991 Amendment:* In (1), in first sentence before "sum", deleted "penal"; in (2) inserted first sentence requiring Department to review amount of bond every 5 years and consult with licensee or permittee if bond level needs adjustment and inserted third and fourth sentences requiring

Department to make written findings, to provide copy of findings, and, for operating permits, to publish notice of findings in newspaper in county in which the operation is located and authorizing permittee or interested person adversely affected to obtain contested case hearing on adjusted bond level within 30 days of request; and made minor changes in style. Amendment effective July 1, 1991.

*1985 Amendment:* Inserted (3) requiring hearing before bond can be released.

## 82-4-339. Annual report of activities by permittee — fee — notice of large-scale mineral developer status.

**Compiler's Comments**

*2021 Amendments — Composite Section:* Chapter 152 in (1)(e) substituted "82-4-335(4)(a)" for "82-4-335(5)(a)"; and made minor changes in style. Amendment effective October 1, 2021.

Chapter 324 in (1) in middle of first sentence substituted "rule" for "rules of the board". Amendment effective July 1, 2021.

*2005 Amendment:* Chapter 63 in (1)(e) at end substituted "82-4-335(5)(a)" for "82-4-335(4)(a)". Amendment effective March 24, 2005.

*2001 Amendment:* Chapter 488 in (1) in first sentence near end after "pay the annual fee of" increased annual fee from $25 to $100; and made minor changes in style. Amendment effective May 1, 2001.

*Saving Clause:* Section 12, Ch. 488, L. 2001, was a saving clause.

*Severability:* Section 13, Ch. 488, L. 2001, was a severability clause.

*1995 Amendment:* Chapter 418 near end of (1) and in (1)(f) substituted "department" for "board". Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1991 Amendments:* Chapter 227 in (1)(d) changed subsection reference to 90-6-302. Amendment effective March 29, 1991.

Chapter 637 inserted (1)(e) requiring permittee to update information required in 82-4-335(4)(a); and made minor changes in style. Amendment effective July 1, 1991.

*1985 Amendment:* Inserted (1)(d) referring to number of persons on payroll; and inserted (2) referring to notice of large-scale mineral developer status.

## 82-4-340. Successor operator.

**Compiler's Comments**

*Termination Provision Repealed:* Section 2, Ch. 566, L. 2023, repealed sec. 6, Ch. 458, L. 2019, which terminated the 2019 amendment to this section June 30, 2026. Effective May 18, 2023.

*2019 Amendment:* Chapter 458 inserted (2) regarding conditions for transfer of a permit to a successor operator; and made minor changes in style. Amendment effective July 1, 2019, and terminates June 30, 2026.

*1995 Amendment:* Chapter 418 near beginning and near end substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1985 Amendment:* Near beginning after "uncompleted", deleted "mining".

*Section Not Codified:* Section 50-1210(4), R.C.M. 1947, was not codified in the MCA because it was of temporary significance. This subsection has not been repealed and is still valid law. Citation may be made to sec. 10, Ch. 252, L. 1971, as amended by sec. 1, Ch. 427, L. 1977.

## 82-4-341. Compliance — reclamation by department.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 1, Ch. 566, L. 2023. Amendment effective May 18, 2023.

*Termination Provision Repealed:* Section 2, Ch. 566, L. 2023, repealed sec. 6, Ch. 458, L. 2019, which terminated the 2019 amendment to this section June 30, 2026. Effective May 18, 2023.

*2019 Amendment:* Chapter 458 inserted (8) regarding ability of department to hold a suspended permit and place the proceeds from a cash bond in an account, spend proceeds, and transfer or revoke permits; and made minor changes in style. Amendment effective July 1, 2019, and terminates June 30, 2026.

*2001 Amendment:* Chapter 488 in (5) in first sentence at end after "the permittee and the surety" substituted "by certified mail" for "by order"; in (6) in first sentence near middle after "reclamation of the disturbed lands" inserted remainder of sentence regarding reclamation plans and findings by department concerning prevention of substantial reclamation failure and in last sentence after "the department shall return" substituted remainder of sentence regarding amount not expended, including interest unless the surety agrees otherwise, for "any amount not expended"; and made minor changes in style. Amendment effective May 1, 2001.

*Saving Clause:* Section 12, Ch. 488, L. 2001, was a saving clause.

*Severability:* Section 13, Ch. 488, L. 2001, was a severability clause.

*1999 Amendment:* Chapter 507 at end of first sentence in (2) inserted "or as required pursuant to subsection (8)"; at end of first sentence in (3) inserted language requiring department notice and hearing and at beginning of second sentence inserted "As soon as practicable thereafter"; in (4) substituted "department" for "board"; and inserted (8) requiring department to determine whether further suspension of mine operation will cause violations or impair reclamation when no mineral extraction or ore processing has occurred for past 5 years, requiring department to notify permittee to abate conditions upon written determination of violations or reclamation impairment, authorizing department to grant reasonable time extensions for good cause, requiring department to order abatement of condition or reclamation if permittee does not abate conditions or reclamation within specified time, authorizing permittee to request hearing within 30 days of order, and providing that request for hearing stays order pending final decision unless department determines in writing that stay creates imminent threat of significant harm or impairs reclamation. Amendment effective April 28, 1999.

*Saving Clause:* Section 20, Ch. 507, L. 1999, was a saving clause.

*Severability:* Section 21, Ch. 507, L. 1999, was a severability clause.

*1995 Amendments — Composite Section:* Chapter 204 at beginning of (1) substituted language requiring inspection at least annually of permit area for former language that read: "Following receipt of the permittee's report and at any other reasonable time the board may elect" and at end substituted language requiring inspection to determine if permittee has complied with part, rules, or the permit for former language requiring inspection to determine if permittee has complied with reclamation plan and Department rules; inserted introductory clause in (4) regarding forfeiture of bond; in (4)(c), after "required", deleted former language authorizing Board, with staff, equipment, and material under its control or by contract, to take action to reclaim lands by competitive bidding and requiring record of expenses; in (5) deleted former second sentence requiring order to state expenses incurred by Board in reclaiming disturbed land and to include notice of amount due; in (6) inserted first three sentences authorizing Board, with its staff, equipment, and material or by contract, to reclaim certain disturbed lands through competitive bidding and to keep expense records and inserted last sentence requiring Board to return unexpended amount following reclamation; and made minor changes in style.

Chapter 418 in (1), (2), in three places, (3), (4)(a), (4)(c), (5), in two places, (6), in three places, and (7), in three places, substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

Because Ch. 418 transferred duties from the Board to the Department, the Code Commissioner has substituted "department" for "board" in the material enacted by Ch. 204 to reflect the intent of Ch. 418. Authority for the change is found in sec. 569, Ch. 546.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

### 82-4-342. Amendment to operating permits.

**Compiler's Comments**

*2021 Amendments — Composite Section:* Chapter 152 inserted (5)(l) concerning applications for rock product permits and amendments pursuant to 82-4-343; and made minor changes in style. Amendment effective October 1, 2021.

Chapter 324 in (2)(a) at beginning of first and last sentences substituted "department" for "board". Amendment effective July 1, 2021.

*2015 Amendment:* Chapter 399 inserted (5)(k) regarding modifications to tailings storage facilities; and made minor changes in style. Amendment effective October 1, 2015.

*Applicability:* Section 16, Ch. 399, L. 2015, provided: "[This act] applies to:

(1) operators producing or milling ore under an existing operating permit on or after [the effective date of this act];

(2) applicants who submit an application for an operating permit after [the effective date of this act]; and

(3) a tailings storage facility constructed after [the effective date of this act].” Effective October 1, 2015.

*2011 Amendment:* Chapter 410 in (1) in first sentence inserted “a permit revision as described in subsections (5)(g) through (5)(j) or”; in (2)(a) in second sentence in two places inserted “revisions and”; in (4) near beginning inserted “a revision or” and near end inserted “or amended”; in (5) at end inserted “and permit revisions”; in (5)(g) substituted “25 acres or 10%” for “10 acres or 5%”; inserted (5)(h) relating to changes consistent with part and rules; in (5)(i) after “operating plan” deleted “or reclamation plan”, substituted “if the changes” for “provided that the impacts of the change”, and at end substituted “relative to the entire operation and the changes are consistent with subsection (5)(g)” for “relative to the impacts of the entire operation and there is less than 10 acres of additional disturbance”; and made minor changes in style. Amendment effective October 1, 2011.

*Preamble:* The preamble attached to Ch. 410, L. 2011, provided: “WHEREAS, the metal mine reclamation laws provide substantive requirements for the permitting of metal mines in Montana; and

WHEREAS, the Montana Environmental Policy Act provides procedures for environmental assessment with respect to decisions of state agencies; and

WHEREAS, coordination of review of permit applications for compliance with substantive requirements of mine permitting statutes and environmental assessment of permit decisions would create efficiency, reduce burdens on state government, and require permit applicants to more fully bear the burden of providing complete permit applications that meet all requirements of the metal mine reclamation laws and other laws of the state related to mine permitting in a timely fashion; and

WHEREAS, completion of the requirements of the Montana Environmental Policy Act within the timeframes required can be facilitated by an initial determination of compliance with applicable permitting laws and regulations.”

*2003 Amendment:* Chapter 365 inserted (2)(b) requiring permit amendment to be considered minor if for purpose of retention of facilities valuable for postmining use, evidence submitted shows local government has requested retention for postmining use, and postmining use meets statutory requirements; inserted (5)(i) providing department not required to prepare assessment or impact statement for changes in permit for retention of mine-related facilities valuable for postmining use; and made minor changes in style. Amendment effective April 16, 2003.

*Preamble:* The preamble attached to Ch. 365, L. 2003, provided: “WHEREAS, metal mine operators typically construct ancillary industrial facilities in conjunction with the operation of metal mines; and

WHEREAS, facilities may include office buildings, shop buildings, electrical transmission lines, electrical power substations, electronic communication lines and facilities, water lines, water treatment plants, septic systems, roads, parking lots, fencing, security stations, and environmental monitoring sites; and

WHEREAS, these facilities may have significant value when the operator discontinues the mining operations; and

WHEREAS, the continued availability of these facilities may provide economic development opportunities for the residents of the county where the facilities are located and to the people of Montana generally; and

WHEREAS, the metal mine reclamation laws do not include provisions that encourage or require the Department of Environmental Quality or the mine operator to consider the feasibility of a postmining use of these facilities for other industrial purposes instead of simply removing the facilities; and

WHEREAS, the Legislature believes that future beneficial use provisions could be provided for in the metal mine reclamation laws without significantly increasing the cost to the state or to the operator of obtaining and maintaining a mine operating permit.

THEREFORE, the Legislature finds that it is beneficial and appropriate to create these provisions.”

*1995 Amendment:* Chapter 418 in (2), in first and second sentences, substituted “board” for “department”. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: “The provisions of 2-15-131 through 2-15-137 apply to [this act].”

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*Saving Clause:* Section 8, Ch. 472, L. 1993, was a saving clause.

*Severability:* Section 9, Ch. 472, L. 1993, was a severability clause.

*Effective Date:* Section 10, Ch. 472, L. 1993, provided: "[This act] is effective on passage and approval." Approved April 21, 1993.

### 82-4-343. Operating permit — rock products — fees.

**Compiler's Comments**

*Effective Date:* This section is effective October 1, 2021.

### 82-4-349. Limitations of actions — venue.

**Compiler's Comments**

*2005 Amendment:* Chapter 337 in (3) near middle of second sentence after "determined" substituted "by the court" for "under 75-1-203". Amendment effective April 21, 2005.

*Applicability:* Section 22, Ch. 337, L. 2005, provided: "[This act] applies to environmental impact statements on which the agency responsible for preparation commenced preparation after December 31, 2004."

*2003 Amendment:* Chapter 361 inserted (2) relating to venue; inserted (3) relating to judicial challenges to an exploration license or operating permit; and made minor changes in style. Amendment effective April 16, 2003.

*Preamble:* The preamble attached to Ch. 361, L. 2003, provided: "WHEREAS, Article II, section 3, of the Montana Constitution enumerates certain inalienable individual rights, including the right to a clean and healthful environment, the right of pursuing life's basic necessities, the right of enjoying and defending an individual's life and liberty, the right of acquiring, possessing, and protecting property, and the right of seeking individual safety, health, and happiness in all lawful ways; and

WHEREAS, the constitutionally enumerated rights are by their very nature bound to result in competing interests in specific fact situations; and

WHEREAS, Article IX, section 1, of the Montana Constitution provides that the state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations and directs the Legislature to provide for the administration and enforcement of this duty and also directs the Legislature to provide adequate remedies for the protection of the environmental life support system from degradation and to provide adequate remedies to prevent unreasonable depletion and degradation of natural resources; and

WHEREAS, the Legislature has reviewed the intent of the framers of the 1972 Montana Constitution as evidenced in the verbatim transcripts of the constitutional convention; and

WHEREAS, there is no indication that one enumerated inalienable right is intended to supersede other inalienable rights, including the right to use property in all lawful means; and

WHEREAS, the Legislature, mindful of its constitutional obligation to provide for the administration and enforcement of the constitution, has enacted a comprehensive set of laws to accomplish the goals of the constitution, including the Montana Clean Indoor Air Act of 1979, Title 50, chapter 40, part 1, MCA; the Montana Environmental Policy Act, Title 75, chapter 1, parts 1 through 3, MCA; the Clean Air Act of Montana, Title 75, chapter 2, parts 1 through 4, MCA; water quality laws, Title 75, chapter 5, MCA; The Natural Streambed and Land Preservation Act of 1975, Title 75, chapter 7, part 1, MCA; The Montana Solid Waste Management Act, Title 75, chapter 10, part 2, MCA; The Montana Hazardous Waste Act, Title 75, chapter 10, part 4, MCA; the Comprehensive Environmental Cleanup and Responsibility Act, Title 75, chapter 10, part 7, MCA; the Montana Megalandfill Siting Act, sections 75-10-901 through 75-10-945, MCA; the Montana Underground Storage Tank Installer and Inspector Licensing and Permitting Act, Title 75, chapter 11, part 2, MCA; the Montana Underground Storage Tank Act, Title 75, chapter 11, part 5, MCA; the Montana Major Facility Siting Act, Title 75, chapter 20, MCA; the Open-Space Land and Voluntary Conservation Easement Act, Title 76, chapter 6, MCA; the Environmental Control Easement Act, Title 76, chapter 7, MCA; The Strip and Underground Mine Siting Act, Title 82, chapter 4, part 1, MCA; The Montana Strip and Underground Mine Reclamation Act, Title 82, chapter 4, part 2, MCA; The Opencut Mining Act, Title 82, chapter 4, part 4, MCA; and The Nongame and Endangered Species Conservation Act, Title 87, chapter 5, part 1, MCA."

*Severability:* Section 39, Ch. 361, L. 2003, was a severability clause.

*Retroactive Applicability:* Section 41, Ch. 361, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to actions for judicial review or other causes of action challenging the issuance of a permit, petition for review, amendment, license, arbitration, action, certificate, or inspection that are pending but not yet decided on or after [the effective date of this act]." Effective April 16, 2003.

*1999 Amendment:* Chapter 507 inserted second sentence requiring issuance of summons and service of process on defendants within 60 days after action filed. Amendment effective April 28, 1999.

*Saving Clause:* Section 20, Ch. 507, L. 1999, was a saving clause.

*Severability:* Section 21, Ch. 507, L. 1999, was a severability clause.

*Applicability:* Section 23(3)(a), Ch. 507, L. 1999, provided: "For purposes of the amendment in [section 7] [82-4-349] relating to the time for issuance of summons and service of process in legal actions challenging department decisions granting or denying an exploration license or operating permit issued under Title 82, chapter 4, part 3, the 60-day time limit specified in [section 7] [82-4-349] applies to actions that are pending on [the effective date of this act] [effective April 28, 1999] and the 60-day period must begin on [the effective date of this act]." Effective April 28, 1999.

*1995 Amendment:* Chapter 418 substituted "department" for "board". Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*Saving Clause:* Section 8, Ch. 472, L. 1993, was a saving clause.

*Severability:* Section 9, Ch. 472, L. 1993, was a severability clause.

*Effective Date:* Section 10, Ch. 472, L. 1993, provided: "[This act] is effective on passage and approval." Approved April 21, 1993.

## 82-4-350. Award of costs and attorney fees.

**Compiler's Comments**

*1993 Statement of Intent:* The statement of intent attached to Ch. 472, L. 1993, provided: "A statement of intent is required for this bill because [section 3] requires the department of state lands [functions now transferred to department of environmental quality] to adopt administrative rules. In adopting rules, the department shall establish application content requirements and amendment processing procedures that are consistent with the permitting requirements established in this bill."

*Saving Clause:* Section 8, Ch. 472, L. 1993, was a saving clause.

*Severability:* Section 9, Ch. 472, L. 1993, was a severability clause.

*Effective Date:* Section 10, Ch. 472, L. 1993, provided: "[This act] is effective on passage and approval." Approved April 21, 1993.

## 82-4-351. Reasons for denial of permit.

**Compiler's Comments**

*1993 Amendment:* Chapter 472 at beginning of (1) substituted "An application for a permit or an application for an amendment to a permit" for "A permit"; at end of (2) substituted "for denial, and be based on a preponderance of the evidence" for "therefor"; and made minor changes in style. Amendment effective April 21, 1993.

*Saving Clause:* Section 8, Ch. 472, L. 1993, was a saving clause.

*Severability:* Section 9, Ch. 472, L. 1993, was a severability clause.

*1985 Amendment:* In (1)(a) substituted "plan of operation or reclamation" for "plan of development, mining, or reclamation".

## 82-4-352. Reapplication with new reclamation plan.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 in second sentence substituted "department" for "board". Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

## 82-4-353. Administrative remedies — notice — appeals — parties.

**Compiler's Comments**

*Termination Provision Repealed:* Section 2, Ch. 566, L. 2023, repealed sec. 6, Ch. 458, L. 2019, which terminated the 2019 amendment to this section June 30, 2026. Effective May 18, 2023.

*2019 Amendment:* Chapter 458 in (3) substituted "82-4-341(7) and (9)" for "82-4-341(7) and (8)". Amendment effective July 1, 2019, and terminates June 30, 2026.

*2011 Amendment:* Chapter 410 in (3) substituted "82-4-337(4)" for "82-4-337(3)". Amendment effective October 1, 2011.

*Preamble:* The preamble attached to Ch. 410, L. 2011, provided: "WHEREAS, the metal mine reclamation laws provide substantive requirements for the permitting of metal mines in Montana; and

WHEREAS, the Montana Environmental Policy Act provides procedures for environmental assessment with respect to decisions of state agencies; and

WHEREAS, coordination of review of permit applications for compliance with substantive requirements of mine permitting statutes and environmental assessment of permit decisions would create efficiency, reduce burdens on state government, and require permit applicants to more fully bear the burden of providing complete permit applications that meet all requirements of the metal mine reclamation laws and other laws of the state related to mine permitting in a timely fashion; and

WHEREAS, completion of the requirements of the Montana Environmental Policy Act within the timeframes required can be facilitated by an initial determination of compliance with applicable permitting laws and regulations."

*2001 Amendment:* Chapter 79 inserted (2) allowing an applicant to request a hearing concerning denial of the application; in (3) at beginning of first sentence after "hearings and" substituted "appeals under 82-4-337(3), 82-4-338(2), 82-4-341(7) and (8), 82-4-361, 82-4-362, and subsection (2) of this section must be conducted by the board" for "appeal procedures shall be"; and made minor changes in style. Amendment effective March 20, 2001.

*Preamble:* The preamble attached to Ch. 79, L. 2001, provided: "WHEREAS, certain environmental statutes administered by the Montana Department of Environmental Quality provide that a person aggrieved by a decision of the Department may appeal that decision to the Director of the Department; and

WHEREAS, the possibility of an appeal prevents the Director from becoming involved in certain Department decisions that are subject to appeal to the Director; and

WHEREAS, section 82-4-427, MCA, states that a contested case hearing requested under The Opencut Mining Act must be held within 30 days after the hearing is requested; and

WHEREAS, it is difficult for the Department to conduct a contested case hearing under that Act within 30 days after the hearing is requested; and

WHEREAS, certain revisions to statutes administered by the Department are necessary for clarity and consistency and to conform the statutes to current drafting style."

*Saving Clause:* Section 18, Ch. 79, L. 2001, was a saving clause.

## 82-4-354. Mandamus to compel enforcement.

**Compiler's Comments**

*2021 Amendment:* Chapter 535 in (4) at end deleted "or, if mutually agreed to by the parties to the action, in any other judicial district". Amendment effective October 1, 2021.

*1997 Amendment:* Chapter 535 inserted (4) relating to the district in which the action must be brought; and made minor changes in style.

## 82-4-355. Action for damages to water supply — replacement.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

*1991 Amendment:* In (1), after "engaged in", deleted "a mining or exploration" and after "operation" inserted "for which a license is required pursuant to 82-4-332 or for which a permit is required pursuant to 82-4-335"; and made minor change in style. Amendment effective July 1, 1991.

## 82-4-356. Action in response to complaints related to use of explosives.

**Compiler's Comments**

*1989 Statement of Intent:* The statement of intent attached to Ch. 443, L. 1989, provided: "A statement of intent is required for this bill in order to provide guidance to the department of state lands [functions now transferred to department of environmental quality] concerning the rulemaking authority that is provided in the bill. The department is authorized to adopt rules concerning the types and methods of investigations it may conduct to appropriately respond to complaints about the use of explosives associated with hard-rock mining and exploration activities. The rules may also specify the manner in which persons using explosives shall participate and cooperate in the department's investigation of a complaint and in carrying out any changes ordered by the department as a result of the investigation."

## 82-4-357. Abatement of environmental emergencies.

### Compiler's Comments

*1991 Statement of Intent:* The statement of intent attached to Ch. 637, L. 1991, provided: "A statement of intent is required for this bill to provide guidance to the department of state lands [functions now transferred to department of environmental quality] concerning the adoption of rules to define the types of department expenses that applicants for hard-rock mine operating permits will be required to pay through increased permit application fees. Section 82-4-335(3) of the bill allows the department to increase the permit application review fee to fund expenses that are beyond the department's normal operating expenses and that are reasonably necessary in order for the department to provide a timely and adequate review, including any environmental review that is conducted pursuant to the requirements of the Montana Environmental Policy Act. The department's rules should authorize the use of the money collected from increased permit application fees for expenses, such as the hiring of temporary employees and contracted consultants and data collection and analysis when, due to workload considerations and statutory deadlines, the department cannot otherwise perform an adequate review."

*Effective Date:* Section 11, Ch. 637, L. 1991, provided that this section is effective July 1, 1991.

## 82-4-360. When activity prohibited — exception.

### Compiler's Comments

*2001 Amendment:* Chapter 488 in (1) near middle after "bond forfeited under this part" inserted reference to department's receipt of bond proceeds and surety's completion of reclamation on the person's behalf; inserted (2)(b) regarding conditions leading to bond forfeiture; and made minor changes in style. Amendment effective May 1, 2001.

*Saving Clause:* Section 12, Ch. 488, L. 2001, was a saving clause.

*Severability:* Section 13, Ch. 488, L. 2001, was a severability clause.

*1997 Amendment:* Chapter 42 in (2)(a) substituted "82-4-341(6)" for "82-4-341(5)". Amendment effective March 12, 1997.

*1995 Amendment:* Chapter 418 in (2)(a) substituted "department" for "board". Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

## 82-4-361. Violation — penalties — waiver.

### Compiler's Comments

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 1, Ch. 191, L. 2023. Amendment effective October 1, 2023.

*2021 Amendment:* Chapter 535 in (7) at end deleted "or, if mutually agreed to by the parties to the action, in the first judicial district, Lewis and Clark County". Amendment effective October 1, 2021.

*2005 Amendments — Composite Section:* Chapter 486 inserted (1) relating to violation letters; in (2)(a) at beginning inserted "By issuance of an order pursuant to subsection (6)" and in two places before "penalty" deleted "civil"; in (2)(a)(i) near middle substituted "rule adopted or an order issued" for "rule or order adopted"; in (2)(a)(ii) near middle substituted "rule adopted or an order issued" for "rule or order adopted"; in (2)(b) near end before "penalty" inserted "administrative"; inserted (2)(c) relating to use of judicial action or injunctive relief; inserted (3) relating to penalties for a judicial action (the last sentence concerning the penalty factors in 82-4-1001 was not codified because it was redundant with subsection (4) as inserted by Ch. 487); deleted former (4) that read: "(4) The department shall notify the person or operator of the violation. The department shall issue a statement of proposed penalty within 30 days after issuing the notice of the violation. The person or operator, by filing a written request stating the reason for the request within 20 days of receipt of the notice of proposed penalty, is entitled to a hearing before the board on the issues of whether the alleged violation has occurred and whether the penalty proposed to be assessed is proper. After the hearing, the board shall make findings of fact and issue a written decision as to the occurrence of the violation and, if the board finds that the violation occurred, the amount of penalty warranted. The board shall order the payment of a penalty in that amount. If the time for requesting a hearing expires without a hearing request, the department shall make the findings of fact and issue the written decision and order. The person or operator shall remit the amount of the penalty or petition for judicial review within 30 days of receipt of the order. A person or operator who fails to request the hearing provided for in this subsection or who fails to petition for judicial review within 30 days of receipt of the order forfeits that person's or operator's right to seek judicial review of the violation or penalty determinations. These penalties are recoverable in an action brought by the department in district court"; inserted (6) relating to corrective orders; in (7) near beginning inserted "penalties or" and at end substituted "the first judicial district, Lewis and Clark County" for "any other judicial district" and deleted former last sentence that read: "Legal actions for review of penalty orders or for recovery of penalties must be brought in the district court in the first judicial district, Lewis and Clark County"; and made minor changes in style. Amendment effective October 1, 2005.

Chapter 487 in (2)(a)(ii) near middle substituted "purposely or knowingly" for "willfully"; in (4) substituted language relating to penalty factors in 82-4-1001 for "The department shall take into account the following factors in determining whether to institute a civil penalty action and in determining the penalty amount:

(a) the nature, circumstances, extent, and gravity of the violation;

(b) the violator's prior history of violations;

(c) the economic benefit or savings, if any, to the violator resulting from the violator's action;

(d) the amounts voluntarily expended by the violator to address or mitigate the violation or impacts of the violation; and

(e) other matters that justice may require"; and made minor changes in style. Amendment effective January 1, 2006.

*Saving Clause:* Section 5, Ch. 486, L. 2005, was a saving clause.

Section 29, Ch. 487, L. 2005, was a saving clause.

*2001 Amendment:* Chapter 79 in (3) near end after "order" substituted "issued" for "adopted"; in (4) in second sentence after "after" inserted "issuing the", in third sentence after "request" inserted "stating the reason for the request" and after "hearing" inserted "before the board", in fourth sentence after "hearing" substituted "the board" for "or after the time for requesting a hearing has expired, the department" and after "violation and" inserted "if the board finds that the violation occurred", at beginning of fifth sentence substituted "board" for "department", inserted sixth sentence regarding department action if the time for requesting a hearing expires, and at end of ninth sentence after "department" inserted "in district court"; and made minor changes in style. Amendment effective March 20, 2001.

*Preamble:* The preamble attached to Ch. 79, L. 2001, provided: "WHEREAS, certain environmental statutes administered by the Montana Department of Environmental Quality provide that a person aggrieved by a decision of the Department may appeal that decision to the Director of the Department; and

WHEREAS, the possibility of an appeal prevents the Director from becoming involved in certain Department decisions that are subject to appeal to the Director; and

WHEREAS, section 82-4-427, MCA, states that a contested case hearing requested under The Opencut Mining Act must be held within 30 days after the hearing is requested; and

WHEREAS, it is difficult for the Department to conduct a contested case hearing under that Act within 30 days after the hearing is requested; and

WHEREAS, certain revisions to statutes administered by the Department are necessary for clarity and consistency and to conform the statutes to current drafting style."

*Saving Clause:* Section 18, Ch. 79, L. 2001, was a saving clause.

*1997 Amendments:* Chapter 271 in (1)(a), at beginning, substituted "The department may assess an administrative" for "Except as provided in subsections (1)(b) and (2), a", after "additional" inserted "administrative", near end, after "continues and", inserted "may bring an action for", and after "violation" deleted "may be imposed"; inserted (2) setting out factors to be considered prior to instituting a civil penalty action; deleted (2)(b) that read: "(b) The civil penalties provided for in this section may be waived for a minor violation if it is determined that the violation does not represent potential harm to public health, public safety, or the environment and does not impair the administration of this part. The board shall adopt rules to implement and administer a procedure for waiver of a penalty under this subsection"; and made minor changes in style.

Chapter 273 in (4), in fourth and fifth sentences, substituted "department" for "board". Amendment effective April 16, 1997.

Chapter 535 inserted (5) relating to the district in which actions must be brought.

*Applicability:* Section 3, Ch. 271, L. 1997, provided: "[This act] applies to proceedings begun on or after [the effective date of this act]." Effective April 16, 1997.

*Saving Clause:* Section 6, Ch. 273, L. 1997, was a saving clause.

*1995 Amendment:* Chapter 204 substituted (1)(a) and (1)(b) regarding civil penalties for each violation, for continuing violations, and for violations creating imminent danger to health or safety and authorizing injunctions for former language that read: "A person who violates any of the provisions of this part, the rules or orders adopted under this part (except 82-4-339), the provisions of any license or permit, or the conditions of a small minor exemption shall pay a civil penalty of not less that $100 or more than $1,000 for the violations and an additional civil penalty of not less than $100 or more than $1,000 for each day during which a violation continues and may be enjoined from continuing such violations as provided in this section. These penalties are recoverable in any action brought in the name of the state of Montana by the attorney general in the district court of the first judicial district of this state in and for the county of Lewis and Clark or in the district court having jurisdiction of the defendant"; at beginning of (2)(a) substituted language authorizing the Department to bring an action for restraining order for former language requiring the Attorney General, upon request of the Department, to initiate suit for recovery of penalties; inserted (3) providing procedures for hearing and appeals; and made minor changes in style.

*1991 Amendment:* In (1), near beginning, inserted "the provisions of any license or permit". Amendment effective July 1, 1991.

*1989 Amendment:* Inserted (3) providing for waiver of civil penalties under certain circumstances and requiring adoption of rules; and made minor changes in phraseology.

*1989 Statement of Intent:* The statement of intent attached to Ch. 93, L. 1989, provided: "A statement of intent is required for this bill because it delegates rulemaking authority to the board of land commissioners [functions now transferred to board of environmental review]. Under the provisions of this bill, the board of land commissioners [functions now transferred to board of environmental review] shall adopt rules to implement and administer a procedure for waiver of a minor violation from the civil penalty provisions provided in [section 5] [82-4-361].

It is the intent of the legislature that the waiver be allowed only if a violation does not represent potential harm to the public health, public safety, or the environment and does not otherwise impair administration of the provisions of Title 84, chapter 4, part 3."

*1985 Amendments:* Chapter 284 near beginning of (1) after "this part", inserted "except 82-4-339".

Chapter 386 in (1) near beginning, after "under this part", inserted "or conditions of a small-miner exemption".

**82-4-362. Suspension of permits — hearing.**

**Compiler's Comments**

*2001 Amendment:* Chapter 79 in (1) near middle of first sentence after "notice of" substituted "violation" for "noncompliance" and at end before "permit" inserted "license or", at beginning of second sentence inserted "license or", in third sentence after "suspension of a" inserted "license or", in fourth sentence after "served" inserted "on the licensee or permittee", and in fifth sentence after "notice of" substituted "violation" for "noncompliance", after "specify" substituted "the provisions of" for "in what respects the operator has failed to comply with", before "permit" inserted "license or", and after "permit" inserted "violated and the facts alleged to constitute the violation"; in (2) in first sentence after "notice of" substituted "violation" for "noncompliance" and before "permit" inserted "license or", deleted former second sentence that read: "The licensee or permittee is entitled to a hearing before the department on the revocation of a permit or license or the forfeiture of a performance bond if a hearing is requested within 30 days after service of notice as provided in subsection (1)", at beginning of second sentence after "notice" inserted "of violation or order of suspension" and at end after "hearing" inserted "before the board", inserted third sentence regarding a request for a hearing within 30 days of receipt of the notice or order, and at end of fourth sentence substituted "board" for "department"; and made minor changes in style. Amendment effective March 20, 2001.

*Preamble:* The preamble attached to Ch. 79, L. 2001, provided: "WHEREAS, certain environmental statutes administered by the Montana Department of Environmental Quality provide that a person aggrieved by a decision of the Department may appeal that decision to the Director of the Department; and

WHEREAS, the possibility of an appeal prevents the Director from becoming involved in certain Department decisions that are subject to appeal to the Director; and

WHEREAS, section 82-4-427, MCA, states that a contested case hearing requested under The Opencut Mining Act must be held within 30 days after the hearing is requested; and

WHEREAS, it is difficult for the Department to conduct a contested case hearing under that Act within 30 days after the hearing is requested; and

WHEREAS, certain revisions to statutes administered by the Department are necessary for clarity and consistency and to conform the statutes to current drafting style."

*Saving Clause:* Section 18, Ch. 79, L. 2001, was a saving clause.

*1995 Amendments:* Chapter 204 in first and last sentences in (1), after "permit", deleted "or reclamation plan", inserted second sentence authorizing suspension of permit for failure to comply with order to pay civil penalty, and in third sentence, after "permit", deleted "including the reclamation plan"; and made minor changes in style.

Chapter 418 in (1), in three places, and in (3), in two places, substituted "director" for "commissioner"; and in (2) substituted "department" for "board". Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1993 Amendment:* Chapter 598 near middle of first sentence of (1), after "complied with", deleted "within the time limits set by the department or board or by this part", near middle of third sentence, before "mail", deleted "or registered", and in fourth sentence, after "noncompliance", inserted "or order of suspension", before "or the reclamation plan" inserted "the permit", and after "or the reclamation plan" inserted "and must, if the violation has not been abated, order abatement within a specified time period"; and made minor changes in style.

*1991 Amendment:* In (1), near beginning of first sentence before "reclamation", inserted "a license, permit, or", inserted second sentence allowing Commissioner to suspend a permit when a violation creates a danger to persons outside the permit area, and at end of third sentence, before "permit", inserted "license or"; and made minor changes in style. Amendment effective July 1, 1991.

*1989 Amendment:* In (1), in two places after "rules", inserted "adopted under this part"; inserted second, third, and fourth sentences of (2) providing hearing and notice requirements for licensees or permittees; and made minor changes in phraseology.

*1989 Statement of Intent:* The statement of intent attached to Ch. 93, L. 1989, provided: "A statement of intent is required for this bill because it delegates rulemaking authority to the board of land commissioners [functions now transferred to board of environmental review]. Under the provisions of this bill, the board of land commissioners [functions now transferred to board of environmental review] shall adopt rules to implement and administer a procedure for waiver of a minor violation from the civil penalty provisions provided in [section 5] [82-4-361].

It is the intent of the legislature that the waiver be allowed only if a violation does not represent potential harm to the public health, public safety, or the environment and does not otherwise impair administration of the provisions of Title 84, chapter 4, part 3."

*1985 Amendment:* Inserted (3) referring to suspension for failure to pay fee or file report required under 82-4-339.

*Section Not Codified:* Section 50-1226, R.C.M. 1947, concerning the validity of operating permits issued under prior law, was not codified in the MCA because it was of temporary significance. This statute has not been repealed and is still valid law. Citation may be made to sec. 13, Ch. 281, L. 1974.

## 82-4-367. Long-term or perpetual water treatment permanent trust fund.

**Compiler's Comments**

*Effective Date:* Section 5, Ch. 278, L. 2005, provided that this section is effective July 1, 2005.

## 82-4-371. Reclamation of abandoned mine sites.

**Compiler's Comments**

*2021 Amendment:* Chapter 324 in (3) near beginning of first sentence substituted "department" for "board". Amendment effective July 1, 2021.

*2009 Amendment:* Chapter 78 in (3) inserted second sentence requiring approval of a gift or purchase by the board of land commissioners; and made minor changes in style. Amendment effective March 25, 2009.

*Effective Date:* Section 5, Ch. 329, L. 1995, provided that this section is effective on passage and approval. Approved April 5, 1995.

## 82-4-372. Filing of lien for abandoned mine reclamation project.

**Compiler's Comments**

*Effective Date:* Section 5, Ch. 329, L. 1995, provided that this section is effective on passage and approval. Approved April 5, 1995.

## 82-4-375. Engineer of record — duties.

**Compiler's Comments**

*Effective Date:* This section is effective October 1, 2015.

*Applicability:* Section 16, Ch. 399, L. 2015, provided: "[This act] applies to:

(1) operators producing or milling ore under an existing operating permit on or after [the effective date of this act];

(2) applicants who submit an application for an operating permit after [the effective date of this act]; and

(3) a tailings storage facility constructed after [the effective date of this act]." Effective October 1, 2015.

## 82-4-376. Tailings storage facility — design document — fee.

**Compiler's Comments**

*Effective Date:* This section is effective October 1, 2015.

*Applicability:* Section 16, Ch. 399, L. 2015, provided: "[This act] applies to:

(1) operators producing or milling ore under an existing operating permit on or after [the effective date of this act];

(2) applicants who submit an application for an operating permit after [the effective date of this act]; and

(3) a tailings storage facility constructed after [the effective date of this act]." Effective October 1, 2015.

## 82-4-377. Independent review panel — selection — duties.

**Compiler's Comments**

*Effective Date:* This section is effective October 1, 2015.

*Applicability:* Section 16, Ch. 399, L. 2015, provided: "[This act] applies to:

(1) operators producing or milling ore under an existing operating permit on or after [the effective date of this act];

(2) applicants who submit an application for an operating permit after [the effective date of this act]; and

(3) a tailings storage facility constructed after [the effective date of this act]." Effective October 1, 2015.

## 82-4-378. Quality assurance during construction.

**Compiler's Comments**

*Effective Date:* This section is effective October 1, 2015.

*Applicability:* Section 16, Ch. 399, L. 2015, provided: "[This act] applies to:

(1) operators producing or milling ore under an existing operating permit on or after [the effective date of this act];

(2) applicants who submit an application for an operating permit after [the effective date of this act]; and

(3) a tailings storage facility constructed after [the effective date of this act]." Effective October 1, 2015.

## 82-4-379. Tailings operation, maintenance, and surveillance manual.

**Compiler's Comments**

*Effective Date:* This section is effective October 1, 2015.

*Applicability:* Section 16, Ch. 399, L. 2015, provided: "[This act] applies to:

(1) operators producing or milling ore under an existing operating permit on or after [the effective date of this act];

(2) applicants who submit an application for an operating permit after [the effective date of this act]; and

(3) a tailings storage facility constructed after [the effective date of this act]." Effective October 1, 2015.

## 82-4-380. Periodic review required.

**Compiler's Comments**

*Effective Date:* This section is effective October 1, 2015.

*Applicability:* Section 16, Ch. 399, L. 2015, provided: "[This act] applies to:

(1) operators producing or milling ore under an existing operating permit on or after [the effective date of this act];

(2) applicants who submit an application for an operating permit after [the effective date of this act]; and

(3) a tailings storage facility constructed after [the effective date of this act]." Effective October 1, 2015.

## 82-4-381. Annual inspections.

**Compiler's Comments**

*Effective Date:* This section is effective October 1, 2015.

*Applicability:* Section 16, Ch. 399, L. 2015, provided: "[This act] applies to:

(1) operators producing or milling ore under an existing operating permit on or after [the effective date of this act];

(2) applicants who submit an application for an operating permit after [the effective date of this act]; and

(3) a tailings storage facility constructed after [the effective date of this act]." Effective October 1, 2015.

## 82-4-390. Cyanide heap and vat leach open-pit gold and silver mining prohibited.

**Compiler's Comments**

*1999 Amendment:* Chapter 457 at end of (1) inserted exception clause; and at end of (2) substituted "or any amended permit that is necessary for the continued operation of the mine" for "but the permit may not be amended to allow its operations to be expanded". Amendment effective April 23, 1999.

*Codification:* Section 2, I.M. No. 137, a codification instruction, omitted the standard clause providing that the provisions of this part apply to section 1, I.M. No. 137.

*Effective Date:* Section 3, I.M. No. 137, provided that this section was effective upon approval by the electorate. Initiative approved November 3, 1998.

**Case Notes**

*Initiative Banning Cyanide Mining — Reverse Condemnation Against State Not Justiciable in Federal Court:* Initiative Measure No. 137, codified as 82-4-390, which banned the use of open-pit mining using cyanide leaching except as to mines operating with existing permits, could not be the basis of a reverse condemnation action in federal court because such an action is jurisdictionally barred by the 11th amendment to the U.S. Constitution. Eleventh amendment immunity cannot be avoided by the application of Ex parte Young, 209 US 123 (1908), since a reverse condemnation action is a form of retroactive relief and not a claim for prospective relief. Seven Up Pete Venture v. Schweitzer, 523 F3d 948 (9th Cir. 2008).

*Failure to Actively Pursue Administrative Mining Permitting Process — Mineral Lease Properly Terminated:* Plaintiffs had an operating permit pending for a cyanide leach pit gold mine when voters passed Initiative Measure No. 137 (I-137) that prohibited cyanide mining in Montana. Plaintiffs then filed a legal challenge to I-137, but failed to pursue any administrative actions in pursuit of the permitting process. The state Department of Environmental Quality (DEQ) subsequently terminated plaintiffs' mineral leases prior to resolution of the legal challenge on grounds that plaintiffs had not actively pursued permitting until requesting an administrative hearing 2 weeks after the leases expired, and the District Court upheld the agency's decision. Plaintiffs contended on appeal that the leases were improperly terminated, but the Supreme Court affirmed. Challenging the validity of a voter-passed initiative, without more, did not constitute an administrative act of pursuing a permit. The DEQ was not obligated to extend the primary terms of the leases to include the time necessary for plaintiffs to seek invalidation of I-137, and because plaintiffs did not pursue the administrative process during the legal challenge, the leases were properly terminated. Seven Up Pete Venture v. St., 2005 MT 146, 327 M 306, 114 P3d 1009 (2005).

*Initiative Banning Cyanide Mining Not Unconstitutional Taking or Impairment of Contract — Opportunity to Apply for Mining Permit Not Property Right:* Plaintiffs had an operating permit pending for a cyanide leach pit gold mine when voters passed Initiative Measure No. 137 (I-137) that prohibited cyanide mining in Montana. Plaintiffs sued on grounds that I-137 interfered with their property right in the permit, constituted an unconstitutional regulatory taking for which they should be compensated, and violated the contract clause in Art. II, sec. 31, Mont. Const. The District Court found for the state on all issues, and plaintiffs appealed, but the Supreme Court affirmed. Plaintiffs' mere opportunity to seek a mining permit did not constitute a property right, given the state's wide discretion to reject the application even without the passage of I-137. Further, I-137 did not constitute a taking because plaintiffs had not yet obtained a right to mine that the initiative took away. Moreover, even though the District Court incorrectly held that plaintiffs' corporate mining agreement was not substantially impaired by I-137, the court nonetheless correctly concluded that there was no contract clause violation because I-137 was reasonably related to the legitimate and significant public purpose of protecting the environment. Seven Up Pete Venture v. St., 2005 MT 146, 327 M 306, 114 P3d 1009 (2005).

## Part 4
## Opencut Mining Reclamation

### Part Compiler's Comments

*Report to Environmental Quality Council:* Section 15, Ch. 334, L. 2019, provided: "(1) The department of environmental quality shall review laws, rules, and fees for the opencut mining program and solicit suggestions from stakeholders, including suggestions to streamline the permitting process.

(2) Before September 15, 2020, the department shall report the findings of the review and proposed changes to laws, rules, or fees to the environmental quality council established in 5-16-101."

*Severability Clause:* Section 16, Ch. 326, L. 1973, read: "The provisions of this act are severable, and if any part or provision thereof shall be held void the decision of the court so holding shall not affect or impair any of the remaining parts of provisions of this act that are severable from the invalid applications."

*Repealing Clause:* Section 17, Ch. 326, L. 1973, read: "Sections 50-1018 through 50-1033, R.C.M. 1947, are repealed. However, contracts entered into under the provisions of sections 50-1018 through 50-1033, R.C.M. 1947, are not affected hereby, and shall remain in effect until terminated or completed."

### Part Administrative Rules

Title 17, chapter 24, subchapter 2, ARM Rules implementing The Opencut Mining Act.

### Part Attorney General's Opinions

*Policy Provision of Act Relevant to Determination of Extent of Board's Contracting Authority:* A policy section is relevant not only to the question of legislative intent concerning an act's overall purpose but also to the scope of administrative agency authority under the act. Thus, 82-4-402, the policy section of The Opencut Mining Act, is properly considered in determining the extent of the Board of Land Commissioners' (functions now transferred to Board of Environmental Review) authority under this Act to require reclamation contract commitments in addition to those mandated under 82-4-434. 40 A.G. Op. 47 (1984).

### Part Collateral References

Improving Montana's Opencut Mine Permitting Process, Performance Audit, Mont. Leg. Audit Div. (June 2008), https://leg.mt.gov/content/Publications/Audit/Report/08P-04.pdf.

### 82-4-402. Intent, findings, and policy.

### Compiler's Comments

*2007 Amendment:* Chapter 385 in (2) at end of first sentence of introductory clause and in (2)(c) at end substituted "operations" for "materials mining". Amendment effective October 1, 2007.

*2003 Amendment:* Chapter 361 inserted (1) relating to constitutional obligations and legislative intent; and made minor changes in style. Amendment effective April 16, 2003.

*Preamble:* The preamble attached to Ch. 361, L. 2003, provided: "WHEREAS, Article II, section 3, of the Montana Constitution enumerates certain inalienable individual rights, including the right to a clean and healthful environment, the right of pursuing life's basic necessities, the right of enjoying and defending an individual's life and liberty, the right of acquiring, possessing, and protecting property, and the right of seeking individual safety, health, and happiness in all lawful ways; and

WHEREAS, the constitutionally enumerated rights are by their very nature bound to result in competing interests in specific fact situations; and

WHEREAS, Article IX, section 1, of the Montana Constitution provides that the state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations and directs the Legislature to provide for the administration and enforcement of this duty and also directs the Legislature to provide adequate remedies for the protection of the environmental life support system from degradation and to provide adequate remedies to prevent unreasonable depletion and degradation of natural resources; and

WHEREAS, the Legislature has reviewed the intent of the framers of the 1972 Montana Constitution as evidenced in the verbatim transcripts of the constitutional convention; and

WHEREAS, there is no indication that one enumerated inalienable right is intended to supersede other inalienable rights, including the right to use property in all lawful means; and

WHEREAS, the Legislature, mindful of its constitutional obligation to provide for the administration and enforcement of the constitution, has enacted a comprehensive set of laws to accomplish the goals of the constitution, including the Montana Clean Indoor Air Act of 1979, Title 50, chapter 40, part 1, MCA; the Montana Environmental Policy Act, Title 75, chapter 1, parts 1 through 3, MCA; the Clean Air Act of Montana, Title 75, chapter 2, parts 1 through 4, MCA; water quality laws, Title 75, chapter 5, MCA; The Natural Streambed and Land Preservation Act of 1975, Title 75, chapter 7, part 1, MCA; The Montana Solid Waste Management Act, Title 75, chapter 10, part 2, MCA; The Montana Hazardous Waste Act, Title 75, chapter 10, part 4, MCA; the Comprehensive Environmental Cleanup and Responsibility Act, Title 75, chapter 10, part 7, MCA; the Montana Megalandfill Siting Act, sections 75-10-901 through 75-10-945, MCA; the Montana Underground Storage Tank Installer and Inspector Licensing and Permitting Act, Title 75, chapter 11, part 2, MCA; the Montana Underground Storage Tank Act, Title 75, chapter 11, part 5, MCA; the Montana Major Facility Siting Act, Title 75, chapter 20, MCA; the Open-Space Land and Voluntary Conservation Easement Act, Title 76, chapter 6, MCA; the Environmental Control Easement Act, Title 76, chapter 7, MCA; The Strip and Underground Mine Siting Act, Title 82, chapter 4, part 1, MCA; The Montana Strip and Underground Mine Reclamation Act, Title 82, chapter 4, part 2, MCA; The Opencut Mining Act, Title 82, chapter 4, part 4, MCA; and The Nongame and Endangered Species Conservation Act, Title 87, chapter 5, part 1, MCA."

*Severability:* Section 39, Ch. 361, L. 2003, was a severability clause.

*Retroactive Applicability:* Section 41, Ch. 361, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to actions for judicial review or other causes of action challenging the issuance of a permit, petition for review, amendment, license, arbitration, action, certificate, or inspection that are pending but not yet decided on or after [the effective date of this act]." Effective April 16, 2003.

*2001 Amendment:* Chapter 325 at beginning inserted introductory phrase concerning economy of state; and made minor changes in style. Amendment effective October 1, 2001.

*1999 Amendment:* Chapter 507 in two places substituted "opencut materials" for "opencut mineral"; near end of second sentence after "property" inserted "through reclamation"; and made minor changes in style. Amendment effective April 28, 1999.

*Saving Clause:* Section 20, Ch. 507, L. 1999, was a saving clause.

*Severability:* Section 21, Ch. 507, L. 1999, was a severability clause.

*1987 Amendment:* In two places substituted "mineral mining" for "bentonite, clay, scoria, phosphate rock, sand, or gravel mining".

### Attorney General's Opinions

*Section Properly Considered in Determining Extent of Board's Contracting Authority Under Act:* A policy section is relevant not only to the question of legislative intent concerning an act's overall purpose but also to the scope of administrative agency authority under the act. Thus, this section is properly considered in determining the extent of the Board of Land Commissioners' (functions now transferred to Board of Environmental Review) authority under the Opencut Mining Act to require reclamation contract commitments in addition to those mandated under 82-4-434. 40 A.G. Op. 47 (1984).

## 82-4-403. Definitions.

### Compiler's Comments

*2021 Amendment:* Chapter 545 inserted definitions of occupied dwelling unit and water conveyance facilities; and made minor changes in style. Amendment effective May 14, 2021.

*2013 Amendment:* Chapter 198 in definition of affected land after "operations" deleted "including the area from which overburden or materials are to be or have been removed and upon which the overburden is to be or has been deposited, existing private roads that are used and roads constructed to gain access to the materials, areas of processing facilities on or contiguous to the opencut mine, treatment and sedimentation ponds, soil and materials stockpile areas on or contiguous to the opencut mine, and any other surface or subsurface disturbance associated with opencut operations. For the purposes of this subsection, an existing"; in definition of opencut operation inserted "including", in (a) at end deleted "including access", in (c) substituted current language for "processing of materials within the area that is to be mined or contiguous to the area that is to be mined or the access road", inserted (d) concerning overburden and materials, deleted former (d) that read: "(d) transportation of materials on areas referred to in subsections (7)(a) through (7)(c)", in (e) substituted current language for "storing or stockpiling of materials on areas referred to in subsections (7)(a) through (7)(c)", and in (g) substituted current language for "any other associated surface or subsurface activity conducted on areas referred to in subsections (7)(a) through (7)(c)"; in definition of operator substituted current language for ""Operator" means a person engaged in or controlling an opencut operation. When a permit has been issued for an operation, a person who removes materials from the site under the control of the operator is not considered an operator"; in definition of processing facilities in (c) substituted current language for "other equipment used in processing opencut materials" and inserted (d) including washout areas; and made minor changes in style. Amendment effective October 1, 2013.

*2007 Amendment:* Chapter 385 throughout section in three places substituted "opencut operation" for references to opencut mining operation; inserted definitions of amendment and plan of operation; in definition of affected land near middle of first sentence after "deposited" inserted "existing private roads that are used and", after "ponds" inserted "soil", and at end inserted "and any other surface or subsurface disturbance associated with opencut operations" and inserted second sentence providing that an affected road may be included as affected land only with the landowner's consent; deleted definition of final cut that read: ""Final cut" means the last pit created in an opencut-mined area"; in definition of landowner after "means the" substituted "holder of legal title to" for "owner of"; in definition of materials after "soil" deleted "materials" and after "gravel" inserted "or mixtures of those substances"; in definition of opencut operation in introductory clause after "means the" substituted "following activities, if they are conducted for the primary purpose of sale or utilization of materials" for "mining of materials by", in (a)(i) after "overburden" deleted "lying upon natural deposits of materials", and inserted (b) through (g) describing activities that are defined as an opencut operation; in definition of operator inserted second sentence providing that when a permit has been issued for an operation, a person who removes materials from the site under the control of the operator is not considered an operator; in definition of overburden after "earth" deleted "and other materials"; in definition of processing facilities in (a) after "screens" inserted "and pug mills", in (b) after "asphalt" inserted "wash", and inserted (c) including other processing equipment in the definition; deleted definition of progress report that read: ""Progress report" means a report on a form provided by the department, with appropriate maps, that shows:

(a) any change in ownership or control of the affected land and includes a landowner consent form if a change has occurred;

(b) any change in personnel who are in charge of the operation or responsible for reclamation;

(c) any change in any contractors or subcontractors who will be working at the site; and

(d) all land that has been affected by the operation"; in definition of reclamation after "affected land" deleted "by opencut-mining operations" and at end after "industrial" substituted "development" for "sites"; deleted definition of reclamation plan that read: ""Reclamation plan" means a plan that:

(a) meets the requirements of 82-4-434; and

(b) contains a description of current land use, topographical data, water data, soils data, leased areas, and intended mine areas and an explanation of proposed reclamation of the land, including appropriate maps"; deleted definition of refuse that read: ""Refuse" means all waste material directly connected with the opencut-mining operations"; in definition of soil at beginning substituted ""Soil" means the dark or root-bearing surface matter that has been generated through time by the interaction of biological activity, climate, topography, and parent material" for ""Soil materials" are those horizons that contain topsoil or other soils leached free of deleterious salts", after "recognized" inserted "and identified", and at end after "authorities" inserted "and methods"; deleted definition of spoil that read: ""Spoil" means the overburden that is disturbed from its natural state in the process of opencut mining"; and made minor changes in style. Amendment effective October 1, 2007.

*1999 Amendment:* Chapter 507 in definitions of affected land, opencut mining, and overburden substituted "material" or "materials" for "mineral" or "minerals"; deleted former definition of contract that read: ""Contract" means a mined land reclamation contract prepared by the board to meet the requirements of this part"; in definition of landowner substituted "subjected to" for "directly affected by"; substituted materials for minerals as defined term and in definition of materials substituted "peat" for "phosphate rock" and after "sand" inserted "soil materials"; in definition of opencut mining deleted former (c) that read: "(c) removing overburden for the purpose of determining the location, quality, or quantity of any natural deposit of minerals"; in definition of progress report after "report" substituted language regarding form and maps provided by department and outlining map requirements for former language that read: "showing the land that the operator has affected by opencut mining during the year. The report must show the number of acres of affected land and all reclamation accomplished"; deleted former definition of public notice that read: ""Public notice" means notice given by publication in a newspaper in the general area where the affected land is located. The notice must be given once a week for 3 successive weeks"; in definition of reclamation plan inserted "meets the requirements of 82-4-434"; and made minor changes in style. Amendment effective April 28, 1999.

*Saving Clause:* Section 20, Ch. 507, L. 1999, was a saving clause.

*Severability:* Section 21, Ch. 507, L. 1999, was a severability clause.

*Applicability:* Section 23(1), Ch. 507, L. 1999, provided: "[Section 1(8)] [82-4-303(8)] and [section 9(6)] [82-4-403(6)] apply to operations conducted after July 31, 1999, except that the department of environmental quality may accept small miner exclusions and issue licenses and permits to implement these provisions at any time after [the effective date of this act] [effective April 28, 1999]. [Section 1(8)] [82-4-303(8)] and [section 9(6)] [82-4-403(6)] apply to those operations upon filing of the exclusion or issuance of the license or permit."

Section 23(3)(b), Ch. 507, L. 1999, provided that for purposes of the amendments in [section 9], amending 82-4-403, "relating to changing opencut mining "contracts" to "permits", contracts issued before [the effective date of this act] [effective April 28, 1999] are permits. The department of environmental quality shall issue permit documents to the contract holders within a reasonable time after [the effective date of this act]." Effective April 28, 1999.

*1995 Amendment:* Chapter 418 in definition of Board substituted "board of environmental review provided for in 2-15-3502" for "state board of land commissioners"; inserted definition of Department; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1987 Amendment:* Substituted ""Affected land" means the area of land and land covered by water that is disturbed by opencut mining operations, including the area from which overburden or mineral is to be or has been removed and upon which the overburden is to be or has been deposited, roads constructed to gain access to the mineral, areas of processing facilities on or contiguous to the opencut mine, treatment and sedimentation ponds, and mineral stockpile areas on or contiguous to the opencut mine" for former definition that read: ""Affected land" means the area of land from which overburden is to be or has been removed and upon which the overburden is to be or has been deposited"; deleted former (5) that read: ""Highwall" means that side of the pit adjacent to unmined land"; inserted definition of minerals; in definition of opencut mining, in introductory clause, and in (7)(c) and definition of overburden substituted "minerals" for "bentonite, clay, scoria, phosphate rock, sand, or gravel"; in definition of opencut mining inserted language referring to mining directly from natural deposits of minerals; in (7)(c), at beginning, substituted "removing" for "including the removal of"; in definition of operator substituted "or" for "and"; and inserted definition of processing facilities.

## 82-4-405. Inapplicability to government.

### Compiler's Comments

*2021 Amendment:* Chapter 428 at beginning deleted "Except as provided in subsection (2)"; deleted former (2) that read: "(2) Counties, cities, and towns are responsible for the fees required pursuant to 82-4-437(2) and (3)"; and made minor changes in style. Amendment effective May 7, 2021.

*2019 Amendment:* Chapter 334 in (2) substituted "fees" for "fee" and after "82-4-437(2)" inserted "and (3)". Amendment effective July 1, 2019.

*2009 Amendment:* Chapter 477 in (1) at beginning inserted exception clause; inserted (2) providing that counties, cities, and towns are responsible for the fee required pursuant to 82-4-437(2); and made minor changes in style. Amendment effective May 8, 2009.

*Applicability:* Section 12(1), Ch. 477, L. 2009, provided that except as provided in subsection (4), this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 2007.

Section 12(4), Ch. 477, L. 2009, provided: "The exemption provided for in 15-38-113(4) applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 2000, for counties, cities, and towns."

*1999 Amendment:* Chapter 507 in middle inserted reference to federal government or its agencies. Amendment effective April 28, 1999.

*Saving Clause:* Section 20, Ch. 507, L. 1999, was a saving clause.

*Severability:* Section 21, Ch. 507, L. 1999, was a severability clause.

### Attorney General's Opinions

*Retroactive:* After July 1, 1975, the State of Montana and its subdivisions need not comply with any fee or bonding requirements of The Opencut Mining Act. 36 A.G. Op. 31 (1975) (see 2009 amendment).

## 82-4-406. Exemption — opencut operations on federal and state lands.

### Compiler's Comments

*2021 Amendment:* Chapter 324 in two places substituted "department" for "board". Amendment effective July 1, 2021.

*2007 Amendment:* Chapter 385 near beginning after "federal" inserted "and state", near middle after "regulations" inserted "or rules administered or", after "federal" inserted "or state", after "administering" inserted "or having jurisdiction over", before "land" inserted "affected", and near end after "controls for" substituted "opencut operations on" for "reclamation of"; and made minor changes in style. Amendment effective October 1, 2007.

### Attorney General's Opinions

*Applicability of Opencut Mining Act:* The Opencut Mining Act does not apply to federal agencies conducting opencut mining operations on private or federal land absent congressional authorization. But the Act does apply to private contractors mining on private land, and unless conflicting federal legislation applies, the Act also applies to private contractors mining on federal land. Any private contractor to whom the Act applies is required to enter into a contract pursuant to 82-4-431. 37 A.G. Op. 164 (1978).

## 82-4-422. Powers, duties, and functions.

### Compiler's Comments

*2021 Amendment:* Chapter 324 in (2) in introductory clause substituted "department" for "board"; in (2)(b)(iii) after "requirements" deleted "that the board considers"; in (3) at beginning inserted "The board shall"; and made minor changes in style. Amendment effective July 1, 2021.

*2007 Amendment:* Chapter 385 in (1)(a) near middle after "evaluation of the" substituted "proposed opencut operations" for "operation by" and at end after "observed" deleted "and that the operation and the reclamation of the affected area can be carried out consistently with the purpose of this part"; inserted (1)(e) allowing the department to enforce, administer, and implement the opencut mining laws; in (2)(a) substituted "opencut operations" for "opencut mining"; in (2)(b)(ii) at beginning inserted "providing procedures" and at end substituted "filing of annual reports" for "for any other matters of administration not specifically enumerated in this part"; inserted (2)(b)(iii) concerning administrative requirements; and made minor changes in style. Amendment effective October 1, 2007.

*2001 Amendments — Composite Section:* Chapter 79 deleted former (1)(b) that read: "(b) conduct hearings and, for the purposes of conducting those hearings, administer oaths and affirmations, subpoena witnesses, compel attendance of witnesses, hear evidence, and require the production of any books, papers, correspondence, memoranda, agreements, documents, or other records relevant or material to the inquiry"; inserted (2)(c) requiring the board to conduct hearings; and made minor changes in style. Amendment effective March 20, 2001.

Chapter 325 near middle of (1)(a) substituted "requirements of this part and rules adopted to implement this part" for "requirements of the part or rules"; inserted (1)(b) allowing department to amend permits; and made minor changes in style. Amendment effective October 1, 2001.

*Preamble:* The preamble attached to Ch. 79, L. 2001, provided: "WHEREAS, certain environmental statutes administered by the Montana Department of Environmental Quality provide that a person aggrieved by a decision of the Department may appeal that decision to the Director of the Department; and

WHEREAS, the possibility of an appeal prevents the Director from becoming involved in certain Department decisions that are subject to appeal to the Director; and

WHEREAS, section 82-4-427, MCA, states that a contested case hearing requested under The Opencut Mining Act must be held within 30 days after the hearing is requested; and

WHEREAS, it is difficult for the Department to conduct a contested case hearing under that Act within 30 days after the hearing is requested; and

WHEREAS, certain revisions to statutes administered by the Department are necessary for clarity and consistency and to conform the statutes to current drafting style."

*Saving Clause:* Section 18, Ch. 79, L. 2001, was a saving clause.

*1999 Amendment:* Chapter 507 at beginning of (1)(a) substituted "issue permits when" for "enter into contracts where"; in (2)(b) substituted "permits" for "contracts"; and made minor changes in style. Amendment effective April 28, 1999.

*Saving Clause:* Section 20, Ch. 507, L. 1999, was a saving clause.

*Severability:* Section 21, Ch. 507, L. 1999, was a severability clause.

*Applicability:* Section 23(3)(b), Ch. 507, L. 1999, provided that for purposes of the amendments in [section 11], amending 82-4-422, "relating to changing opencut mining "contracts" to "permits", contracts issued before [the effective date of this act] [effective April 28, 1999] are permits. The department of environmental quality shall issue permit documents to the contract holders within a reasonable time after [the effective date of this act]." Effective April 28, 1999.

*1995 Amendment:* Chapter 418 in (1) and (1)(a) substituted "department" for "board"; deleted former (2) that read: "(2) prepare and adopt rules pertaining to opencut mining to accomplish the purposes of this part"; deleted (4) that read: "(4) adopt uniform procedures for the filing of necessary records, the issuance of contracts, and for any other matters of administration not specifically enumerated in this part"; and inserted (2) authorizing the Board to adopt rules on the subjects of former subsections (2) and (4). Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

## 82-4-424. Receipt and expenditure of funds — disposition of penalties and other money.

**Compiler's Comments**

*2019 Amendment:* Chapter 334 in (2) near beginning substituted "except fees provided for in 82-4-437" for "except annual fees"; and deleted former (3) that read: "(3) The department shall deposit 85% of proceeds from annual fees into the opencut fund established in 82-4-438 and transfer 15% of the proceeds from the fees to the department of revenue for distribution in accordance with 15-38-106." Amendment effective July 1, 2019.

*2009 Amendment:* Chapter 477 in (2) near middle of first sentence after "part" inserted "except annual fees"; inserted (3) regarding deposit and transfer of proceeds from annual fees; and made minor changes in style. Amendment effective May 8, 2009.

*Applicability:* Section 12(1), Ch. 477, L. 2009, provided that except as provided in subsection (4), this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 2007.

Section 12(4), Ch. 477, L. 2009, provided: "The exemption provided for in 15-38-113(4) applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 2000, for counties, cities, and towns."

*2007 Amendment:* Chapter 385 in (1) at end of first sentence deleted "by opencut mining"; in (2) at beginning after "All" deleted "fees, fines"; and made minor changes in style. Amendment effective October 1, 2007.

*2001 Amendment:* Chapter 338 deleted former (2) that read: "(2) Any funds of any public works programs available to the department must be expended and used to reclaim and rehabilitate any lands that have been subject to opencut mining and that have not been reclaimed and rehabilitated in accordance with the standards of this part"; and substituted (2) concerning deposit of fees, fines, and penalties in the environmental rehabilitation and response account in the state special revenue fund provided for in 75-1-110 and concerning funds held as bond or as a result of bond forfeiture being deposited in the environmental rehabilitation and response account for former text that read: "There is an opencut mining and reclamation account within the state special revenue fund established in 17-2-102. There must be deposited in the account all fees, fines, penalties, and other money that have been or will be paid under the provisions of this part. The money in the account is available to the department through appropriation and must be spent by the department for the reclamation and revegetation of land, research pertaining to the reclamation and revegetation of land, and the rehabilitation of water affected by opencut mining operations and for administration of this part. Any unspent or unencumbered money in the account at the end of a fiscal year must remain in the account until spent or appropriated by the legislature." Amendment effective July 1, 2001.

The amendment to this section made by Ch. 488, L. 2001, was rendered void by sec. 11, Ch. 488, L. 2001, a coordination instruction.

*Severability:* Section 8, Ch. 338, L. 2001, was a severability clause.

*1995 Amendment:* Chapter 418 in (1), in two places, and in (2) substituted "department" for "board"; in (3), in third sentence after "department", deleted "of state lands"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1991 Amendment:* Inserted (3) establishing the opencut mining and reclamation account, providing the purposes for which it may be appropriated, and providing for its reversion.

### 82-4-425. Inspection of opencut operations.

**Compiler's Comments**

*2019 Amendment:* Chapter 334 near beginning before "representatives" deleted "accredited". Amendment effective July 1, 2019.

*2013 Amendment:* Chapter 198 inserted second sentence regarding reasonable notice. Amendment effective October 1, 2013.

*2007 Amendment:* Chapter 385 near middle after "opencut" substituted "operations" for "mining". Amendment effective October 1, 2007.

*1995 Amendment:* Chapter 418 near beginning substituted "department" for "board". Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

### 82-4-426. Reclamation of land on which bond forfeited.

**Compiler's Comments**

*2019 Amendment:* Chapter 334 substituted "or its agents or contractors may enter and reclaim" for "may reclaim". Amendment effective July 1, 2019.

*2007 Amendment:* Chapter 385 deleted former second sentence that read: "If the amount of the forfeited bond exceeds the cost of reclamation, the excess must be deposited in the environmental rehabilitation and response account in the state special revenue fund provided for in 75-1-110"; and made minor changes in style. Amendment effective October 1, 2007.

*2001 Amendment:* Chapter 338 at end of second sentence substituted "environmental rehabilitation and response account in the state special revenue fund provided for in 75-1-110" for "state general fund". Amendment effective July 1, 2001.

*Severability:* Section 8, Ch. 338, L. 2001, was a severability clause.

*1995 Amendments:* Chapter 418 near middle of first sentence substituted "department" for "board". Amendment effective July 1, 1995.

Chapter 509 inserted second sentence concerning depositing excess amount of forfeited bonds in general fund. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

### 82-4-427. Hearing — appeal — venue.

**Compiler's Comments**

*2021 Amendment:* Chapter 535 in (5) at end of first sentence deleted "or, if mutually agreed upon by both parties in the action, in the first judicial district, Lewis and Clark County". Amendment effective October 1, 2021.

*2019 Amendment:* Chapter 334 in (3) at end inserted "by submitting a written request stating the reasons for the appeal within 30 days of the receipt of the decision". Amendment effective July 1, 2019.

*2013 Amendment:* Chapter 198 in (1)(a) at beginning inserted "Subject to subsections (1)(b) and (1)(c)"; inserted (1)(b) regarding eligibility for appeal; inserted (1)(c) providing exception to (1)(b); and made minor changes in style. Amendment effective October 1, 2013.

*2007 Amendment:* Chapter 385 in (1) at beginning after "A person" substituted "whose interests are or may be adversely affected" for "who is aggrieved", after "department" inserted "to approve or disapprove a permit application and accompanying material or a permit amendment application and accompanying material", and near end after "request" inserted "stating the reasons for the appeal"; inserted (2) allowing an operator to request a hearing under certain conditions; inserted (3) allowing an operator or landowner to request a hearing under certain conditions; in (5) at beginning of first sentence substituted "A petition for judicial review of a board decision made" for "An action to challenge the issuance of a permit" and at end after "occur" inserted "or, if mutually agreed upon by both parties in the action, in the first judicial district, Lewis and Clark County"; in (6) at beginning of first sentence substituted "The petition for judicial review" for "A judicial challenge to a permit issued pursuant to this part by a party other than the permitholder or applicant" and near middle after "issued" inserted "or the applicant"; and made minor changes in style. Amendment effective October 1, 2007.

*2005 Amendment:* Chapter 337 in (4) near middle of second sentence after "determined" substituted "by the court" for "under 75-1-203". Amendment effective April 21, 2005.

*Applicability:* Section 22, Ch. 337, L. 2005, provided: "[This act] applies to environmental impact statements on which the agency responsible for preparation commenced preparation after December 31, 2004."

*2003 Amendment:* Chapter 361 inserted (3) relating to venue; and inserted (4) relating to judicial challenges to a permit. Amendment effective April 16, 2003.

*Preamble:* The preamble attached to Ch. 361, L. 2003, provided: "WHEREAS, Article II, section 3, of the Montana Constitution enumerates certain inalienable individual rights, including the right to a clean and healthful environment, the right of pursuing life's basic necessities, the right of enjoying and defending an individual's life and liberty, the right of acquiring, possessing, and protecting property, and the right of seeking individual safety, health, and happiness in all lawful ways; and

WHEREAS, the constitutionally enumerated rights are by their very nature bound to result in competing interests in specific fact situations; and

WHEREAS, Article IX, section 1, of the Montana Constitution provides that the state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations and directs the Legislature to provide for the administration and enforcement of this duty and also directs the Legislature to provide adequate remedies for the protection of the environmental life support system from degradation and to provide adequate remedies to prevent unreasonable depletion and degradation of natural resources; and

WHEREAS, the Legislature has reviewed the intent of the framers of the 1972 Montana Constitution as evidenced in the verbatim transcripts of the constitutional convention; and

WHEREAS, there is no indication that one enumerated inalienable right is intended to supersede other inalienable rights, including the right to use property in all lawful means; and

WHEREAS, the Legislature, mindful of its constitutional obligation to provide for the administration and enforcement of the constitution, has enacted a comprehensive set of laws to accomplish the goals of the constitution, including the Montana Clean Indoor Air Act of 1979, Title 50, chapter 40, part 1, MCA; the Montana Environmental Policy Act, Title 75, chapter 1, parts 1 through 3, MCA; the Clean Air Act of Montana, Title 75, chapter 2, parts 1 through 4, MCA; water quality laws, Title 75, chapter 5, MCA; The Natural Streambed and Land Preservation Act of 1975, Title 75, chapter 7, part 1, MCA; The Montana Solid Waste Management Act, Title 75, chapter 10, part 2, MCA; The Montana Hazardous Waste Act, Title 75, chapter 10, part 4, MCA; the Comprehensive Environmental Cleanup and Responsibility Act, Title 75, chapter 10, part 7, MCA; the Montana Megalandfill Siting Act, sections 75-10-901 through 75-10-945, MCA; the Montana Underground Storage Tank Installer and Inspector Licensing and Permitting Act, Title 75, chapter 11, part 2, MCA; the Montana Underground Storage Tank Act, Title 75, chapter 11, part 5, MCA; the Montana Major Facility Siting Act, Title 75, chapter 20, MCA; the Open-Space Land and Voluntary Conservation Easement Act, Title 76, chapter 6, MCA; the Environmental Control Easement Act, Title 76, chapter 7, MCA; The Strip and Underground Mine Siting Act, Title 82, chapter 4, part 1, MCA; The Montana Strip and Underground Mine Reclamation Act, Title 82, chapter 4, part 2, MCA; The Opencut Mining Act, Title 82, chapter 4, part 4, MCA; and The Nongame and Endangered Species Conservation Act, Title 87, chapter 5, part 1, MCA."

*Severability:* Section 39, Ch. 361, L. 2003, was a severability clause.

*Retroactive Applicability:* Section 41, Ch. 361, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to actions for judicial review or other causes of action challenging the issuance of a permit, petition for review, amendment, license, arbitration, action, certificate, or inspection that are pending but not yet decided on or after [the effective date of this act]." Effective April 16, 2003.

*2001 Amendment:* Chapter 79 in (1) after "decision of the department" inserted "under this part" and after "hearing" inserted "before the board, if a written request is submitted to the board"; and in (2) at beginning after "The" inserted "contested case provisions of the", and after "Act" substituted "Title 2, chapter 4, part 6, apply to a hearing held under this section" for "governs hearings before the department and judicial review of those decisions". Amendment effective March 20, 2001.

*Preamble:* The preamble attached to Ch. 79, L. 2001, provided: "WHEREAS, certain environmental statutes administered by the Montana Department of Environmental Quality provide that a person aggrieved by a decision of the Department may appeal that decision to the Director of the Department; and

WHEREAS, the possibility of an appeal prevents the Director from becoming involved in certain Department decisions that are subject to appeal to the Director; and

WHEREAS, section 82-4-427, MCA, states that a contested case hearing requested under The Opencut Mining Act must be held within 30 days after the hearing is requested; and

WHEREAS, it is difficult for the Department to conduct a contested case hearing under that Act within 30 days after the hearing is requested; and

WHEREAS, certain revisions to statutes administered by the Department are necessary for clarity and consistency and to conform the statutes to current drafting style."

*Saving Clause:* Section 18, Ch. 79, L. 2001, was a saving clause.

*1999 Amendment:* Chapter 507 at end of (1) inserted "within 30 days of the department's decision"; at end of (2) after "decisions" deleted "of the board under this part"; and made minor changes in style. Amendment effective April 28, 1999.

*Saving Clause:* Section 20, Ch. 507, L. 1999, was a saving clause.

*Severability:* Section 21, Ch. 507, L. 1999, was a severability clause.

*1995 Amendment:* Chapter 418 in (1) substituted "department" for "commissioner of state lands" and at end deleted "before the board"; and in (2) substituted "department" for "board". Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

## 82-4-431. Permit for mining, processing, and reclamation required.

### Compiler's Comments

*2021 Amendment:* Chapter 545 in (1) in introductory clause substituted "subsections (2) and (3)" for "82-4-440"; in (1)(b) substituted current text for former text (see 2021 Session Law for former text); deleted former (1)(c) that read: "(c) removes materials or overburden at a previously mined site where the removal, combined with the amount of previously mined materials and overburden, exceeds 10,000 cubic yards"; in (2)(a) deleted introductory exception clause that read: "Except as provided in or conditioned under subsections (5) and (6)"; in (2)(a)(i) substituted "one-half mile" for "1 mile"; inserted (2)(a)(C)(iv) excluding certain limited opencut operations; inserted (3) allowing a landowner to remove a limited amount of opencut materials without obtaining a permit; in (4) substituted current text for former text (see 2021 Session Law for former text); deleted former (6), (7), and (8) (see 2021 Session Law for former text); inserted (6)(b)(v) and (6)(b)(vi) setting forth additional actions that may take place prior to the expiration of a permit; and made minor changes in style. Amendment effective May 14, 2021.

*Retroactive Applicability:* Section 8, Ch. 545, L. 2021, provided: "[Sections 3 and 5] [amending 82-4-431 and 82-4-434] apply retroactively, within the meaning of 1-2-109, to amendments for opencut operations in existence on [the effective date of this act] that propose to change the reclamation date or the post mine land use." Effective May 14, 2021.

*2019 Amendment:* Chapter 334 in (1) at beginning inserted exception clause; inserted (9) concerning when a permit is considered effective; inserted (10) concerning expiration date of a permit and actions that may be taken before expiration of a permit; and inserted (11) concerning reclamation obligations and liability despite expiration or termination of a permit; and made minor changes in style. Amendment effective July 1, 2019.

*2013 Amendment:* Chapter 198 in (1) substituted current language for "An operator may not conduct an opencut operation that results in the removal of a total of 10,000 cubic yards or more of materials and overburden until the department has issued a permit to the operator. An operator may not, without a permit, remove materials or overburden from a site from which a total of 10,000 cubic yards or more of materials and overburden in the aggregate has been removed. An operator conducting a number of opencut operations, each of which results in the removal of less than 10,000 cubic yards of materials and overburden but that result in the removal of 10,000 cubic yards or more of materials and overburden in the aggregate, is subject to the provisions of this part, except as provided in this section"; in (2) in two places before "opencut" inserted "limited"; inserted (2)(a) providing an additional requirement for conducting an opencut operation without a permit; in (2)(b) after "removed" deleted "from the site" and substituted "10,000" for "5,000"; in (2)(c)(i) after "information" inserted "on a limited opencut operation form provided by the department"; in (2)(c)(ii) at beginning substituted "within 1 year of the department's receipt of the limited opencut operation form" for "within 180 days of submitting the form"; inserted (3) regarding additional time for reclamation; inserted (4) regarding expansion or continuation of opencut operation; and made minor changes in style. Amendment effective October 1, 2013.

*2007 Amendment:* Chapter 385 in (1) near beginning of first sentence after "conduct" substituted "an opencut operation" for "opencut-mining operations" and at end after "operator" deleted "for the reclamation of the land affected", at beginning of second sentence substituted "An operator" for "A person", after "materials" inserted "or overburden", and near end after "overburden" inserted "in the aggregate", and near beginning of third sentence after "number of" inserted "opencut"; in (2) near beginning of introductory clause after "permit" substituted "under this part may conduct an opencut operation" for "for reclamation may operate an opencut mine" and near middle after "permit" substituted "if the opencut operation" for "or bond if the mine"; in (2)(a) after "removed" inserted "from the site", after "exceed" substituted "5,000" for "2,500", and after "yards" inserted "and the total area from which the materials and overburden are removed does not exceed 5 acres"; in (2)(b)(i) substituted "submits appropriate site and opencut operation information" for "notifies the department prior to beginning operations"; in (2)(b)(ii) at beginning of first sentence after "within" substituted "180 days of submitting the" for "30 days of notifying the department, submits a completed site information", after "salvages" substituted "all soil from the area to be disturbed, removes the materials, grades" for "and stockpiles all root-bearing soil materials, regrades", after "affected" substituted "land" for "area", and at end after "blends the" substituted "graded land into the surrounding topography, replaces an appropriate amount of overburden and all soil, and reclaims to conditions present prior to mining all access roads used for the operation unless the landowner requests in writing that specific roads or portions of the roads remain open" for "reclaimed area into the adjacent topography, and during the first appropriate growing season, replaces all topsoil" and inserted second sentence requiring that roads left open be sized; in (2)(b)(iii) substituted "at the first seasonal opportunity, seeds or plants all affected land with vegetative species that meet the requirements of 82-4-434" for "reseeds or revegetates as required by the department"; in (3) near beginning after "or" substituted "may prohibit the operator from conducting an opencut operation under subsection (2)" for "allow the operator to operate an opencut mine under subsections (1) and (2)" and at end after "permit" deleted "for reclamation"; in (4) after "condition for the" substituted "conduct of an opencut operation" for "operation of an opencut mine"; in (5) at beginning of introductory clause after "Opencut" substituted "operations" for "mines" and after "not" substituted "occur" for "be placed"; in (5)(a) after "in" deleted "flowing" and after "intermittent" inserted "or perennial"; deleted former (5)(b) that read: "(b) in the bottom or head of a confined drainage"; in (5)(b) after "where the" inserted "opencut", after "intercept" inserted "surface water", and after "that is" deleted "naturally"; in (6) after "opencut" substituted "operations" for "mines"; and made minor changes in style. Amendment effective October 1, 2007.

*1999 Amendment:* Chapter 507 in (1) in first sentence after "removal of" inserted "a total of" and after "more of" substituted "materials and overburden until the department has issued a permit to the operator" for "product or overburden or that will result in the disturbance of land that was previously reclaimed pursuant to this part until the operator has entered into a contract with the department", inserted second sentence prohibiting person without a permit from removing materials from site where 10,000 cubic yards or more of materials and overburden have been removed, and in two places in third sentence substituted "materials and overburden" for "product or overburden"; in three places in first sentence in (2) and at end of (3) substituted "permit" for "contract"; in (2)(a) substituted "2,500 cubic yards" for "1,000 cubic yards"; in (3) inserted "approve an application for issuance of a permit under subsection (1) or" and after "under" inserted reference to subsection (1); and made minor changes in style. Amendment effective April 28, 1999.

*Saving Clause:* Section 20, Ch. 507, L. 1999, was a saving clause.

*Severability:* Section 21, Ch. 507, L. 1999, was a severability clause.

*Applicability:* Section 23(3)(b), Ch. 507, L. 1999, provided that for purposes of the amendments in [section 14], amending 82-4-431, "relating to changing opencut mining "contracts" to "permits", contracts issued before [the effective date of this act] [effective April 28, 1999] are permits. The department of environmental quality shall issue permit documents to the contract holders within a reasonable time after [the effective date of this act]." Effective April 28, 1999.

*1995 Amendment:* Chapter 418 in (1), at beginning, deleted "After March 16, 1973" and near end of first sentence substituted "department" for "board"; in (2)(a)(ii), near beginning after "department", deleted "of state lands"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1991 Amendments:* Chapter 408 inserted (4) making sand and gravel opencut mines subject to local zoning regulations; and made minor change in style. Amendment effective April 9, 1991.

Chapter 431 in (1), in first sentence, inserted "or that will result in the disturbance of land that was previously reclaimed pursuant to this part"; and made minor change in style.

*Applicability:* Section 5, Ch. 408, L. 1991, provided: "(1) [This act] [76-1-113, 76-2-209, 82-4-431, and 82-4-432] does not apply to:

(a) an area for which a contract was issued prior to [the effective date of this act] [effective April 9, 1991] or for which an application for contract or contract amendment was filed with the department of state lands [functions now transferred to department of environmental quality] prior to February 23, 1991; or

(b) an area:

(i) that is contiguous to an area described in subsection (1)(a);

(ii) for which the holder of the contract has the legal right to mine on [the effective date of this act] [effective April 9, 1991]; and

(iii) for which the contract holder files with the department on or before January 1, 1992, on a form provided by the department, a legal description of the area, evidence of the legal right to mine, and certification that the contract holder holds the property for the purpose of future sand or gravel mining.

(2) Before June 1, 1991, the department shall mail notice of the provisions and passage of [this act] [76-1-113, 76-2-209, 82-4-431, and 82-4-432] and the form described in subsection (1)(b)(iii) to each person who holds a current contract on [the effective date of this act] [effective April 9, 1991] or who had, prior to February 23, 1991, submitted an application for contract or contract amendment that the department had not approved or denied as of February 23, 1991.

(3) The department shall maintain a list of areas for which certifications have been filed pursuant to subsection (1)(b) and shall provide a copy of the list to any person who requests the list."

*1987 Amendment:* In (1), at end, inserted exception clause; inserted (2) detailing criteria for exemption from reclamation contract requirement; and inserted (3) restricting location of opencut mines.

**Case Notes**

*Board of County Commissioners Compelled to Follow Clear Statutory Language and Allow Gravel Pit in Nonresidential Area:* Plaintiff owned agricultural property adjacent to a school and sought to develop a gravel pit on the property. Plaintiff applied for the appropriate special review with the Board of County Commissioners. The Board determined that a gravel pit would interfere with surrounding property uses and would violate the rights of people who lived and attended school nearby to a clean and healthful environment, citing 82-4-432 and this section as authority for the Board's right to deny the special review. Plaintiff argued that under 76-1-113 and 76-2-209, local planning boards may not prevent the operation of a gravel pit in a nonresidential area. The District Court concluded that plaintiff accurately construed the statutes and that the Board could not deny a gravel pit in a nonresidential area. The Supreme Court affirmed. The Board ruled as if either 76-2-209 did not exist or the statute unconstitutionally deprived residents of a clean and healthful environment, but as an Executive Branch agency, the Board violated the separation of powers doctrine by ruling on the constitutionality of the statute. The statutory language was clear and unambiguous, and the Board was compelled to follow the legal mandate and allow the gravel pit. Further, because the statutes were clear, the District Court was not required to reach the constitutional question and did not err in failing to address the constitutionality of the statute. Merlin Myers Revocable Trust v. Yellowstone County, 2002 MT 201, 311 M 194, 53 P3d 1268 (2002). See also St. v. Still, 273 M 261, 902 P2d 546 (1995), and Goldman Sachs v. District Court, 2002 MT 83, 309 M 289, 46 P3d 606 (2002).

**Attorney General's Opinions**

*Applicability of Opencut Mining Act:* The Opencut Mining Act does not apply to federal agencies conducting opencut mining operations on private or federal land absent congressional authorization. But the Act does apply to private contractors mining on private land, and unless conflicting federal legislation applies, the Act also applies to private contractors mining on federal land. Any private contractor to whom the Act applies is required to enter into a contract pursuant to 82-4-431. 37 A.G. Op. 164 (1978).

## 82-4-432. Application for permit — contents — issuance — amendment.

**Compiler's Comments**

*2021 Amendment:* Chapter 545 inserted (1) concerning the application forms for a permit; in (2)(a) near beginning of introductory clause inserted "pursuant to subsections (2) through (13)"; in (2)(b)(ii) at end inserted "and in effect prior to the filing of a permit application or at the time a written request is received for a preapplication meeting pursuant to this section"; in (2)(f) and (9)(a)(ii) substituted current text for former text (see 2021 Session law for former text); in (3) in second sentence before "meeting" inserted "preapplication"; inserted (14) regarding what operations not described by subsection (1)(b) must submit when applying for a permit or an amendment; and made minor changes in style. Amendment effective May 14, 2021.

*2019 Amendment:* Chapter 334 in (2)(c) substituted "contains information sufficient to initiate acceptability review by addressing" for "addresses"; inserted (2)(e) concerning a written agreement authorizing an operator access to the site to perform reclamation if the operator's right to mine is terminated; inserted (2)(g) concerning documentation of consultation with the state historic preservation office; inserted (12) concerning the suspension of time limits until the weather or other field conditions allow for an adequate site inspection; and allowing an operator to provide information by other means; and made minor changes in style. Amendment effective July 1, 2019.

*2013 Amendment:* Chapter 198 in (1)(d) after "county" inserted "accompanied by a map showing the location of the proposed operation sufficient to allow the public to locate the proposed site"; deleted former (1)(e) that read: "(e) the date when the opencut operation is proposed to commence"; in (2)(e) after "using the" deleted "most current known", after "shown" inserted "no more than 60 days prior to the submission of an application", and before "records" inserted "paper or electronic"; in (5)(c) after "map" inserted "or directions on how to access a map"; in (5)(d) after "department" inserted "notification that the application is complete and"; in (6)(a) inserted second and third sentences concerning maps and notice; in (6)(b) before "records" inserted "paper or electronic"; in (7)(b) substituted "documentation on a form provided by" for "documentation to"; in (9)(a)(ii) inserted second sentence regarding multiple property owners of the same parcel; in (11)(b) at end substituted "current permit" for "original permit"; in (11)(c) at end deleted "or that the application requires an extended review pursuant to 82-4-439"; in (12) substituted "post" for "publish"; and made minor changes in style. Amendment effective October 1, 2013.

*2009 Amendment:* Chapter 477 in (2)(c) near beginning after "that" substituted "addresses" for "meets" and at end inserted "and rules adopted pursuant to this part related to 82-4-434"; inserted (2)(e) requiring that the application be accompanied by a list of surface owners of land located within one-half mile of the boundary of the proposed opencut permit area; in (4)(a)(i) near middle of first sentence after "within" substituted "5 working days" for "30 days", after "review the application" deleted "inspect the proposed site", and at end substituted "application is complete" for "department believes that the application is acceptable", in second sentence at beginning after "application is" substituted "complete if it contains the items listed in" for "acceptable if it complies with all requirements of", in third sentence after "not" substituted "complete" for "acceptable", after "shall" substituted "notify the applicant in writing and include" for "include in the notification", and at end substituted "information necessary to make the application complete" for "all deficiencies"; deleted former (4)(b) and (4)(c) that read (see 2009 Session Law for former text); inserted (4)(a)(ii) providing that time limit applies to each submittal of the application until the department determines that the application is complete; inserted (4)(b) regarding criteria of application completeness; inserted (4)(c) concerning when an application may be declared abandoned and void; inserted (4)(d) regarding notice of completeness;

inserted (5) and (6) regarding required public notice; inserted (7) through (9) concerning public meetings; inserted (10) regarding application completeness requirements; in (11)(a) substituted "this section" for "subsection (4)"; inserted (11)(b) and (11)(c) providing when application for an amendment is not subject to public notice or public meeting requirements and providing for notification by department; inserted (12) requiring that the department publish a copy of an acceptable permit or amendment on its website; and made minor changes in style. Amendment effective May 8, 2009.

*Applicability:* Section 12(2) and (3), Ch. 477, L. 2009, provided: "(2) Except as provided in subsection (3), [sections 7 and 8] [amending 82-4-432 and enacting 82-4-439] apply to permit applications and amendment applications pursuant to 82-4-432 submitted after [the effective date of this act].

(3) [Section 7(4)(c)] [82-4-432(4)(c)] applies retroactively, within the meaning of 1-2-109, to permit applications and amendment applications submitted prior to [the effective date of this act]." Effective May 8, 2009.

*2007 Amendment:* Chapter 385 in (1)(a) near beginning substituted "applicant" for "operator"; in (1)(c) at beginning inserted "estimated", after "volume of" substituted "overburden and materials" for "earth", and at end after "removed" deleted "as accurately as the volume may then be estimated, and the volume that has been previously removed, if any"; in (1)(d) near beginning before "operation" inserted "proposed opencut" and after "legal" substituted "description" for "subdivision, section, township and range"; in (1)(e) after "when the" substituted "opencut operation is proposed to commence" for "operation was or will be commenced"; in (1)(f) after "has the" inserted "legal" and after "right" substituted "to mine the designated materials in" for "and power, by legal estate owned, to mine, by opencut mining"; deleted former (2)(b) that read: "(b) a fee of $50 for an application to mine bentonite, clay, scoria, sand, or gravel"; in (2)(b) near middle after "opencut" substituted "operation complies" for "mine and its operating and reclamation plans comply"; in (2)(c) substituted "a plan of operation that meets the requirements of 82-4-434" for "the operator's plan of operation and a complete reclamation plan"; inserted (2)(d) requiring written documentation that the landowner has been consulted about the proposed plan of operation; in (3) at end of first sentence after "regarding" substituted "the proposed opencut operation" for "reclamation"; in (4)(a) near middle of first sentence after "within" substituted "30 days, review the application, inspect the proposed site" for "15 days" and at end substituted "acceptable" for "complete", inserted second sentence regarding when an application is acceptable, and near middle of third sentence after "not" substituted "acceptable" for "complete"; in (4)(b) near beginning of first sentence after "receipt of" substituted "the applicant's responses to the identified deficiencies" for "a complete application" and at beginning of second sentence after "If the" substituted "application is acceptable" for "department denies the application" and at end after "explanation" substituted "of the remaining deficiencies" for "describing why the application was denied"; in (4)(c) in first sentence after "extend" substituted "either or both of the 30-day review periods" for "its period of review", after "notifies the" substituted "applicant" for "person", and near end before "original" inserted "respective"; in (4)(d) at beginning substituted "If the application is acceptable" for "Upon approval of the application", after "operator to" deleted "continue or" and after "opencut" substituted "operation" for "mining"; in (5) near beginning of first sentence after "operator" substituted "may amend a permit by submitting an amendment" for "desiring to have a permit amended to cover additional contiguous or nearby land may file an amended", near beginning of second sentence after "receipt of the" substituted "amendment application, the department shall review it in accordance with the requirements and procedures in subsection (4)" for "amended application and any additional bond that may be required and upon agreement to the terms of the amendment by the parties", and at beginning of third sentence inserted "If the amendment application is acceptable", after "department" substituted "shall" for "may", and at end after "permit" deleted "covering the additional land described in the amended application without the payment of any additional fee"; deleted former (6) that read: "(6) An operator may withdraw any land covered by a permit, except affected land, by notifying the department of the withdrawal, in which case the penalty of the bond or security filed by the operator pursuant to the provisions of this part must be reduced proportionately"; and made minor changes in style. Amendment effective October 1, 2007.

*2001 Amendments — Composite Section:* Chapter 299 in (4) at beginning inserted exception clause; and made minor changes in style. Amendment effective October 1, 2001.

Chapter 325 in (4) near beginning of first sentence substituted "an application" for "a complete application", near middle substituted "15 days" for "30 days" and at end after "person" inserted "whether or not the department believes that the application is complete", inserted second sentence requiring department to identify deficiencies in application if application not complete, at beginning of third sentence inserted "Within 30 days of receipt of a complete application, the department shall notify the applicant", inserted fourth sentence requiring department to identify deficiencies in application if application denied, and inserted sixth sentence requiring department to include reason for extension in notification of extension; and made minor changes in style. Amendment effective October 1, 2001.

*Applicability:* Section 16, Ch. 299, L. 2001, provided: "[This act] applies to environmental reviews that are begun after [the effective date of this act]." Effective October 1, 2001.

*1999 Amendment:* Chapter 507 throughout section substituted "permit" for "contract"; in (2)(b) inserted "for an application to mine bentonite, clay, scoria, sand, or gravel"; in (2)(d) substituted "a complete reclamation plan" for "the method and manner of reclamation that will be used or followed"; in first sentence in (3) in two places substituted "a person" for "the operator" and substituted "an application" for "a plan" and inserted second and third sentences authorizing person to request meeting with department and requiring department to hold meeting if requested; at beginning of first sentence in (4) before "application" inserted "a complete" and after "application" substituted language requiring department to notify person within 30 days of approval or denial of application for former language that read: "bond or security, and fee due from the operator and upon agreement to the terms of the contract by the parties, the department may issue a contract to the applicant which entitles the applicant to continue in or engage in opencut mining on the land therein described"; and made minor changes in style. Amendment effective April 28, 1999.

*Saving Clause:* Section 20, Ch. 507, L. 1999, was a saving clause.

*Severability:* Section 21, Ch. 507, L. 1999, was a severability clause.

*Applicability:* Section 23(3)(b), Ch. 507, L. 1999, provided that for purposes of the amendments in [section 15], amending 82-4-432, "relating to changing opencut mining "contracts" to "permits", contracts issued before [the effective date of this act] [effective April 28, 1999] are permits. The department of environmental quality shall issue permit documents to the contract holders within a reasonable time after [the effective date of this act]." Effective April 28, 1999.

*1995 Amendment:* Chapter 418 in (1), (3), in three places, (4), (5), in two places, and (6) substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1991 Amendment:* Inserted (2)(c) requiring statement from local governing body to certify compliance with local zoning regulations; and made minor changes in style. Amendment effective April 9, 1991.

*Applicability:* Section 5, Ch. 408, L. 1991, provided: "(1) [This act] [76-1-113, 76-2-209, 82-4-431, and 82-4-432] does not apply to:

(a) an area for which a contract was issued prior to [the effective date of this act] [effective April 9, 1991] or for which an application for contract or contract amendment was filed with the department of state lands [functions now transferred to department of environmental quality] prior to February 23, 1991; or

(b) an area:

(i) that is contiguous to an area described in subsection (1)(a);

(ii) for which the holder of the contract has the legal right to mine on [the effective date of this act] [effective April 9, 1991]; and

(iii) for which the contract holder files with the department on or before January 1, 1992, on a form provided by the department, a legal description of the area, evidence of the legal right to mine, and certification that the contract holder holds the property for the purpose of future sand or gravel mining.

(2) Before June 1, 1991, the department shall mail notice of the provisions and passage of [this act] [76-1-113, 76-2-209, 82-4-431, and 82-4-432] and the form described in subsection (1)(b)(iii) to each person who holds a current contract on [the effective date of this act] [effective April 9, 1991] or who had, prior to February 23, 1991, submitted an application for contract or contract amendment that the department had not approved or denied as of February 23, 1991.

(3) The department shall maintain a list of areas for which certifications have been filed pursuant to subsection (1)(b) and shall provide a copy of the list to any person who requests the list."

**Case Notes**

*Board of County Commissioners Compelled to Follow Clear Statutory Language and Allow Gravel Pit in Nonresidential Area:* Plaintiff owned agricultural property adjacent to a school and sought to develop a gravel pit on the property. Plaintiff applied for the appropriate special review with the Board of County Commissioners. The Board determined that a gravel pit would interfere with surrounding property uses and would violate the rights of people who lived and attended school nearby to a clean and healthful environment, citing 82-4-431 and this section as authority for the Board's right to deny the special review. Plaintiff argued that under 76-1-113 and 76-2-209, local planning boards may not prevent the operation of a gravel pit in a nonresidential area. The District Court concluded that plaintiff accurately construed the statutes and that the Board could not deny a gravel pit in a nonresidential area. The Supreme Court affirmed. The Board ruled as if either 76-2-209 did not exist or the statute unconstitutionally deprived residents of a clean and healthful environment, but as an Executive Branch agency, the Board violated the separation of powers doctrine by ruling on the constitutionality of the statute. The statutory language was clear and unambiguous, and the Board was compelled to follow the legal mandate and allow the gravel pit. Further, because the statutes were clear, the District Court was not required to reach the constitutional question and did not err in failing to address the constitutionality of the statute. Merlin Myers Revocable Trust v. Yellowstone County, 2002 MT 201, 311 M 194, 53 P3d 1268 (2002). See also St. v. Still, 273 M 261, 902 P2d 546 (1995), and Goldman Sachs v. District Court, 2002 MT 83, 309 M 289, 46 P3d 606 (2002).

### 82-4-433. Bond.

**Compiler's Comments**

*2019 Amendment:* Chapter 334 in (7) at beginning of third sentence inserted introductory clause concerning time limit; inserted (8) concerning the forfeiture of the bond and the operator's liability for reclamation; inserted (9) concerning bonds canceled by the surety, suspension of a permit if the operator fails to submit a replacement bond, and reinstatement of a permanent after approval of a replacement bond; and made minor changes in style. Amendment effective July 1, 2019.

*2013 Amendment:* Chapter 198 in (3) in first sentence substituted "a certificate of deposit" for "government securities". Amendment effective October 1, 2013.

*2007 Amendment:* Chapter 385 in (1) at beginning of first sentence substituted "Before a permit or permit amendment may be issued, a surety bond made" for "A bond required to be filed under this part by the operator must be in a form that the department prescribes", near middle after "rules" substituted "adopted under this part" for "of the board", and after "permit" inserted "must be submitted to and approved by the department", in second sentence near beginning after "signed by the" substituted "applicant" for "landowner or operator, as appropriate" and at end after "Montana" deleted "as surety", deleted former third and fourth sentences that read: "The bond must be in an amount not to exceed the costs of restoration required by this part as determined by the department. The amount of the bond may not be less than $200 or more than $1,000 an acre unless the department determines, in writing, that the cost of restoration of the land exceeds $1,000 an acre", at beginning of third sentence deleted "Upon the cost determination" and at end after "cost of" substituted "reclamation of the affected land by the department" for "restoring the land", and inserted fourth sentence requiring that the bond be no less than the amount determined by the department; in (2)(a) at beginning of first sentence after "opencut" deleted "mining"; in (3) near beginning of first sentence after "lieu of" substituted "submitting a surety bond pursuant to subsection (1)" for "the bond" and after "operator may" substituted "submit" for "deposit with the department"; in (4) at beginning after "The" substituted "bond or other security" for "penalty of the bond or amount of cash and securities" and after "reduced" deleted "from time to time"; in (5) near middle of second sentence substituted "must be" for "may be"; in (6) at end of first sentence inserted "or shall submit another type of security pursuant to subsection (3)", in second sentence near beginning after "substitution" substituted "within the 30-day time period" for "of surety", after "department" substituted "shall" for "may", and substituted "opencut operations" for "operations", and inserted third sentence allowing additional time to complete the transaction under certain conditions; deleted former (5) that read: "(5) The department shall cause the reclamation of any affected land with respect to which a bond has been forfeited"; in (7) near beginning of first sentence before "requirements" inserted "reclamation" and at end after "requirements" inserted "and may request bond release", near beginning of second sentence substituted "department" for "board" and near end before "bond" deleted "penalty of the", and inserted third sentence requiring notification of the decision on the bond release application; and made minor changes in style. Amendment effective October 1, 2007.

*2005 Amendment:* Chapter 32 inserted (2) concerning opencut-mining operations on federal land and provisions that must be included in the bond; and made minor changes in style. Amendment effective March 18, 2005.

*1999 Amendment:* Chapter 507 throughout section substituted "permit" for "contract"; at end of first sentence in (1) inserted "and the permit"; in first, second, and fourth sentences in (2) and in first and second sentences in (3) substituted "department" for "board"; at end of second sentence in (2) after "required" inserted "but the department may require that the amount of the bond be adjusted to reimburse the department for foreclosure costs" and in fifth sentence substituted "may" for "shall"; and made minor changes in style. Amendment effective April 28, 1999.

*Saving Clause:* Section 20, Ch. 507, L. 1999, was a saving clause.

*Severability:* Section 21, Ch. 507, L. 1999, was a severability clause.

*Applicability:* Section 23(3)(b), Ch. 507, L. 1999, provided that for purposes of the amendments in [section 16], amending 82-4-433, "relating to changing opencut mining "contracts" to "permits", contracts issued before [the effective date of this act] [effective April 28, 1999] are permits. The department of environmental quality shall issue permit documents to the contract holders within a reasonable time after [the effective date of this act]." Effective April 28, 1999.

*1995 Amendment:* Chapter 418 in (1), in three places, (3), (4), and (5) substituted "department" for "board"; in (2), in first sentence after "department", deleted "of state lands"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1991 Amendment:* In (2), in first sentence, inserted reference to letter of credit; and made minor changes in style.

*1987 Amendment:* In (2), in fourth and last sentences, substituted "affected land" for "mined acreages"; and made minor changes in phraseology.

*1983 Amendment:* In (1), in third sentence, deleted "penalty of the" before "bond", at beginning of fourth sentence, deleted "but" and inserted "The amount of the bond", at end of fourth sentence, inserted "unless" provision for determination of cost by the department, and inserted last sentence referring to Board's setting of bond amount where cost of restoration exceeds $1,000 per acre.

## 82-4-434. Plan of operation — requirements.

**Compiler's Comments**

*2021 Amendment:* Chapter 545 in (2) in introductory clause substituted "A plan of operation must provide" for "The department may not accept a plan of operation unless the plan provides"; deleted former (2)(b) concerning the prevention of acid drainage or sedimentation; in (2)(f) at end before "protection" substituted "legally required" for "appropriate"; deleted former (2)(g) concerning the prevention of fires and burning; deleted former (2)(l) concerning surface water and ground water; deleted former (2)(m) concerning noise and visual impacts on residential areas; deleted former (2)(n) concerning additional procedures to prevent significant physical harm; inserted (2)(j), (2)k), and (2)(l) regarding what other information is to be submitted in application; inserted (3)(d) outlining what an operator may request when reclamation is not completed in the time specified; and made minor changes in style. Amendment effective May 14, 2021.

*Retroactive Applicability:* Section 8, Ch. 545, L. 2021, provided: "[Sections 3 and 5] [amending 82-4-431 and 82-4-434] apply retroactively, within the meaning of 1-2-109, to amendments for opencut operations in existence on [the effective date of this act] that propose to change the reclamation date or the post mine land use." Effective May 14, 2021.

*2019 Amendment:* Chapter 334 deleted former (1) that read: "(1) The department shall immediately submit a plan of operation received in a permit or permit amendment application involving expansion of the permit area to the state historic preservation office for evaluation of possible archaeological or historical values in the area to be mined"; in (2)(a) after "including but not limited to" inserted "agriculture"; in (3) after "plan of operation" substituted "is not completed" for "has not been completed" and after "the department" substituted "may" for "after 30 days' written notice, shall"; inserted (3)(a) concerning the pursuit of an administrative order; in (3)(b) at beginning inserted "after 30 days' written notice" and in middle before "issue an order to reclaim" deleted "may"; in (3)(c) at beginning deleted "may" and at end deleted "and may sue for damages for breach of the conditions of the permit, for payment of the performance bond, or for both"; and made minor changes in style. Amendment effective July 1, 2019.

*2007 Amendment:* Chapter 385 in (1) at beginning deleted "The reclamation plan must meet the following requirements:

(1) The department shall submit each reclamation plan or operator-proposed amendments to the reclamation plan to the landowner for recommendations and shall consider those recommendations in deciding whether to approve or disapprove any plan or operator-proposed amendments. The department may seek technical help from any state or federal agency" and after "plan" inserted "of operation received in a permit or permit amendment application involving expansion of the permit area"; in (2) near beginning of first sentence after "department" substituted "shall accept a plan of operation" for "may approve a reclamation plan only", after "plan" substituted "complies with the requirements of this part and the rules adopted pursuant to this part and" for "provides for the best possible reclamation under the circumstances at the time, so", and after "after" substituted "the opencut operation is" for "mining operations are", in second sentence at beginning substituted "plan of operation" for "reclamation plan"; after "accepted" deleted "in writing", and near end after "review and" substituted "amendment" for "modification", and in third sentence at beginning after "Any" substituted "amendment" for "modification"; in (3) near beginning of introductory clause after "may not" substituted "accept" for "approve a reclamation plan or"; in (3)(a) at beginning after "that the" inserted "affected" and near end after "other" inserted "reasonable, practical, and achievable"; deleted former (2)(b) that read: "(b) that to the extent reasonable and practicable, the operator will establish vegetative cover commensurate with the proposed land use"; in (3)(b) before "operation" inserted "opencut" near middle after "streams" substituted "catchments, ponds" for "for the construction of earth dams", after "drainage" inserted "and sediment will be constructed and maintained", and after "provided the" deleted "formation of the impoundments or"; in (3)(c) at beginning of first sentence after "that" substituted "soil and other suitable overburden" for "to accomplish practical utilization of soil materials, the material", after "affected" substituted "land" for "areas", after "required by the" substituted "postmining land use" for "reclamation plan", and at end after "phase of the" substituted "opencut operation" for "mining operations, at a depth sufficient for plant growth on slopes of 3:1 or less" and in second sentence after "soil" substituted "and other suitable overburden" for "materials"; in (3)(d) near beginning after "grading will" substituted "result in a postmining topography conducive to the designated postmining land use" for "be commensurate with the topography sought and land use designated"; in (3)(e) at beginning after "that" deleted "metal and other", after "will be" deleted "removed or", and after "buried" inserted "on site in a manner that protects water quality and is compatible with the postmining land use or will be disposed of off site in accordance with state laws and rules"; in (3)(f) after "minimizes" deleted "channeling and other"; deleted former (2)(h) that read: "(h) that the operator will submit a progress report annually to the department"; in (3)(g) at beginning of first sentence after "that" substituted "the opencut operation" for "all operations" and after "burning" deleted "of carbonaceous materials" and inserted second sentence providing that approval of the plan for fire prevention and control does not relieve the operator of the duty to comply with air quality permitting and protection requirements; in (3)(h) after "values" substituted "on affected lands" for "in areas to be mined"; in (3)(i) near end after "use for" substituted "the opencut operation" for "extractive purposes"; in (3)(j) at end after "erosion" deleted "and that all seed will be drilled unless otherwise provided in the plan"; in (3)(k) after "concurrent with" substituted "the opencut operation" for "mining operations"; in (3)(l) at end before "operation" inserted "opencut"; in (3)(n) near beginning after "procedures" inserted "including monitoring"; in (4) near beginning after "plan" inserted "of operation"; in (5)(a) near middle after "new" substituted "plan of operation" for "reclamation plan" and at end after "time" inserted "for reclamation"; in (5)(b) near middle after "new" substituted "plan of operation" for "reclamation plan"; inserted (5)(b)(i) allowing approval if the new plan of operation or amendments comply with the requirements of this section; in (5)(b)(ii)(A) after "faith" substituted "conducted opencut operations" for "carried on reclamation" and after "plan" substituted "of operation" for "and the proposed new plan or amendments to the existing plan will result in reclamation as or more desirable than the reclamation proposed under the existing plan"; in (5)(b)(ii)(B) after "plan" inserted "of operation"; deleted former (4)(c) that read: "(c) When accepted, the proposed new reclamation plan or the proposed amendments to the existing plan become a part of the permit"; deleted former (5) that read: "(5) The operator shall provide a performance bond or an alternative acceptable to the department in an amount commensurate with the estimated cost of reclamation, but in no case may the bond be less than $200 an acre. The estimated cost of reclamation must be set forth in the reclamation plan"; in (6) after "permit" substituted "plan of operation" for "reclamation plan"; deleted former (7) that read: "(7) The permit is effective when signed by the department and the operator and remains

in force until terminated by mutual consent or by the department upon 6 months' notice"; and made minor changes in style. Amendment effective October 1, 2007.

*Code Commissioner Correction:* In (3)(g) the code commissioner substituted "wildland fires" for "forest fires" pursuant to sec. 32, Ch. 336, L. 2007.

*2001 Amendment:* Chapter 325 in (1) in two places in first sentence before "amendments" inserted "operator-proposed" and inserted last sentence requiring modifications by department to comply with 82-4-436; and made minor changes in style. Amendment effective October 1, 2001.

*1999 Amendment:* Chapter 507 throughout section substituted "permit" for "contract"; in introductory clause substituted "reclamation plan" for "contract"; deleted former first, second, third, and fourth sentences in (1) that read: "The operator shall submit a reclamation plan to the department before commencing any opencut mining and may not commence mining before the plan receives approval from the department. The operator may request and receive a meeting with the department prior to submission of the plan. If the department does not notify the operator that it has approved or disapproved a plan within 30 days after the department has received the plan, the department is considered to have approved the plan. The department, however, for sufficient cause, may extend its period of consideration for an additional 30 days if it notifies the operator prior to the end of the original 30-day period"; in third sentence in (1) substituted "department" for "board" and after "immediately" substituted "to the state historic preservation office" for "to the director of the university of Montana-Missoula statewide archaeological survey" and in fourth sentence after "reclamation" deleted "procedures available"; in (2) after "plan" inserted "or a plan of operations"; inserted second sentence in (2)(d) requiring depth of soil materials placed on reclaimed land to be specified in plan; in (2)(k) substituted "those postmine land uses that do not require vegetation" for "rock faces, bench faces, and excavations used for water impoundments"; in (2)(l) after "permanent" deleted "suitable" and after "cover" substituted "that is suitable for the postmine land use" for "for wildlife, livestock"; inserted (2)(o) authorizing department to disapprove reclamation plan or plan of operations unless plans provide that noise and visual impacts on residential areas will be minimized to degree practicable; inserted (2)(p) authorizing department to disapprove reclamation plan or plan of operations unless plans provide implementation of any additional procedures necessary to prevent significant physical harm to land or adjacent land, structures, improvements, or life forms; in (3) after "cease" substituted "may issue an order to reclaim, a notice of violation, or an order of abatement or may institute an action" for "shall institute an action" and after "breach of" substituted "the conditions of the permit" for "contract"; in (4)(a) substituted "term of the permit" for "period of reclamation"; and made minor changes in style. Amendment effective April 28, 1999.

*Saving Clause:* Section 20, Ch. 507, L. 1999, was a saving clause.

*Severability:* Section 21, Ch. 507, L. 1999, was a severability clause.

*Applicability:* Section 23(3)(b), Ch. 507, L. 1999, provided that for purposes of the amendments in [section 17], amending 82-4-434, "relating to changing opencut mining "contracts" to "permits", contracts issued before [the effective date of this act] [effective April 28, 1999] are permits. The department of environmental quality shall issue permit documents to the contract holders within a reasonable time after [the effective date of this act]." Effective April 28, 1999.

*1995 Amendment:* Chapter 418 in (1), in 13 places, (2), (2)(h), (3), (4)(a), (4)(b), (5), (6), and (7), in two places, substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

*Name Change — Direction to Code Commissioner:* Pursuant to sec. 36, Ch. 308, L. 1995, in this section the Code Commissioner changed "university of Montana" to "university of Montana-Missoula".

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1991 Amendment:* In (2)(n), after "surface", inserted "water"; and made minor changes in style.

*1987 Amendment:* Inserted (2)(n) requiring protection of surface and ground water.

**Case Notes**

*Application for Mining Permit Not Protected Entitlement When Department Retains Discretion to Deny Application — Compensation May Be Required for Certain Zoning Regulations:* Helena Sand and Gravel, Inc., (HSG) received a gravel mining permit from the Department of Environmental Quality (DEQ) that applied to 110 of its approximately 421 acres located north of East Helena. Subsequently, the Lewis and Clark County Board of Commissioners adopted a special district based on a citizens' petition that included all of HSG's property and prohibited sand and gravel mining within the district's boundaries. HSG brought suit alleging that the county had improperly prohibited HSG from mining sand and gravel on its property. The District Court granted summary judgment to the county and concluded that HSG failed to show a protected entitlement to a mining permit, but the court did not separately consider HSG's ownership interest in the real property. On appeal, HSG first asserted that DEQ would have been required by statute to issue HSG a permit or permit amendment for the remaining 311 acres, and thus the regulations adopted by the Board amounted to a taking of private property. The Supreme Court disagreed and held that the statutory language gave DEQ leeway to withhold its approval of a permit application unless the application satisfied 14 separate requirements outlined in 82-4-434. Because DEQ retained discretion to deny unacceptable applications, HSG did not have a constitutionally protected property interest in its right to apply for a mining permit. Additionally, HSG asserted that the impact of the zoning regulations on the value of its property was a taking. The court concluded that under its decision in Kafka v. Mont. Dept. of Fish, Wildlife & Parks, 2008 MT 460, 348 Mont. 80, 201 P.3d 8, because justice and fairness may require that a person deprived of an established property interest be compensated for the loss even when that compensable property interest retains some economic value, the case had to be remanded for the District Court to consider the magnitude of the economic impact of the county's regulations and the degree to which those regulations interfered with HSG's legitimate property interests. Helena Sand & Gravel, Inc. v. Lewis & Clark County Planning & Zoning Comm'n, 2012 MT 272, 367 Mont. 130, 290 P.3d 691.

**Attorney General's Opinions**

*Board Empowered to Require Contract Terms in Addition to Those in This Section:* A policy section is relevant not only to the question of legislative intent concerning an act's overall purpose but also to the scope of administrative agency authority under the act. Thus, 82-4-402, the policy section of The Opencut Mining Act, is properly considered in determining the extent of the Board of Land Commissioners' [functions now transferred to Board of Environmental Review] authority under this Act to require reclamation contract commitments in addition to those mandated under this section. 40 A.G. Op. 47 (1984).

### 82-4-436. Plan amendments by department.

**Compiler's Comments**

*2007 Amendment:* Chapter 385 in (1) near beginning after "operation" deleted "reclamation plan or other" and after "may" substituted "amend" for "modify"; in (2) near beginning after "continued" inserted "opencut" and after "existing plan" inserted "of operation"; in (3)(c) after "text" substituted "maps, drawings, and other appropriate information that constitute" for "of"; in (4) near middle of second sentence after "until" inserted "15 days" and at end substituted "in 82-4-427" for "of the Montana Administrative Procedure Act, provided for in Title 2, chapter 4, parts 6 and 7"; in (5) near beginning after "operator" substituted "requests a hearing on" for "does not appeal", after "amendment" substituted "is not" for "becomes", and after "enforceable" substituted "until completion of the contested case process" for "15 days after the operator receives the notification"; deleted former (6) that read: "(6) An action to challenge the issuance of an amendment pursuant to this section must be brought in the county in which the activity is proposed to occur. If an activity is proposed to occur in more than one county, the action may be brought in any of the counties in which the activity is proposed to occur"; deleted former (7) that read: "(7) A judicial challenge to an amendment issued pursuant to this section by a party other than the amendment holder or applicant must include the party to whom the amendment was issued unless otherwise agreed to by the amendment holder or applicant. All judicial challenges of amendments for projects with a project cost, as determined by the court, of more than $1 million must have precedence over any civil cause of a different nature pending in that court. If the court determines that the challenge was without merit or was for an improper purpose, such as to harass, to cause unnecessary delay, or to impose needless or increased cost in litigation, the court may award attorney fees and costs incurred in defending the action"; and made minor changes in style. Amendment effective October 1, 2007.

*2005 Amendment:* Chapter 337 in (7) near middle of second sentence after "determined" substituted "by the court" for "under 75-1-203". Amendment effective April 21, 2005.

*Applicability:* Section 22, Ch. 337, L. 2005, provided: "[This act] applies to environmental impact statements on which the agency responsible for preparation commenced preparation after December 31, 2004."

*2003 Amendment:* Chapter 361 inserted (6) relating to venue; and inserted (7) relating to judicial challenges to an amendment. Amendment effective April 16, 2003.

*Preamble:* The preamble attached to Ch. 361, L. 2003, provided: "WHEREAS, Article II, section 3, of the Montana Constitution enumerates certain inalienable individual rights, including the right to a clean and healthful environment, the right of pursuing life's basic necessities, the right of enjoying and defending an individual's life and liberty, the right of acquiring, possessing, and protecting property, and the right of seeking individual safety, health, and happiness in all lawful ways; and

WHEREAS, the constitutionally enumerated rights are by their very nature bound to result in competing interests in specific fact situations; and

WHEREAS, Article IX, section 1, of the Montana Constitution provides that the state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations and directs the Legislature to provide for the administration and enforcement of this duty and also directs the Legislature to provide adequate remedies for the protection of the environmental life support system from degradation and to provide adequate remedies to prevent unreasonable depletion and degradation of natural resources; and

WHEREAS, the Legislature has reviewed the intent of the framers of the 1972 Montana Constitution as evidenced in the verbatim transcripts of the constitutional convention; and

WHEREAS, there is no indication that one enumerated inalienable right is intended to supersede other inalienable rights, including the right to use property in all lawful means; and

WHEREAS, the Legislature, mindful of its constitutional obligation to provide for the administration and enforcement of the constitution, has enacted a comprehensive set of laws to accomplish the goals of the constitution, including the Montana Clean Indoor Air Act of 1979, Title 50, chapter 40, part 1, MCA; the Montana Environmental Policy Act, Title 75, chapter 1, parts 1 through 3, MCA; the Clean Air Act of Montana, Title 75, chapter 2, parts 1 through 4, MCA; water quality laws, Title 75, chapter 5, MCA; The Natural Streambed and Land Preservation Act of 1975, Title 75, chapter 7, part 1, MCA; The Montana Solid Waste Management Act, Title 75, chapter 10, part 2, MCA; The Montana Hazardous Waste Act, Title 75, chapter 10, part 4, MCA; the Comprehensive Environmental Cleanup and Responsibility Act, Title 75, chapter 10, part 7, MCA; the Montana Megalandfill Siting Act, sections 75-10-901 through 75-10-945, MCA; the Montana Underground Storage Tank Installer and Inspector Licensing and Permitting Act, Title 75, chapter 11, part 2, MCA; the Montana Underground Storage Tank Act, Title 75, chapter 11, part 5, MCA; the Montana Major Facility Siting Act, Title 75, chapter 20, MCA; the Open-Space Land and Voluntary Conservation Easement Act, Title 76, chapter 6, MCA; the Environmental Control Easement Act, Title 76, chapter 7, MCA; The Strip and Underground Mine Siting Act, Title 82, chapter 4, part 1, MCA; The Montana Strip and Underground Mine Reclamation Act, Title 82, chapter 4, part 2, MCA; The Opencut Mining Act, Title 82, chapter 4, part 4, MCA; and The Nongame and Endangered Species Conservation Act, Title 87, chapter 5, part 1, MCA."

*Severability:* Section 39, Ch. 361, L. 2003, was a severability clause.

*Retroactive Applicability:* Section 41, Ch. 361, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to actions for judicial review or other causes of action challenging the issuance of a permit, petition for review, amendment, license, arbitration, action, certificate, or inspection that are pending but not yet decided on or after [the effective date of this act]." Effective April 16, 2003.

*Effective Date:* This section is effective October 1, 2001.

## 82-4-437. Annual report — fees.

### Compiler's Comments

*2021 Amendment:* Chapter 324 in (1) at end of last sentence substituted "department" for "board". Amendment effective July 1, 2021.

*2019 Amendment — Code Commissioner Correction:* Chapter 334 in (2)(a) substituted "4.5 cents" for "2.5 cents"; in (2)(b) at end substituted "subsection (2)(a)" for "this section"; inserted (3) concerning operator fees and adoption of rules; in (4) substituted "fees" for "fee" and inserted reference to subsection (3)(a)(i); and made minor changes in style. Amendment effective July 1, 2019.

In (3)(b), the code commissioner substituted "this subsection (3)" for "this subjection" for clarity and to correct a typographical error.

*2013 Amendment:* Chapter 198 in (1), (2)(a), and (2)(b) substituted references to opencut operations for references to permitted operations; in (2)(a) substituted "materials for all operations" for "material"; inserted (3) regarding submission of report when mining without a permit; and made minor changes in style. Amendment effective October 1, 2013.

*2009 Amendment:* Chapter 477 inserted (2) requiring that certain permitted operations submit a fee with the annual report; and made minor changes in style. Amendment effective May 8, 2009.

*Applicability:* Section 12(1), Ch. 477, L. 2009, provided that except as provided in subsection (4), this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 2007.

Section 12(4), Ch. 477, L. 2009, provided: "The exemption provided for in 15-38-113(4) applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 2000, for counties, cities, and towns."

*Effective Date:* This section is effective October 1, 2007.

### 82-4-438. Opencut fund — use of fund.

**Compiler's Comments**

*2019 Amendment:* Chapter 334 in (2) before "money" deleted "85% of the" and substituted "fees" for "fee". Amendment effective July 1, 2019.

*Effective Date:* Section 11, Ch. 477, L. 2009, provided: "[This act] is effective on passage and approval." Approved May 8, 2009.

*Applicability:* Section 12(1), Ch. 477, L. 2009, provided that except as provided in subsection (4), this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 2007.

Section 12(4), Ch. 477, L. 2009, provided: "The exemption provided for in 15-38-113(4) applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 2000, for counties, cities, and towns."

### 82-4-439. Extended review — criteria — timeframes.

**Compiler's Comments**

*2021 Amendment:* Chapter 545 in (1) at end substituted "reveal the proposed plan of operation violates provisions of this part" for "reveal substantial issues not adequately satisfied in the proposed plan of operation"; and made minor changes in style. Amendment effective May 14, 2021.

*Effective Date:* Section 11, Ch. 477, L. 2009, provided: "[This act] is effective on passage and approval." Approved May 8, 2009.

*Applicability:* Section 12(2) and (3), Ch. 477, L. 2009, provided: "(2) Except as provided in subsection (3), [sections 7 and 8] [amending 82-4-432 and enacting 82-2-439] apply to permit applications and amendment applications pursuant to 82-4-432 submitted after [the effective date of this act].

(3) [Section 7(4)(c)] [82-4-432(4)(c)] applies retroactively, within the meaning of 1-2-109, to permit applications and amendment applications submitted prior to [the effective date of this act]." Effective May 8, 2009.

### 82-4-441. Administrative and judicial penalties — enforcement.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 2, Ch. 191, L. 2023. Amendment effective October 1, 2023.

*2021 Amendment:* Chapter 535 in (6) at end deleted "or, if mutually agreed on by both parties in the action, in the first judicial district, Lewis and Clark County". Amendment effective October 1, 2021.

*2007 Amendment:* Chapter 385 in (2) at end of introductory clause before "permit" deleted "reclamation"; and in (6) near middle of second sentence after "opencut" substituted "operation" for "mine". Amendment effective October 1, 2007.

*2005 Amendment:* Chapter 486 inserted (1) relating to violation letters; in (2) at beginning inserted "By issuance of an order pursuant to subsection (5)" and near end inserted "or orders issued"; in (2)(a) at beginning substituted "administrative penalty" for "civil penalty"; in (2)(b) near beginning substituted "administrative penalty" for "civil penalty" and at end deleted "following the service of notice of the violation"; inserted (3) relating to penalties for judicial action; inserted (4) relating to penalty factors; deleted former (2) and (3) that read: "(2) The department shall take into account the following factors in determining whether to institute a civil penalty action and in determining the penalty amount:

(a) the nature, circumstances, extent, and gravity of the violation;
(b) the violator's prior history of violations within the past 3 years;
(c) the economic benefit or savings, if any, to the violator resulting from the violator's action;

(d) the amounts voluntarily expended by the violator to address or mitigate the violation or impacts of the violation; and

(e) other matters that justice may require to decrease the amount of penalty.

(3) The department shall notify the person or operator of the violation. The department shall issue a statement of proposed penalty, including the penalty calculation that identifies and describes the factors considered pursuant to subsection (2), no more than 10 days after issuing the notice of violation. After a hearing provided for in 82-4-427, the board shall make findings of fact, issue a written decision as to the occurrence of the violation and, if the board finds that the violation occurred, the amount of penalty warranted, and order the payment of a penalty in that amount. If the time for requesting a hearing expires without a hearing request, the department shall make the findings of fact and issue the written decision and order. The person or operator shall remit the amount of any penalty within 30 days of the order. If the person or operator wishes to obtain judicial review of the assessment, the person or operator shall submit with the penalty a statement that the penalty is being paid under protest and the department shall hold the payment in escrow until judicial review is complete. A person or operator who fails to request and submit testimony at the hearing provided for in this subsection or who fails to pay the assessed penalty under protest within 30 days of the order assessing the penalty forfeits the right to seek judicial review of the violation or penalty determinations. These penalties are recoverable in an action brought by the department in the district court of the first judicial district, Lewis and Clark County, or in the district court of the county in which the opencut mine is located"; inserted (5) relating to violation orders; in (6) in first sentence at end deleted "in the district court of the first judicial district, Lewis and Clark County, or in the district court of the county in which the opencut mine is located" and inserted last sentence that establishes venue for actions for injunctions or penalties; inserted (7) relating to bringing judicial or injunctive actions instead of administrative actions; and made minor changes in style. Amendment effective October 1, 2005.

The amendments to this section made by sec. 3, Ch. 486, L. 2005, and sec. 27, Ch. 487, L. 2005, were rendered void by sec. 4, Ch. 486, L. 2005, a coordination section.

*Saving Clause:* Section 5, Ch. 486, L. 2005, was a saving clause.

Section 29, Ch. 487, L. 2005, was a saving clause.

*2001 Amendments — Composite Section:* Chapter 79 in (3) deleted former second sentence that read: "The person or operator is entitled, by filing a written request within 20 days of receipt of the notice of violation, to a hearing on the issues of whether the alleged violation has occurred and whether the penalty proposed to be imposed is proper", in second sentence after "10 days after" inserted "issuing the", in third sentence after "hearing" substituted "provided for in 82-4-427, the board" for "or after the time for requesting a hearing has expired, the department" and after "violation and" inserted "if the board finds that the violation occurred", and inserted fourth sentence regarding department action if the time for requesting a hearing expires; in (4) near middle after "permit" inserted "issued"; and made minor changes in style. Amendment effective March 20, 2001.

Chapter 325 at end of (2)(b) inserted "within the past 3 years"; at end of (2)(e) inserted "to decrease the amount of penalty"; in (3) near middle of second sentence inserted "including the penalty calculation that identifies and describes the factors considered pursuant to subsection (2)"; and made minor changes in style. Amendment effective October 1, 2001.

*Preamble:* The preamble attached to Ch. 79, L. 2001, provided: "WHEREAS, certain environmental statutes administered by the Montana Department of Environmental Quality provide that a person aggrieved by a decision of the Department may appeal that decision to the Director of the Department; and

WHEREAS, the possibility of an appeal prevents the Director from becoming involved in certain Department decisions that are subject to appeal to the Director; and

WHEREAS, section 82-4-427, MCA, states that a contested case hearing requested under The Opencut Mining Act must be held within 30 days after the hearing is requested; and

WHEREAS, it is difficult for the Department to conduct a contested case hearing under that Act within 30 days after the hearing is requested; and

WHEREAS, certain revisions to statutes administered by the Department are necessary for clarity and consistency and to conform the statutes to current drafting style."

*Saving Clause:* Section 18, Ch. 79, L. 2001, was a saving clause.

*1999 Amendment:* Chapter 507 in (1) substituted "a reclamation permit" for "a contract for reclamation"; and in (4) substituted "a permit pursuant" for "a contract made pursuant". Amendment effective April 28, 1999.

*Saving Clause:* Section 20, Ch. 507, L. 1999, was a saving clause.

*Severability:* Section 21, Ch. 507, L. 1999, was a severability clause.

*Applicability:* Section 23(3)(b), Ch. 507, L. 1999, provided that for purposes of the amendments in [section 18], amending 82-4-441, "relating to changing opencut mining "contracts" to "permits", contracts issued before [the effective date of this act] [effective April 28, 1999] are permits. The department of environmental quality shall issue permit documents to the contract holders within a reasonable time after [the effective date of this act]." Effective April 28, 1999.

*1997 Amendments:* Chapter 271 in (1), at beginning, inserted "The department may assess against"; in (1)(a) and (1)(b), at beginning, deleted "shall pay"; deleted (1)(c) that read: "(c) may be enjoined from continuing the violation as provided in this section"; substituted (2) setting out factors to be considered prior to instituting a civil penalty action for former (2) that read: "The civil penalties provided for in this section may be waived for a minor violation if it is determined that the violation does not represent potential harm to public health, public safety, or the environment and does not impair the administration of this part. The board shall adopt rules to implement and administer a procedure for waiver of a penalty under this subsection"; and made minor changes in style. Amendment effective April 16, 1997.

Chapter 273 in (3), near middle of fourth sentence, substituted "department" for "board". Amendment effective April 16, 1997.

*Applicability:* Section 3, Ch. 271, L. 1997, provided: "[This act] applies to proceedings begun on or after [the effective date of this act]." Effective April 16, 1997.

*Saving Clause:* Section 6, Ch. 273, L. 1997, was a saving clause.

*1995 Amendment:* Chapter 418 at beginning of (3), after "department", deleted "of state lands"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1991 Amendment:* In (1), at end, deleted "These penalties are recoverable in an action brought in the name of the state of Montana by the attorney general in the district court having jurisdiction of the defendant or by mutual agreement of the parties involved, in the district court of the first judicial district. Penalty money shall be credited to the general fund"; deleted former (2) that read: "(2) The attorney general shall, upon the request of the department, sue for the recovery of the penalties provided for in this section and bring an action for a restraining order or a temporary or permanent injunction against an operator or other person violating or threatening to violate an order adopted under this part"; inserted (3) providing administrative procedures in case of a violation; and inserted (4) authorizing Department to bring an action to enjoin violations.

*1987 Amendment:* In (1), near beginning of first sentence after "rules adopted thereunder", inserted "or provisions of a contract for reclamation"; and inserted (3) providing for waiver of civil penalties in certain cases.

*1987 Statement of Intent:* The statement of intent attached to Ch. 280, L. 1987, provided: "A statement of intent is required for this bill to provide guidelines on rules that must be adopted by the board of land commissioners [functions now transferred to board of environmental review] under the provisions of section 7, which amends 82-4-441. Currently, 82-4-441 requires the imposition of a penalty regardless of the seriousness of a violation. A waiver of penalty provision would allow the department of state lands [functions now transferred to department of environmental quality] to serve a notice of noncompliance, informing the operator of violations of the act or contract, without imposing a fine for minor violation.

It is anticipated that the rules would set forth those instances where a violation would not result in a fine. Under the amendment to 82-4-441, a fine may be waived if the violation does not represent potential harm to public health, public safety, or the environment and does not impair the administration of the Opencut Mining Act. The adopted rules will set forth a mechanism through which the department may exercise its discretion in waiving a penalty. Also, the rules will set forth, within the guidelines of the statute, those violations that do not warrant the imposition of a fine. In establishing these rules, the department shall consider:

(1) whether the violation is inadvertent or unavoidable or results from an emergency situation;

(2) whether the violation will significantly alter or hinder reclamation or the approved reclaimed use;

(3) whether there has been a history of violations by the operator;

(4) whether the operator has shown good faith in rectifying the violation; and

(5) other pertinent factors relating to the seriousness of the violation."

### 82-4-442. Suspension and revocation orders.

**Compiler's Comments**

*Effective Date:* This section is effective October 1, 2007.

### 82-4-445. Reclamation of abandoned mine sites.

**Compiler's Comments**

*2021 Amendment:* Chapter 324 in (3) near beginning of introductory clause substituted "department" for "board". Amendment effective July 1, 2021.

*Effective Date:* Section 5, Ch. 329, L. 1995, provided that this section is effective on passage and approval. Approved April 5, 1995.

### 82-4-446. Filing of lien for abandoned mine reclamation project.

**Compiler's Comments**

*Effective Date:* Section 5, Ch. 329, L. 1995, provided that this section is effective on passage and approval. Approved April 5, 1995.

## Part 6
## Interstate Mining Compact

**Part Compiler's Comments**

*Effective Date:* Section 6, Ch. 310, L. 2023, provided: "[This act] is effective on passage and approval." Approved May 1, 2023.

## Part 10
## Penalties, Fees, and Interest

**Part Compiler's Comments**

*Saving Clause:* Section 29, Ch. 487, L. 2005, was a saving clause.

*Effective Date:* Section 31, Ch. 487, L. 2005, provided that this part is effective January 1, 2006.

### 82-4-1001. Penalty factors.

**Compiler's Comments**

*2021 Amendment:* Chapter 324 in (5) substituted current text providing the department of environmental quality rulemaking authority for former text that read: "The board of environmental review and the department of environmental quality may, for the statutes listed in subsection (4) for which each has rulemaking authority, adopt rules to implement this section." Amendment effective July 1, 2021.

*Repeal of Contingencies:* Section 1, Ch. 79, L. 2009, repealed section 6, Ch. 486, L. 2005, and section 30, Ch. 487, L. 2005, which established certain contingencies related to this section regarding violations, penalties, and waivers under the coal and uranium mine and reclamation laws. Effective October 1, 2009.

*Contingent Voidness:* Section 30, Ch. 487, L. 2005, was a contingent voidness provision that provided: "If any portion of [section 3] [82-4-1001] is disapproved by the United States secretary of the interior pursuant to 30 CFR 732.17, then [section 25] [amending 82-4-254] and the reference in [section 3(4)] [82-4-1001(4)] to 82-4-254 are void." The code commissioner bracketed the reference to 82-4-254 in subsection (4) of this section because it is void upon disapproval by the secretary of the interior.

**Administrative Rules**

Title 17, chapter 4, subchapter 3, ARM Penalty calculation procedures.

### 82-4-1006. Abandoned mine reclamation account.

**Compiler's Comments**

*Effective Date:* Section 3, Ch. 357, L. 2007, provided that this section is effective July 1, 2007.

# CHAPTER 10
# OIL AND GAS — GENERAL PROVISIONS

**Chapter Case Notes**

*Oil and Gas Leases in Deep Creek of Bob Marshall:* Federal agencies violated the National Environmental Policy Act of 1969 by issuing oil and gas leases without preparation of an environmental impact statement and without adequate consideration of a no-action alternative. They violated the Endangered Species Act of 1973 by issuing leases without preparation of a comprehensive biological opinion assessing effects on threatened and endangered species in the area. Bob Marshall Alliance v. Hodel, 852 F2d 1223 (9th Cir. 1988).

*Gas Pipeline on Tribal Land:* A 50-year term for natural gas pipeline rights-of-way, consented to by the tribe, was valid. Blackfeet Indian Tribe v. Mont. Power Co., 838 F2d 1055 (9th Cir. 1988).

*Oil and Gas Leases on National Forest Lands:* Issuance of leases without "no surface occupancy" stipulations required filing of an environmental impact statement. Connor v. Burford, 836 F2d 1521 (9th Cir. 1988).

*Ambiguity in Reservation — Summary Judgment Improper:* In a 1944 deed, the grantor reserved "six percent of all royalties received for oil and gas removed from the above-described property". In 1968, the mineral owners leased the property subject to a one-eighth landowner's royalty (12½% of oil and gas produced). In a subsequent suit, the royalty owners claimed they were entitled to 6% of production and the mineral owners claimed that the royalty owners were entitled to 6% of the landowner's royalty of 12½% of production. The District Court granted summary judgment for the mineral owners. The Supreme Court reversed on the grounds that the reservation language is ambiguous and the true intent of the parties is discernible only with reference to extrinsic evidence, not from the deed alone; therefore, summary judgment was inappropriate. Proctor v. Werk, 220 M 246, 714 P2d 171, 43 St. Rep. 333 (1986).

*Ambiguity in Reservation — Course of Conduct:* Plaintiffs initiated an action to determine their rights under a reservation in an assignment of an oil and gas lease. The 1926 lease assigned reserved the right to take and use gas "for the purpose of extracting, making, or manufacturing casing-head gasoline or by-products or carbon black". The course of conduct and expert testimony both showed that the language was meant to be nonrestrictive. Souders v. Mont. Power Co., 203 M 483, 662 P2d 289, 40 St. Rep. 583 (1983).

**Chapter Law Review Articles**

Taxation of Oil and Gas Interests, Dye, 32 Mont. L. Rev. 57 (1971).

Remedies for Breach of Implied Covenants in Oil and Gas Leases in Montana, Gordon, 28 Mont. L. Rev. 187 (1967).

Effect of County and State Recordation of Options on Federal Oil and Gas Leases, Roth, 20 Mont. L. Rev. 101 (1958).

Reservoir Mechanics, Tarner, 17 Mont. L. Rev. 1 (1955).

The Origin, the Accumulation, and the Findings of Oil and Gas, Parker, 17 Mont. L. Rev. 10 (1955).

Elements of Reservoir Engineering, Wanner, 17 Mont. L. Rev. 15 (1955).

Abstracts and Oil Titles, Hanson, 17 Mont. L. Rev. 108 (1955).

A Survey of Oil and Gas Law in Montana as It Relates to the Oil and Gas Lease, Sullivan, 16 Mont. L. Rev. 1 (1955).

## Part 1
## Royalty Interests

**Part Case Notes**

*No Adverse Possession of Royalty Interest by Color of Title Found — Estoppel Applied:* Defendants in an action to quiet title to a royalty interest argued that they held color of title to the interest by virtue of an invalid tax deed and subsequent conveyances. However, defendants also argued that the reservation of a royalty interest by Rosebud County, their ultimate grantor, was invalid. Citing Russell v. Texas Co., 238 F2d 636 (1956), the Supreme Court held that the defendants could not attack a royalty reservation in a title under and through which defendants claimed adverse possession by color of title. The court held that defendants were estopped from attacking Rosebud County's royalty reservation and that because defendants' grant expressly subjects them to the county's reservation of a royalty interest, defendants had no color of title to their royalty. Stanford v. Rosebud County, 251 M 128, 822 P2d 1074, 48 St. Rep. 1124 (1991).

*No Adverse Possession of Royalty Interest by Use and Occupancy Found — Burden of Proof Unmet:* Defendants in an action to quiet title to certain royalty interests argued that they established adverse possession. Citing Burlingame v. Marjerrison, 204 M 464, 665 P2d 1136 (1983), the Supreme Court noted that adverse possession must rely upon possession that is actual, visible, exclusive, hostile, and continuous for the required statutory period. Because the defendants failed to produce evidence that they possessed or had taken any of the proceeds from the royalty, which was held by the clerk of court, the Supreme Court held that adverse possession did not apply. Stanford v. Rosebud County, 251 M 128, 822 P2d 1074, 48 St. Rep. 1124 (1991).

*Royalty Interest Not Derived From Mineral Interest — Owner of Mineral and Surface Interests Not Entitled to Royalty Interest:* Defendants in an action to quiet title to mineral interests in oil and gas argued that because a royalty interest can be derived only from a mineral interest of which they owned 75% and because they invested in and were in control of the mineral interest, they were entitled to all royalties except those burdened by the production lease. Citing McSweyn v. Musselshell County, 193 M 525, 632 P2d 1095, 38 St. Rep. 1260 (1981), the Supreme Court held that the distinction between a mineral interest and a royalty interest must be recognized. A mineral interest is a right to develop or lease for development and to keep the proceeds of the lease, whereas a royalty interest is the right to a share in production while remaining free from the costs of production. Defendants' argument that they can spend time and money on production yet have a royalty interest blurs this distinction and is contradictory to the definition of a royalty interest. The court refused to recognize such a basis for a royalty interest and awarded the royalty interest to plaintiffs. Stanford v. Rosebud County, 251 M 128, 822 P2d 1074, 48 St. Rep. 1124 (1991).

*Unresolved Issues Regarding Royalty Interests — Summary Judgment Precluded:* Prior to 1955, McDonald & Eide, Inc. (M&E) owned the entire working interest in a lease on a producing oil well. On July 12, 1955, M&E assigned 100% of its interest in the south half and 50% of its interest in the north half to H. W. McDonald, but this assignment was not recorded until 1963. After M&E's corporate charter was repealed for failure to pay taxes, corporate officers of M&E purported to assign M&E's total working interest to V. Eide and J. Von DeLinde in 1961, but this assignment conflicted with the one previously made to McDonald, who filed a quiet title action. Thereafter, all three entered an agreement with Continental Oil Company (Continental) assigning to the company an undivided one-half interest in the lease. While the quiet title action was pending, McDonald assigned undivided interests to G. Huntley, D. Iverson, and A. Larson with the intent to convey to each the respective share "held in suspense by Continental". In 1964, final judgment quieted title in McDonald subject to the agreement with Continental. In 1965, M&E stockholders appointed F. Gunnip as receiver, and he sued M&E corporate officers to recover the lease and other property. A 1970 judgment voided the 1961 agreement, and in 1976, final judgment provided that Gunnip owned one-half interest in the north half of the lease while Eide, Von DeLinde, and Continental were held to have no interest. Shell Oil Company, responsible for disbursing the lease proceeds, continued to pay Continental one-half of the proceeds under the agreement with McDonald, and although Gunnip was owner of a 50% interest, he received only a 25% share of proceeds. In 1981, Gunnip assigned a 3.75% interest in the north half to Huntley and a 2.5% interest in the north half to R. Schwinn. Huntley became aware that Gunnip was not receiving his full share, so Gunnip, Huntley, and Schwinn sued Continental, requesting an additional one-eighth of the proceeds. The District Court granted summary judgment to Continental in 1985, but the Supreme Court reversed on appeal, holding that: (1) unresolved issues of material fact remained regarding Continental's interest; (2) a trial must be had to assess Continental's interest considering potential application of adverse possession, waiver, and estoppel; and (3) Continental's asserted 50% interest in the north half of the lease must be tested against the interest of McDonald's assignees and successors in interest. The case was remanded for further proceedings. Gunnip v. Cont. Oil Co., 223 M 141, 727 P2d 1315, 43 St. Rep. 1605 (1986). On remand, the District Court neglected to assess Continental's interest as directed. On later appeal, the Supreme Court granted supervisory control and determined that: (1) plaintiffs failed to present substantial evidence to support a theory of adverse possession, waiver, or estoppel against Continental; (2) Continental owned an undivided one-half interest in the working interest in the north half of the lease; and (3) Gunnip and his assigns owned the remaining half of the working interest in the north half. Cont. Oil Co. v. Elks Nat'l Foundation, 235 M 438, 767 P2d 1324, 46 St. Rep. 121 (1989).

*Assignment of Oil and Gas Lease Working Interest to Trust Valid Grant:* In 1954, Fitzpatrick and three other parties entered into an operating agreement concerning the working interest in an oil and gas lease. The agreement included a clause giving each party a preferential right to purchase the working interest of any other party. In 1969, Fitzpatrick divided his interest into three parts. He assigned one-third to his wife, reserved one-third in himself, and assigned one-third in four equal parts to four trusts which he had created for his four children. In 1972, Fitzpatrick signed a quitclaim assignment of whatever working interest he had to Youngblood, successor in interest to one of the four parties to the 1954 agreement. Youngblood had acquired similar quitclaim assignments from the other two parties to the original agreement. Believing that he owned 100% of the working interest in the lease, Youngblood began development of oil and gas wells on the land. The land became productive in 1972. In 1975, Youngblood, concerned about whether or not he had acquired all of Fitzpatrick's interest, had Fitzpatrick and his wife sign letters to ratify that Youngblood had acquired all their working interest in 1972. The Fitzpatrick children, as beneficiaries of the trusts, refused to sign similar letters. Youngblood then filed an action to quiet title to the working interest in him. The District Court found for Youngblood, ruling that the 1969 assignment was invalid for failure of delivery, failure of acceptance, and for retention of dominion and control over the working interest by Fitzpatrick. The Supreme Court reversed. The court ruled that Fitzpatrick's intent in making the 1969 assignment was to transfer income from oil and gas production to his wife and four children and that delivery was therefore complete. Acceptance of the assignment may be presumed because the net effect of the assignment was beneficial to the trusts. The court further ruled that there was not sufficient evidence that Fitzpatrick retained dominion and control over the working interests after the 1969 assignment. Finally, the court ruled that the parties did not intend the preferential purchase clause to apply to a transfer without consideration between family members, so Youngblood was not entitled to enforce that clause. Exeter Exploration Co. v. Fitzpatrick, 202 M 209, 661 P2d 1255, 40 St. Rep. 38 (1983).

*Deed Reserving Mineral Interest to County — No Mutual Mistake:* A 1944 deed reserved a mineral interest to the county. The deed did not on its face indicate mutual mistake, the parties agreed in 1977 that the 1944 deed reserved a royalty, and not one of the interested parties claimed mutual mistake. Plaintiff did not overcome the presumption that the 1944 deed contained the final agreement of the parties. McSweyn v. Musselshell County, 193 M 525, 632 P2d 1095, 38 St. Rep. 1260 (1981).

**Part Law Review Articles**

Oil and Gas Leasehold and Other Estates, Shepherd, 14 Mont. L. Rev. 1 (1953).

## 82-10-101. Action for accounting for royalty.

**Case Notes**

*Procedures for Determining Market Price of Gas:* In an appeal from a declaratory judgment action, petitioner Montana Power Company requested the Supreme Court to determine whether the procedures adopted on remand from a previous case by the District Court for determining market price are consistent with the Supreme Court's instruction for remand. The Supreme Court held that the District Court's action on remand was proper, which action set the market price of gas at a certain level, and required the parties to attempt to renegotiate the market price if market conditions materially change, the court retaining jurisdiction if the parties cannot agree as to price. Mont. Power v. Kravik, 189 M 369, 616 P2d 321, 37 St. Rep. 1531 (1980).

## 82-10-102. Remedy not exclusive.

**Compiler's Comments**

*1983 Amendments — Composite Section:* Chapter 500, at beginning of section, changed "The remedy herein provided for" to "The remedy provided for in 82-10-101"; near end changed "provisions of this part" to "provisions of 82-10-101"; and at end changed "this part" to "that section".

Chapter 582, near beginning of section, changed "The remedy herein provided for" to "The remedy provided for in 82-10-101"; and after "the provisions of" and "provided for by" changed "this part" to "that section".

In preparing the composite of this section, the compiler has chosen the section designation "82-10-101" from Ch. 500 rather than the language "that section" from Ch. 582, for purposes of clarity.

## 82-10-103. Obligation to pay royalties as essence of contract — interest.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

*1985 Amendment:* In (2) near beginning, substituted "120 days after the initial oil or gas produced under the lease is marketed and within 60 days for all oil and 90 days for all gas produced and marketed thereafter" for "180 days after oil or gas produced under the lease is marketed" and at end, inserted "and annually whenever the aggregate amount is less than $10".

*Source:* This section was drawn from 47-16-39.1 of the North Dakota Century Code but was substantially amended in the legislative process.

**82-10-104. Payment of royalties — form of record required.**

**Compiler's Comments**

*2005 Amendment:* Chapter 19 in (1)(d) at beginning substituted "time period" for "month and year"; inserted (1)(k) requiring a producer to include contact information with a payment; inserted (2) requiring a producer paying royalties to specify by line item every charge assessed against the royalty owner; in (3) near middle after "subsection (1)" inserted "or (2)"; and made minor changes in style. Amendment effective July 1, 2006.

**82-10-110. Division order — definition — effect.**

**Compiler's Comments**

*Source:* This section is based on Oklahoma Statutes Annotated, Title 52, section 570.11.

## Part 2
## Lease of Local Government Land

**Part Case Notes**

*Deed Reserving Mineral Interest to County — No Mutual Mistake:* A 1944 deed reserved a mineral interest to the county. The deed did not on its face indicate mutual mistake, the parties agreed in 1977 that the 1944 deed reserved a royalty, and not one of the interested parties claimed mutual mistake. Plaintiff did not overcome the presumption that the 1944 deed contained the final agreement of the parties. McSweyn v. Musselshell County, 193 M 525, 632 P2d 1095, 38 St. Rep. 1260 (1981).

**82-10-202. Acreage pooling.**

**Law Review Articles**

Some Legal Aspects of the Unitization of Federal, State and Fee Lands, Hinkle, 14 Mont. L. Rev. 49 (1953).

## Part 3
## Underground Gas Storage Reservoirs

**82-10-303. Use of eminent domain to acquire underground reservoirs.**

**Compiler's Comments**

*2001 Amendment:* Chapter 125 in (1) in first sentence inserted reference to Title 70, chapter 30; and made minor changes in style. Amendment effective October 1, 2001.

*Interim Study Bill — Eminent Domain:* Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

**82-10-304. Certificate of board required prior to use of eminent domain.**

**Compiler's Comments**

*2001 Amendment:* Chapter 125 in (1) in first sentence inserted references to Title 70, chapter 30, and this chapter; and made minor changes in style. Amendment effective October 1, 2001.

*Interim Study Bill — Eminent Domain:* Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

**82-10-305. Proceedings.**

**Compiler's Comments**

*2001 Amendment:* Chapter 125 at end deleted reference to Title 70, chapter 31; and made minor changes in style. Amendment effective October 1, 2001.

*Interim Study Bill — Eminent Domain:* Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

## Part 4
## Abandoned Oil and Gas Wells — Reclamation

**82-10-401. Notice required before abandonment of well — owner's option.**

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

**Administrative Rules**

Title 36, chapter 22, subchapter 13, ARM Abandonment, plugging, and restoration.

### 82-10-402. Inventory of abandoned wells and seismic operations — reclamation procedures.

**Compiler's Comments**

*2009 Amendments — Composite Section:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Chapter 474 inserted (5) regarding funds that may be used for reclamation of certain abandoned carbon dioxide injection wells; and made minor changes in style. Amendment effective on occurrence of contingency.

Style changes were slightly different in the chapters. In each case, the codifier chose appropriate text.

*Saving Clause:* Section 29, Ch. 474, L. 2009, was a saving clause.

*Transition — Contingent Implementation:* Section 30, Ch. 474, L. 2009, provided: "If the United States environmental protection agency adopts regulations allowing states to apply for primacy over carbon dioxide sequestration wells under the federal underground injection control program adopted by the environmental protection agency, the board of oil and gas conservation shall in consultation with the department of environmental quality and the department of natural resources and conservation develop draft rules to implement [this act] [Chapter 474, L. 2009] and seek primacy." A final rule allowing states to apply for primacy over carbon dioxide sequestration wells under the federal underground injection control program was adopted by the environmental protection agency and is found at Volume 75 of the Federal Register, pages 77229 through 77303.

*1989 Amendment:* In (1), in two places, substituted "board of oil and gas conservation" for "department of natural resources and conservation" and "record" for "list"; in (2), near beginning of first sentence, substituted "record compiled" for "list supplied by the department" and near middle of first sentence, after "determine", inserted "and list"; in (3) substituted language that provides that when a person who abandoned well, sump, or hole cannot be identified or located or does not have resources to pay for complete reclamation, Board may reclaim land with funds from account consistent with 82-11-161 and 82-11-164 for "When the person who abandoned a well, sump, or hole cannot be identified or located under the preceding subsection, the board shall notify the department of natural resources and conservation. The department may then reclaim the disturbed land with funds available from the resource indemnity trust fund under 15-38-202, when available"; inserted (4) defining well for purposes of subsection (3); and made minor changes in phraseology. Amendment effective July 1, 1989.

## Part 5
## Surface Owner Damage and Disruption Compensation

**Part Compiler's Comments**

*Source:* This part is based on Title 38, chapter 11.1, North Dakota Century Code.

*Severability:* Section 10, Ch. 199, L. 1981, was a severability section.

**Part Case Notes**

*Surface Owner Damage and Compensation — No Requirement to Exhaust Statutory Remedies:* Before litigating a damage claim in court, a surface owner is not required to exhaust the statutory remedy under Title 82, ch. 10, part 5, which is designed to facilitate communications between surface owners and oil and gas operators in order to resolve damage disputes. Interstate Explorations, LLC v. Morgen Farm and Ranch, Inc., 2016 MT 20, 382 Mont. 136, 364 P.3d 1267.

*Use of Pore Space — Separate Compensation Not Required:* The District Court correctly concluded that the owner of an oil and gas lease could dispose of wastewater in a well on the surface estate owner's property without paying the surface estate owner additional compensation for the use of the pore space beneath the well. Although the pore space belongs to the surface estate, the surface estate owner failed to establish that the use of the pore space affected the surface estate owner's interest in the land value, agricultural production, or value to improvements under the Surface Owner Damage and Disruption Compensation Act. Burlington Resources Oil & Gas Co. v. Lang & Sons, Inc., 2011 MT 199, 361 Mont. 407, 259 P.3d 766.

**Part Law Review Articles**

Sunburst School District No. 2 v. Texaco, Inc.: Rethinking Restoration Damages as a Remedy for Tortious Injury to Land and Property, Tanner, 70 Mont. L. Rev. 291 (2009).

### 82-10-502. Definitions.

**Compiler's Comments**

*2013 Amendment:* Chapter 345 inserted definitions of lost land value and reasonably available use; and made minor changes in style. Amendment effective October 1, 2013.

### 82-10-503. Notice of drilling operations.

**Compiler's Comments**

*2007 Amendment:* Chapter 57 in (1) inserted third sentence concerning including certain material with notice, in fifth sentence substituted "180 days" for "90 days", "20 days" for "10 days", and near end "any activity that disturbs" for "commencement of any activity on", and inserted last sentence concerning waiver of notice; inserted (2) concerning surface owner responsibility for providing names and addresses of parties using surface operations; inserted (3) concerning entry for certain purposes prior to notice; and made minor changes in style. Amendment effective October 1, 2007.

*Applicability:* Section 7, Ch. 57, L. 2007, provided: "[This act] applies to proceedings begun on or after October 1, 2007."

*1985 Amendment:* Inserted last sentence referring to time deadlines for giving notice of drilling operations.

*1983 Amendment:* Twice after "surface owner" inserted "and any purchaser under contract for deed" and after second insertion substituted "their addresses" for "his address".

**Case Notes**

*Preliminary Injunction to Ensure Entry to Property for Gas and Oil Drilling:* Plaintiff was granted a preliminary injunction to prohibit defendant from denying plaintiff's entry onto defendant's land to exercise oil and gas drilling rights pursuant to a surface and damage agreement between the parties. Defendant contended that the injunction was improperly granted because plaintiff failed to provide statutory notice as required by 82-10-503(1). Plaintiff satisfied all other statutory requirements, but instead of sending notice to defendant's address of record, plaintiff sent notice to the land manager's personal address. The land manager then met with the plaintiff and accepted written correspondence and the statutory notice. Under common law and by specific terms of the agreement, plaintiff was allowed access to exercise its mineral rights. The statute was not intended to abrogate the common-law right of entry, and defendant offered no authority that would bar plaintiff from entering the land for failing to provide statutory notice. Rather, plaintiff established the likelihood of success on its claim and the likelihood of irreparable damage if the injunction was not granted. Therefore, the Supreme Court affirmed the grant of the preliminary injunction. Pinnacle Gas Resources, Inc. v. Diamond Cross Properties, LLC, 2009 MT 12, 349 M 17, 201 P3d 160 (2009). See also Hurley v. N. Pac. Ry. Co., 153 M 199, 455 P2d 321 (1969), and W. Energy Co. v. Genie Land Co., 195 M 202, 635 P2d 1297 (1981).

### 82-10-504. Surface damage and disruption payments — dispute resolution — penalty for late payment.

**Compiler's Comments**

*2013 Amendment:* Chapter 345 in (1)(a) in first sentence inserted "in good faith"; and in (1)(e) substituted "under this subsection" for "contemplated by this subsection". Amendment effective October 1, 2013.

*2007 Amendment:* Chapter 57 in (1)(a) inserted first sentence concerning attempt to negotiate agreement on damages and near end of second sentence substituted "oil and gas" for "drilling"; inserted (1)(c) concerning dispute resolution process; in (1)(e) near end of first sentence substituted "oil and gas" for "drilling"; and made minor changes in style. Amendment effective October 1, 2007.

*Applicability:* Section 7, Ch. 57, L. 2007, provided: "[This act] applies to proceedings begun on or after October 1, 2007."

*1985 Amendment — Subsection Enactment:* In (1)(c) substituted "receive annual damage payments" for "be paid damages in annual installments".

Subsection (2) concerning penalty for late payment by an oil and gas developer or operator was enacted as a separate section by Ch. 497, L. 1985, but is codified with this section for convenience.

### 82-10-505. Liability for damages to property.

**Compiler's Comments**

*2007 Amendment:* Chapter 57 near end of second sentence substituted "oil and gas" for "drilling"; and made minor changes in style. Amendment effective October 1, 2007.

*Applicability:* Section 7, Ch. 57, L. 2007, provided: "[This act] applies to proceedings begun on or after October 1, 2007."

### 82-10-506. Notification of injury.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

### 82-10-507. Agreement — offer of settlement.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

### 82-10-510. Penalty for notice violation.

**Compiler's Comments**

*Effective Date:* This section is effective October 1, 2007.

*Applicability:* Section 7, Ch. 57, L. 2007, provided: "[This act] applies to proceedings begun on or after October 1, 2007."

### 82-10-511. Remedies cumulative.

**Case Notes**

*Surface Owner Damage and Compensation — No Requirement to Exhaust Statutory Remedies:* Before litigating a damage claim in court, a surface owner is not required to exhaust the statutory remedy under Title 82, ch. 10, part 5, which is designed to facilitate communications between surface owners and oil and gas operators in order to resolve damage disputes. Interstate Explorations, LLC v. Morgen Farm and Ranch, Inc., 2016 MT 20, 382 Mont. 136, 364 P.3d 1267.

## Part 6
## Disclosure of Fracturing Fluids

**Part Compiler's Comments**

*Erroneous Codification Instruction — Code Commissioner Correction:* Section 6, Ch. 316, L. 2017, provided that sections 1 through 3 were to be codified as an integral part of Title 82, chapter 10, part 1. The code commissioner has codified those sections as Title 82, chapter 10, part 6, to more closely reflect the subject matter.

*Effective Date:* This part is effective October 1, 2017.

*Preamble:* The preamble attached to Ch. 316, L. 2017, provided: "WHEREAS, Board of Oil and Gas Conservation rules related to the disclosure of fracturing fluids are made redundant by passage of this bill; and

WHEREAS, ARM 36.22.608 contradicts the provisions of this bill because a description of the requirements for a proposed well stimulation do not conform to the requirements which would be reflected in law; and

WHEREAS, ARM 36.22.1015 contradicts the provisions of this bill because disclosure of well stimulation fluids do not conform to the requirements which would be reflected in law; and

WHEREAS, ARM 36.22.1016 contradicts the provisions of this bill because options for the protection of proprietary chemicals and trade secrets do not conform to the requirements which would be reflected in law."

# CHAPTER 11
# OIL AND GAS CONSERVATION

**Chapter Administrative Rules**

Title 36, chapter 22, ARM Board of Oil and Gas Conservation.

**Chapter Case Notes**

*Reasonable Notice Required Before Duty to Drill Offset Well Arises:* Clarifying its opinion in U.V. Indus., Inc. v. Danielson, 184 M 203, 602 P2d 571 (1979), the Supreme Court held that before a lessee's duty to drill an offset well arises, the lessee must have reasonable notice of the necessity to protect the leasehold. Notice "can either be express, from the lessor, or constructive, gained from the surrounding circumstances". This rule is only applicable in cases when a lessor is seeking relief in the form of damages. If he is seeking other forms of relief, such as forfeiture of the lease, he must give written notice in order to give the lessor a chance to cure the breach. Sundheim v. Reef Oil Corp., 247 M 244, 806 P2d 503, 48 St. Rep. 181 (1991).

*Forfeiture of Gas and Oil Lease — Common-Law Offset Drilling Rule:* Where an oil and gas lease provided that no change in ownership of the land was to be binding upon the lessees until after lessee had been given a copy of any such transfer, lessor's grantees' right to damages for failure to drill an offset well under the common-law offset drilling rule could not be defeated by a failure to give the required notice, as the purpose of the notice is to prevent the lessee's forfeiture of the lease for failure to pay delay rentals to the proper party. Such required notice has nothing to do with implied covenants. U. V. Indus., Inc. v. Danielson, 184 M 203, 602 P2d 571 (1979).

*Notice or Demand to Drill Under Common-Law Offset Drilling Rule:* Where plaintiffs' well was being drained by an adjoining well in which defendants (plaintiffs' lessees under a gas and oil lease) also had an interest, there was no requirement that plaintiffs must serve written notice or demand to drill an offset well under the common-law offset drilling rule, as those defendants were presumed to know that plaintiffs' well was being drained. However, as to those defendants who did not own an interest in the well causing the plaintiffs' well to drain, the plaintiffs must give notice to drill. U. V. Indus., Inc. v. Danielson, 184 M 203, 602 P2d 571 (1979).

*Common-Law Offset Drilling Rule — Implied Covenant Not Altered by Enactment of Statutes:* Where the parties entered into a mineral lease for the production of oil underlying plaintiff's property, there was by common law implied in this and every oil and gas lease a covenant on the part of the lessee to protect the premises of his lessor from drainage by an adjacent producing well by drilling an offset well. The implied covenant was not per se eliminated by the enactment of the 1953 oil and gas conservation law, and an oil and gas lessee still has a duty under the implied covenant to protect his premises from drainage by drilling an offset well, if doing so would not be in violation of the statutes or of a valid rule or order of the Oil and Gas Conservation Board. U. V. Indus., Inc. v. Danielson, 184 M 203, 602 P2d 571 (1979).

**Chapter Law Review Articles**

Application of the Doctrine of Correlative Rights by the State Conservation Agency in the Absence of Express Statutory Authorization, Strong, 28 Mont. L. Rev. 205 (1967).

Symposium on Rocky Mountain Oil and Gas Law, Vol. 17, No. 1, Mont. L. Rev. (1955).

Conservation in Montana, Marchi, 17 Mont. L. Rev. 100 (1955).

A Survey of Oil and Gas Law in Montana as It Relates to the Oil and Gas Lease, Sullivan, 16 Mont. L. Rev. 1 (1955).

Oil and Gas Leasehold and Other Estates, Shepherd, 14 Mont. L. Rev. 1 (1953).

**Chapter Collateral References**

Board of Oil and Gas Conservation Regulatory Program, Performance Audit, Mont. Leg. Audit Div. (September 2011), https://leg.mt.gov/content/Publications/Audit/Report/11P-04.pdf.

## Part 1
## Regulation by Board of Oil and Gas Conservation

**Part Administrative Rules**

Title 36, chapter 22, ARM Board of Oil and Gas Conservation.

**Part Law Review Articles**

Application of the Doctrine of Correlative Rights by the State Conservation Agency in the Absence of Express Statutory Authorization, 28 Mont. L. Rev. 205 (1967).

### 82-11-101. Definitions.

**Compiler's Comments**

*2009 Amendment:* Chapter 474 inserted definitions of carbon dioxide, carbon dioxide injection well, geologic storage operator, geologic storage reservoir, and verification and monitoring; in definition of pool at end of second sentence after "pool" deleted "as that term is used in this chapter", and inserted third sentence providing that the definition includes an underground reservoir for the long-term storage of carbon dioxide; and made minor changes in style. Amendment effective on occurrence of contingency.

*Saving Clause:* Section 29, Ch. 474, L. 2009, was a saving clause.

*Transition — Contingent Implementation:* Section 30, Ch. 474, L. 2009, provided: "If the United States environmental protection agency adopts regulations allowing states to apply for primacy over carbon dioxide sequestration wells under the federal underground injection control program adopted by the environmental protection agency, the board of oil and gas conservation shall in consultation with the department of environmental quality and the department of natural resources and conservation develop draft rules to implement [this act] [Chapter 474, L. 2009] and seek primacy." A final rule allowing states to apply for primacy over carbon dioxide sequestration wells under the federal underground injection control program was adopted by the environmental protection agency and is found at Volume 75 of the Federal Register, pages 77229 through 77303.

*1993 Amendment:* Chapter 379 deleted definition of gas that read: ""Gas" means all natural gases and all other fluid hydrocarbons as produced at the wellhead and not defined as oil in subsection (10) of this section"; deleted definition of oil that read: ""Oil" means crude petroleum oil and other hydrocarbons regardless of gravity which are produced at the wellhead in liquid form by ordinary production methods and which are not the result of condensation of gas before or after it leaves the reservoir"; in definition of waste inserted (b) excluding from definition loss of gas to atmosphere during coal mining; and made minor changes in style.

*Saving Clause:* Section 6, Ch. 379, L. 1993, was a saving clause.

*1991 Amendment:* In definition of responsible person inserted "disposal well, water source well, drill site", after "hole" inserted "or other area where oil and gas drilling and production operations were conducted", and deleted former (a) and (b) requiring responsible person to be either a corporation, association, partnership, or other business organization with assets in excess of $250,000 or, if the business organization does not have assets in excess of $250,000, to be a natural person with primary ownership in the business organization; and made minor changes in style.

*Saving Clause:* Section 6, Ch. 734, L. 1991, was a saving clause.

*1989 Amendment:* Inserted definition of responsible person. Amendment effective July 1, 1989.

*1987 Amendment:* Inserted definitions of administrator, class II injection well, fluid, pollution, and state waters; and in definition of gas changed reference to subsection (7) to reference to subsection (10).

*1983 Amendment:* In definition of gas, substituted reference to "(7)" for "(6)".

*Severability Clause:* Section 8, Ch. 19, L. 1979, read: "If a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications."

## 82-11-103. Lands subject to law.

### Compiler's Comments

*2009 Amendment:* Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

*1991 Amendment:* In first sentence after "its" deleted "taxation and" and after "powers" inserted "including all state-owned lands"; and made minor changes in style.

*Saving Clause:* Section 6, Ch. 734, L. 1991, was a saving clause.

### Law Review Articles

Oil and Gas Leases on Federal Lands, Malone, 14 Mont. L. Rev. 20 (1953).

## 82-11-104. Construction — no conflict with board of land commissioners' authority.

### Compiler's Comments

*2009 Amendment:* Chapter 474 near middle after "agreements for the" inserted "storage of carbon dioxide in a geologic storage reservoir or the"; and made minor changes in style. Amendment effective on occurrence of contingency.

*Saving Clause:* Section 29, Ch. 474, L. 2009, was a saving clause.

*Transition — Contingent Implementation:* Section 30, Ch. 474, L. 2009, provided: "If the United States environmental protection agency adopts regulations allowing states to apply for primacy over carbon dioxide sequestration wells under the federal underground injection control program adopted by the environmental protection agency, the board of oil and gas conservation shall in consultation with the department of environmental quality and the department of natural resources and conservation develop draft rules to implement [this act] [Chapter 474, L. 2009] and seek primacy." A final rule allowing states to apply for primacy over carbon dioxide sequestration wells under the federal underground injection control program was adopted by the environmental protection agency and is found at Volume 75 of the Federal Register, pages 77229 through 77303.

*1991 Amendment:* At end of section inserted proviso subjecting state lands to laws concerning space and statutory pooling and unitization in absence of agreements; and made minor changes in style.

*Saving Clause:* Section 6, Ch. 734, L. 1991, was a saving clause.

### 82-11-110. Oil and gas education and research account.

**Compiler's Comments**

*Effective Date:* This section is effective October 1, 2009.

### 82-11-111. Powers and duties of board.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 1, Ch. 555, L. 2023. Amendment effective October 1, 2023.

*2019 Amendment:* Chapter 3 in (7)(d) substituted "Montana technological university" for "Montana tech of the university of Montana". Amendment effective October 1, 2019.

*2011 Amendment:* Chapter 19 in version effective on occurrence of contingency in (6) substituted "82-11-181" for "85-11-181"; and made minor changes in style. Amendment effective October 1, 2011.

*2009 Amendments — Composite Section:* Chapter 329 inserted (7) authorizing board to promote state's oil and gas industry and outlining authorized activities; and made minor changes in style. Amendment effective October 1, 2009.

Chapter 474 in (2)(a) near end after "water" inserted "or carbon dioxide"; in (2)(b) after "gas wells" inserted "carbon dioxide injection wells"; in (5) at beginning inserted "Subject to subsection (7)" and after "over" inserted "carbon dioxide injection wells, geologic storage reservoirs"; in (5)(a) after "operate" inserted "carbon dioxide injection wells and" and at end after "made by it" inserted "and pursuant to 82-11-123. If a permit for a carbon dioxide injection well is revoked, an operator may not seek a refund of application or permitting fees or fees paid pursuant to 82-11-181 or 82-11-184(2)(b)"; in (5)(d)(iv) after "operator" inserted "or geologic storage operator"; in (5)(e) after "operation of" inserted "carbon dioxide injection wells and"; in (6) at end inserted "or the geologic storage reservoir program account established in 82-11-181"; inserted (8) requiring solicitation of comments from the department of environmental quality prior to holding a hearing; inserted (9) providing that carbon dioxide within a geologic storage reservoir is not a pollutant, nuisance, or a hazardous or deleterious substance for purposes of administering carbon dioxide injection wells; and made minor changes in style. Amendment effective on occurrence of contingency.

Style changes were slightly different in the chapters. In each case, the codifier chose appropriate text.

*Saving Clause:* Section 29, Ch. 474, L. 2009, was a saving clause.

*Transition — Contingent Implementation:* Section 30, Ch. 474, L. 2009, provided: "If the United States environmental protection agency adopts regulations allowing states to apply for primacy over carbon dioxide sequestration wells under the federal underground injection control program adopted by the environmental protection agency, the board of oil and gas conservation shall in consultation with the department of environmental quality and the department of natural resources and conservation develop draft rules to implement [this act] [Chapter 474, L. 2009] and seek primacy." A final rule allowing states to apply for primacy over carbon dioxide sequestration wells under the federal underground injection control program was adopted by the environmental protection agency and is found at Volume 75 of the Federal Register, pages 77229 through 77303.

*1989 Amendment:* Inserted (6) requiring Board to determine, for purposes of using account, when person cannot be identified or located or does not have sufficient resources to plug well, sump, or hole or when previously abandoned well, sump, or hole is cause of problems and no responsible party can be identified or located or, if identified or located, does not have resources to correct problem. Amendment effective July 1, 1989.

*1987 Amendment:* In (2)(a) substituted "disposal or injection of water and disposal of oil field wastes" for "disposal of salt water and oil field wastes"; in (2)(b), after "gas wells", inserted "or class II injection wells"; and inserted (5) referring to jurisdiction over class II injection wells.

*1987 Statement of Intent:* The statement of intent attached to Ch. 503, L. 1987, provided: "It is the intent of the legislature that the board of oil and gas conservation adopt rules necessary to regulate class II injection wells under the provisions of this act. These rules must establish an enforceable program meeting the requirements of the environmental protection agency for state administration of an underground injection control program and ensuring compliance with state water quality laws."

*1983 Amendment:* In (2)(a), referring to prevention of contamination of or damage to surrounding land or underground strata, inserted all of subsection except "regulating the disposal of salt water and oil field wastes".

*Section Not Codified:* Section 60-127(2)(e), R.C.M. 1947, a clause requiring the Board to promulgate rules no later than Nov. 1, 1974, was not codified in the MCA. This clause has not been repealed and is still valid law. Citation may be made to sec. 4, Ch. 288, L. 1953, as amended by sec. 1, Ch. 222, L. 1975.

**Case Notes**

*Common-Law Rule Not Superseded by Authority of Board:*

In an action by plaintiffs (lessor's grantees) for damages resulting from defendant lessees' failure under an oil and gas lease to protect the plaintiffs' interests by drilling an offset well, the common-law offset drilling rule, under which plaintiffs seek damages, has not been superseded by the administrative powers of the Board of Oil and Gas Conservation, as the powers of the Board do not include the authority to adjudicate private rights. As held in the case of Pattie v. Oil & Gas Conserv. Comm'n, 145 M 531, 402 P2d 596 (1965), the Legislature gave the Board the duty to consider correlative rights in making orders, but adjudication of those rights must be by civil action in the District Courts. U. V. Indus., Inc. v. Danielson, 184 M 203, 602 P2d 571 (1979).

Under 82-11-201, the Oil and Gas Conservation Commission had authority to consider correlative rights and private interests in making regulatory orders establishing spacing units with respect to fringe owners, but it does not have authority to adjudicate disputes involving those rights. Pattie v. Oil & Gas Conserv. Comm'n, 145 M 531, 402 P2d 596 (1965).

## 82-11-112. Intergovernmental cooperation.

**Compiler's Comments**

*2021 Amendments — Composite Section:* Chapter 526 at beginning inserted "Subject to the provisions of 76-2-109"; and made minor changes in style. Amendment effective May 14, 2021.

Chapter 533 at beginning inserted "Subject to 76-2-109"; and made minor changes in style. Amendment effective May 14, 2021.

**Law Review Articles**

Some Legal Aspects of the Unitization of Federal, State and Fee Lands, Hinkle, 14 Mont. L. Rev. 20 (1953).

## 82-11-117. Confidentiality of records.

**Compiler's Comments**

*2017 Amendment:* Chapter 316 in (1) at beginning of first and second sentences inserted exception clause; in (2) in first sentence in three places inserted "or service company", in first sentence after "by the board" inserted "in accordance with this section or by the administrator in accordance with Title 82, chapter 10, part 6", in second sentence near beginning substituted "board" for "department", and inserted third sentence concerning public disclosure of information submitted to board; inserted (4) concerning treatment of certain submitted information; in (5) inserted "under this chapter or Title 82, chapter 10, part 6"; and made minor changes in style. Amendment effective October 1, 2017.

*Preamble:* The preamble attached to Ch. 316, L. 2017, provided: "WHEREAS, Board of Oil and Gas Conservation rules related to the disclosure of fracturing fluids are made redundant by passage of this bill; and

WHEREAS, ARM 36.22.608 contradicts the provisions of this bill because a description of the requirements for a proposed well stimulation do not conform to the requirements which would be reflected in law; and

WHEREAS, ARM 36.22.1015 contradicts the provisions of this bill because disclosure of well stimulation fluids do not conform to the requirements which would be reflected in law; and

WHEREAS, ARM 36.22.1016 contradicts the provisions of this bill because options for the protection of proprietary chemicals and trade secrets do not conform to the requirements which would be reflected in law."

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

**82-11-118. Fees for processing applications.**

**Compiler's Comments**

*2009 Amendment:* Chapter 474 in (1) in first sentence after "application from" inserted "a geologic storage operator or" and in second sentence after "owner" inserted "geologic storage operator"; and made minor changes in style. Amendment effective on occurrence of contingency.

*Saving Clause:* Section 29, Ch. 474, L. 2009, was a saving clause.

*Transition — Contingent Implementation:* Section 30, Ch. 474, L. 2009, provided: "If the United States environmental protection agency adopts regulations allowing states to apply for primacy over carbon dioxide sequestration wells under the federal underground injection control program adopted by the environmental protection agency, the board of oil and gas conservation shall in consultation with the department of environmental quality and the department of natural resources and conservation develop draft rules to implement [this act] [Chapter 474, L. 2009] and seek primacy." A final rule allowing states to apply for primacy over carbon dioxide sequestration wells under the federal underground injection control program was adopted by the environmental protection agency and is found at Volume 75 of the Federal Register, pages 77229 through 77303.

*1995 Amendment:* Chapter 451 in (1) substituted "15-36-303" for "15-23-601 or 15-36-101". Amendment effective January 1, 1996.

*Applicability:* Section 55, Ch. 451, L. 1995, provided: "(1) [This act] applies to oil and natural gas produced and sold on or after January 1, 1996.

(2) (a) [Sections 21 through 26] [7-1-2111, 7-7-2101, 7-7-2203, 7-14-2524, 7-14-2525, and 7-16-2327] apply to county fiscal years beginning after June 30, 1996.

(b) [Sections 38 through 46] [20-9-104, 20-9-141, 20-9-161, 20-9-331, 20-9-333, 20-9-501, 20-9-507, 20-10-144, and 20-10-146] apply to school fiscal years beginning after June 30, 1996.

(3) (a) An operator is subject to provisions of Title 15, chapter 23, parts 1 and 6 [part 6 now repealed]; Title 15, chapter 36; Title 15, chapter 38; and Title 82, chapter 11, part 1, as those laws read on December 31, 1995, for all oil and natural gas produced and sold by the operator before January 1, 1996. [On December 31, 1995, Title 15, ch. 36, contained only part 1, now repealed. Part 3 of that chapter became effective January 1, 1996.]

(b) Except as provided in subsection (3)(c), the payment, collection, and distribution of taxes on oil and natural gas production occurring before January 1, 1996, must be made according to the provisions of the laws referred to in subsection (3)(a) governing the tax in effect on the last day of the tax period in which the activity, enterprise, or product being taxed was engaged in, took place, or was produced and sold.

(c) [Section 19] [15-36-325, now repealed] applies to the payment, collection, and distribution of the local government severance tax for oil and natural gas produced and sold after December 31, 1994, and before January 1, 1996.

(d) All taxes collected pursuant to audit or collected after the date the tax is payable under the laws referred to in subsection (3)(a) must be distributed according to the statute governing allocation of the tax in effect on the date when the tax liability was incurred."

*1993 Statement of Intent:* The statement of intent attached to Ch. 9, Sp. L. November 1993, provided: "A statement of intent is required for this bill because the board of oil and gas conservation is authorized to approve and certify production decline rates for the purpose of determining incremental production from enhanced recovery projects as provided in this bill.

The department of revenue has adopted rules for determining incremental production from tertiary production based on production decline rates. It is the intent of this legislation that the determination of incremental production is more appropriately a function of the board of oil and gas conservation because the board already has comprehensive statutory authority over oil and gas exploration and development activities in Montana.

The legislature intends that the board of oil and gas conservation shall, in consultation with the department of revenue, adopt rules setting forth the methodology by which the board may approve new or expanded secondary and tertiary recovery projects. The rules must include the method for establishing the rate of decline in production in the existing level of development in a project area. For a secondary or tertiary recovery project for which initial approval is sought, the rules must include the method for establishing the rate of decline in production from existing primary or secondary recovery operations in a proposed project area. In addition, the rules must include the method for determining the level of production from existing wells in a project area in order to establish the level of incremental production that qualifies for the tax incentive rates provided in this bill.

The board of oil and gas conservation is required to establish by rule a fee schedule to defray the expenses associated with reviewing applications for enhanced recovery projects. The fee schedule adopted by the board must take into account the complexity of processing the application.

A statement of intent is also required for this bill because the department of revenue is granted rulemaking authority for determining the allocation of incremental production from enhanced recovery projects to production that is subject to net proceeds taxation and to production that is subject to the local government severance tax. The allocation must be based on the ratio of production from wells drilled before July 1, 1985, in a project area that qualifies for a reduced tax rate on incremental production to production from wells drilled after June 30, 1985, in the project area that qualifies for a reduced tax rate on incremental production."

*Report Requirement Repealed:* Section 1, Ch. 223, L. 2003, repealed sec. 21, Ch. 9, Sp. L. November 1993, which required the board of oil and gas conservation to report annually to the revenue oversight committee.

*Report Required:* Section 21, Ch. 9, Sp. L. November 1993, provided: "The board of oil and gas conservation shall report at least once a year to the revenue oversight committee regarding the implementation of [this act]. The reports must include but are not limited to information regarding:

(1) the methods used to determine production decline rates;

(2) rules adopted to implement [this act];

(3) the number of enhanced recovery projects completed or anticipated to be completed in a year; and

(4) the number of horizontal wells completed or anticipated to be completed in a year and the method of recovery from the horizontal wells."

*Severability:* Section 23, Ch. 9, Sp. L. November 1993, was a severability clause.

*Effective Date — Applicability:* Section 24, Ch. 9, Sp. L. November 1993, provided: "[This act] is effective on passage and approval [approved December 17, 1993] and applies to oil production from new or expanded enhanced recovery projects and to tax years that begin after December 31, 1993."

## 82-11-122. Notice of intention to drill or conduct seismic operations — notice to surface owner.

### Compiler's Comments

*2009 Amendment:* Chapter 474 inserted (2) requiring a drilling permit and notice of an application for a permit. Amendment effective on occurrence of contingency.

*Saving Clause:* Section 29, Ch. 474, L. 2009, was a saving clause.

*Transition — Contingent Implementation:* Section 30, Ch. 474, L. 2009, provided: "If the United States environmental protection agency adopts regulations allowing states to apply for primacy over carbon dioxide sequestration wells under the federal underground injection control program adopted by the environmental protection agency, the board of oil and gas conservation shall in consultation with the department of environmental quality and the department of natural resources and conservation develop draft rules to implement [this act] [Chapter 474, L. 2009] and seek primacy." A final rule allowing states to apply for primacy over carbon dioxide sequestration wells under the federal underground injection control program was adopted by the environmental protection agency and is found at Volume 75 of the Federal Register, pages 77229 through 77303.

*1985 Amendments:* Chapter 339 near middle of third sentence, after "explorations", deleted "with explosives".

Chapter 497 inserted second sentence referring to requirement of notice to surface owner.

### Attorney General's Opinions

*Survey Plat With Intention to Drill — Conformance With Corner Recordation Act Required:* Survey plats submitted with a notice of intention to drill under 82-11-122 must be completed in conformance with Title 70, ch. 22, part 1. 41 A.G. Op. 89 (1986).

## 82-11-123. Requirements for oil and gas operations.

### Compiler's Comments

*2009 Amendment:* Chapter 474 in (1)(a) after "ownership of" inserted "carbon dioxide injection wells, carbon dioxide, geologic storage reservoirs, and"; in (1)(c) near beginning after "wells" inserted "carbon dioxide injection wells" and in three places inserted "carbon dioxide"; in (1)(e) at beginning inserted exception clause; inserted (1)(f) requiring the furnishing of a bond or surety; in (1)(h) in first sentence after "water" inserted "or carbon dioxide" and near end of third sentence after "gas" inserted "carbon dioxide"; in (1)(i) after "operation of" inserted "carbon dioxide injection wells and"; inserted (2) setting out additional requirements for the geologic carbon dioxide injection well permitting system; and made minor changes in style. Amendment effective on occurrence of contingency.

*Saving Clause:* Section 29, Ch. 474, L. 2009, was a saving clause.

*Transition — Contingent Implementation:* Section 30, Ch. 474, L. 2009, provided: "If the United States environmental protection agency adopts regulations allowing states to apply for primacy over carbon dioxide sequestration wells under the federal underground injection control program adopted by the environmental protection agency, the board of oil and gas conservation shall in consultation with the department of environmental quality and the department of natural resources and conservation develop draft rules to implement [this act] [Chapter 474, L. 2009] and seek primacy." A final rule allowing states to apply for primacy over carbon dioxide sequestration wells under the federal underground injection control program was adopted by the environmental protection agency and is found at Volume 75 of the Federal Register, pages 77229 through 77303.

*1997 Amendment:* Chapter 34 deleted former (5)(b) that read: "(b) if the well is completed after June 30, 1989, until the owner notifies the board that the well is producing oil and gas in commercial quantities and meets the requirements of 82-11-162"; and made minor changes in style. Amendment effective February 24, 1997.

*1993 Amendment:* Chapter 376 in (2), after "surveys", inserted "geological sample logs, mud logs, core descriptions, and ordinary core analysis"; in (5), in second sentence after "bond", inserted "may be forfeited in its entirety by the board for failure to perform the duty to properly plug each dry or abandoned well and"; and made minor changes in style. Amendment effective April 16, 1993.

*Retroactive Applicability:* Section 2, Ch. 376, L. 1993, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to all wells."

*1989 Amendments:* Chapter 83 in (3) substituted "strata" for "stratum" and "cave-ins" for "cavings".

Chapter 530 inserted (5)(a) and (5)(b) stating circumstances under which bond may not be canceled or absolved. Amendment effective July 1, 1989.

*1987 Amendment:* In (3), after "wells", inserted "and class II injection wells"; in (7), near beginning after "gas", inserted "or injects or disposes of water" and near end, after "gas", inserted "or water"; and inserted (8) requiring monitoring equipment or methods in the operation of class II injection wells.

**Case Notes**

*Correlative Rights:* Under 82-11-201, the Oil and Gas Conservation Commission had authority to consider correlative rights and private interests in making regulatory orders establishing spacing units with respect to fringe owners, but it does not have authority to adjudicate disputes involving those rights. Pattie v. Oil & Gas Conserv. Comm'n, 145 M 531, 402 P2d 596 (1965).

## 82-11-125. Availability of cores or chips, cuttings, and bottom-hole temperatures to board.

**Compiler's Comments**

*1983 Amendment:* In (2) near middle of first sentence after "shall within", changed "6 months" to "3 years" and deleted former second and third sentences, which read: "The cuttings, cores, chips, and logs shall be impounded and kept secure and confidential by the board until such time that the board desires to use the same; however, the board may not use the logs, chips, cores, and cuttings from stratigraphic test wells until a period of 3 years from the date of their impounding by the board has elapsed, unless the owner of the stratigraphic test well consents to their use by the board prior to the expiration of the 3-year period. The board, during the period of impoundment for any cores, cuttings, chips, or logs from any stratigraphic test well, may not give any person access to the cores, chips, cuttings, or logs, and it may not disclose any information relating thereto or derived therefrom."; and deleted former (3), which read: "Notwithstanding subsection (2), bottom-hole temperatures furnished to the board by stratigraphic test well owners shall be public information immediately upon filing with the board."

## 82-11-127. Prohibited activity — Makoshika state park.

**Compiler's Comments**

*2009 Amendment:* Chapter 474 in (2) after "class II injection well" inserted "or a carbon dioxide injection well"; and deleted former (3) through (5) that read: "(3) Except as provided in subsection

(5), on lands managed as Makoshika state park, pursuant to Title 23, chapter 1, and under the control of the department of fish, wildlife, and parks, by grant, acquisition, lease, easement, or other means, a person may not:

(a) drill, construct, convert, or operate an oil or gas well, stratigraphic test well, or core hole;
(b) conduct vibroseis, drill a seismic shot hole, or set a surface charge;
(c) explore for oil or gas in a manner that damages the land surface; or
(d) construct or place any surface facility associated with oil or gas exploration or development.

(4) The prohibitions in subsection (3) do not preclude the development of oil or gas resources from beneath Makoshika state park through directional drilling or access from property outside the boundaries of the state park provided that the surface resources of the state park are not disturbed.

(5) The prohibitions listed in subsection (3) do not apply to oil or gas resources within Makoshika state park that are owned by a private person, nor do the prohibitions apply to school trust lands within the boundaries of the park. The state acknowledges the mineral rights of Dawson County and the state school trust and the private property rights of persons owning private mineral rights within Makoshika state park. The department of fish, wildlife, and parks is directed to conduct negotiations with the owners of mineral rights within Makoshika state park, with the purpose of acquiring those rights in the name of the state, and to report the results of the negotiations to the legislature no later than January 8, 2001". Amendment effective on occurrence of contingency.

*Saving Clause:* Section 29, Ch. 474, L. 2009, was a saving clause.

*Transition — Contingent Implementation:* Section 30, Ch. 474, L. 2009, provided: "If the United States environmental protection agency adopts regulations allowing states to apply for primacy over carbon dioxide sequestration wells under the federal underground injection control program adopted by the environmental protection agency, the board of oil and gas conservation shall in consultation with the department of environmental quality and the department of natural resources and conservation develop draft rules to implement [this act] [Chapter 474, L. 2009] and seek primacy." A final rule allowing states to apply for primacy over carbon dioxide sequestration wells under the federal underground injection control program was adopted by the environmental protection agency and is found at Volume 75 of the Federal Register, pages 77229 through 77303.

*1999 Amendment:* Chapter 522 inserted (3) listing certain prohibited oil and gas development activities in Makoshika state park; inserted (4) allowing directional drilling and access from outside park; inserted (5) pertaining to privately owned mineral rights and school trust lands in the park; and made minor changes in style. Amendment effective April 29, 1999.

*Severability:* Section 2, Ch. 522, L. 1999, was a severability clause.

## 82-11-131. Privilege and license tax.

### Compiler's Comments

*2019 Amendment:* Chapter 414 in (1) in middle substituted "assessment of 0.3%" for "assessment not to exceed 3/10 of 1%"; in (2) substituted "a percentage of the assessment" for "the amount of the assessment", after "increase the" substituted "percentage" for "amount", and at end deleted former text that read: "However, the assessment fixed by the board may not exceed the limits prescribed in this section. The amount of the assessment must be a percentage factor, not to exceed 100%, of the rate set forth in subsection (1), and the same percentage factor must be applied by the board in fixing the amount of the assessment on each barrel of crude petroleum produced and each 10,000 cubic feet of natural gas produced. A producer of the crude petroleum and natural gas shall pay the assessment on each barrel of crude petroleum and each 10,000 cubic feet of natural gas produced for the producer, as well as for another, including a royalty holder"; inserted (3) regarding required notice to the department of revenue; and made minor changes in style. Amendment effective July 1, 2019.

*Applicability:* Section 8, Ch. 414, L. 2019, provided: "[This act] applies to oil and gas production occurring on or after July 1, 2019."

*1995 Amendment:* Chapter 573 in (1) increased assessment on market value from "2/10 of 1%" to "3/10 of 1%" and after "petroleum" deleted "originally"; in third sentence in (2), after "crude", substituted "petroleum produced" for "production" and after "natural gas" substituted "produced" for "mentioned in that subsection"; and made minor changes in style. Amendment effective July 1, 1995.

Pursuant to sec. 2, Ch. 573, L. 1995, a coordination section, deleted fifth sentence in (2) that read: "The producer shall be reimbursed for the payments made on crude oil and natural gas produced for another in the same manner as he is reimbursed for net proceeds tax paid under 15-23-607 on crude petroleum or natural gas produced for another"; and in (3) substituted "For the purposes of this section, the provisions of Title 15, chapter 36, part 3, apply to the privilege and license tax assessment" for "The department of revenue shall collect the privilege and license tax assessment in the same manner as the oil and gas severance tax is collected under Title 15, chapter 36." Amendment effective January 1, 1996.

*Purported Repeal — Coordination:* Section 50, Ch. 451, L. 1995, repealed this section, but sec. 2, Ch. 573, L. 1995, a coordination section, voided the repeal.

*Effective Date — Applicability:* Section 3, Ch. 573, L. 1995, provided: "(1) Except as provided in subsection (2), [this act] is effective July 1, 1995, and applies to oil and gas production occurring after June 30, 1995.

(2) [Section 2(2) and (3)], which amend 82-11-131(2) and 82-11-131(3), respectively, are effective January 1, 1996."

*1987 Amendment:* In (2), near end after "tax paid", inserted "under 15-23-607" and at end, after "another", deleted "under 15-23-607".

*1983 Amendment:* Near beginning of (2), after "shall" substituted phrase relating to the Administrative Procedure Act for "by order, without prior notice or hearing"; after "may from time to time" deleted "without prior notice or hearing"; after "increase the amount thereof as" deleted "in its judgment"; and inserted (3) referring to collection of privilege and license tax assessment.

*Statement of Intent:* The statement of intent attached to SB 148 (Ch. 93, L. 1983) provided: "A statement of intent is required for Senate Bill 148 because it grants the Board of Oil and Gas Conservation authority to fix an assessment against each barrel of crude petroleum originally produced.

The Legislature intends that the amount assessed be sufficient to provide funds to defray the expenses of enforcing the oil and gas laws and the operations of the board. The assessment shall not be so high as to generate revenue in excess of expenses."

**Case Notes**

*State Taxation of Indian Trust Properties Valid — No Repeal by Implication Found:* Where the plaintiff Indian tribe sought declaratory and injunctive relief against the levy and collection of certain taxes by the state and several counties on the production of oil and gas owned by the United States in trust for the plaintiff by non-Indian lessees within the boundaries of the plaintiff's reservation, the court held that the provisions of 25 U.S.C. § 398 specifically authorized state taxation of oil and gas on tribal lands and that the provisions of the statute had not been impliedly repealed by 25 U.S.C. § 396. The sovereign right asserted by the plaintiff to be free from state taxation has been controlled by Congress, and the plaintiff has not shown that there is such a repugnancy between the two federal statutes as to satisfy their burden of proving a congressional intent to repeal the former by enactment of the latter or that there is an ambiguity in the law which should be construed in favor of the plaintiff. Blackfeet Tribe v. St., 507 F. Supp. 446, 38 St. Rep. 238 (D.C. Mont. 1981).

## 82-11-135. Money earmarked for board expenses.

**Compiler's Comments**

*2019 Amendment:* Chapter 414 substituted current second sentence for "Subject to legislative fund transfers, the money must be used for the purpose of paying all expenses of the board and for no other purpose." Amendment effective July 1, 2019.

*Applicability:* Section 8, Ch. 414, L. 2019, provided: "[This act] applies to oil and gas production occurring on or after July 1, 2019."

*2011 Amendment:* Chapter 312 in second sentence at beginning inserted "Subject to legislative fund transfers"; and made minor changes in style. Amendment effective May 4, 2011.

*Severability:* Section 18, Ch. 312, L. 2011, was a severability clause.

*2003 Amendment:* Chapter 522 in first sentence substituted "15-36-331" for "15-36-324". Amendment effective April 26, 2003.

*Saving Clause:* Section 19, Ch. 522, L. 2003, was a saving clause.

*Retroactive Applicability:* Section 21, Ch. 522, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to tax revenue derived from oil and natural gas production occurring after December 31, 2002."

*2001 Amendment:* Chapter 306 in first sentence near middle after "money" substituted "distributed to the board under 15-36-324 and collected" for "collected under 15-36-324(8)(b), (9), and (10)(b) and"; and made minor changes in style. Amendment effective April 21, 2001.

*Retroactive Applicability:* Section 6, Ch. 306, L. 2001, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to distributions made after June 30, 2000."

*1997 Amendment:* Chapter 466 in first sentence substituted "15-36-324(8)(b), (9), (10)(b)" for "15-36-324(7)(b)". Amendment effective April 30, 1997.

*1995 Amendment:* Chapter 451 in first sentence inserted "under 15-36-324(7)(b) and"; and made minor changes in style. Amendment effective January 1, 1996.

*Applicability:* Section 55, Ch. 451, L. 1995, provided: "(1) [This act] applies to oil and natural gas produced and sold on or after January 1, 1996.

(2) (a) [Sections 21 through 26] [7-1-2111, 7-7-2101, 7-7-2203, 7-14-2524, 7-14-2525, and 7-16-2327] apply to county fiscal years beginning after June 30, 1996.

(b) [Sections 38 through 46] [20-9-104, 20-9-141, 20-9-161, 20-9-331, 20-9-333, 20-9-501, 20-9-507, 20-10-144, and 20-10-146] apply to school fiscal years beginning after June 30, 1996.

(3) (a) An operator is subject to provisions of Title 15, chapter 23, parts 1 and 6 [now repealed]; Title 15, chapter 36; Title 15, chapter 38; and Title 82, chapter 11, part 1, as those laws read on December 31, 1995, for all oil and natural gas produced and sold by the operator before January 1, 1996. [On December 31, 1995, Title 15, ch. 36, contained only part 1, now repealed. Part 3 of that chapter became effective January 1, 1996.]

(b) Except as provided in subsection (3)(c), the payment, collection, and distribution of taxes on oil and natural gas production occurring before January 1, 1996, must be made according to the provisions of the laws referred to in subsection (3)(a) governing the tax in effect on the last day of the tax period in which the activity, enterprise, or product being taxed was engaged in, took place, or was produced and sold.

(c) [Section 19] [15-36-325, now repealed] applies to the payment, collection, and distribution of the local government severance tax for oil and natural gas produced and sold after December 31, 1994, and before January 1, 1996.

(d) All taxes collected pursuant to audit or collected after the date the tax is payable under the laws referred to in subsection (3)(a) must be distributed according to the statute governing allocation of the tax in effect on the date when the tax liability was incurred."

*1992 Special Session Amendment:* Chapter 15, Sp. L. July 1992, at beginning inserted exception clause.

*Effective Date:* Section 38, Ch. 15, Sp. L. July 1992, provided that this act is effective on passage and approval. The act became effective pursuant to Article VI, sec. 10, of the Montana Constitution due to the passage of 25 days after delivery without gubernatorial action on the bill. Effective August 14, 1992.

*Applicability — Termination:* Section 39(6), Ch. 15, Sp. L. July 1992, provided that this section applies to the tax year beginning after December 31, 1992, and ending before January 1, 1994. This section terminates upon receipt of taxes for tax year 1993.

*1987 Amendment:* In second sentence, before "biennial", deleted "the approval of the department of administration and".

*1983 Amendment:* Substituted references to state special revenue fund for references to earmarked revenue fund.

## 82-11-136. Expenditure of funds from bonds for plugging wells.

### Compiler's Comments

*2009 Amendment:* Chapter 474 in (1) at end substituted "82-11-123(1)(e)" for "82-11-123(5)"; inserted (2) allowing the board to accept and expend funds from bonds for properly plugging abandoned carbon dioxide injection wells; and made minor changes in style. Amendment effective on occurrence of contingency.

*Saving Clause:* Section 29, Ch. 474, L. 2009, was a saving clause.

*Transition — Contingent Implementation:* Section 30, Ch. 474, L. 2009, provided: "If the United States environmental protection agency adopts regulations allowing states to apply for primacy over carbon dioxide sequestration wells under the federal underground injection control program adopted by the environmental protection agency, the board of oil and gas conservation shall in consultation with the department of environmental quality and the department of natural resources and conservation develop draft rules to implement [this act] [Chapter 474, L. 2009] and seek primacy." A final rule allowing states to apply for primacy over carbon dioxide sequestration wells under the federal underground injection control program was adopted by the environmental protection agency and is found at Volume 75 of the Federal Register, pages 77229 through 77303.

*1997 Amendment:* Chapter 422 deleted second sentence that read: "These funds are statutorily appropriated as provided in 17-7-502." Amendment effective July 1, 1997.

*1987 Statement of Intent:* The statement of intent attached to Ch. 265, L. 1987, provided: "A statement of intent is provided for this bill in order to describe the need for a statutory appropriation and deletion of current reporting requirements. In the absence of a statutory appropriation authorizing the board of oil and gas conservation to accept and expend funds received from bonds for the proper plugging of abandoned or dry wells, the board must receive separate authorization for this purpose each biennium through the appropriation process. As a result, the board is unable to correct problems resulting from improperly plugged wells for up to 2 years or until it receives authorization to expend the necessary funds received from forfeited bonds.

The board of oil and gas conservation is removed from receiving statements of crude petroleum and natural gas produced and marketed in the state in order to avoid duplicative reporting requirements.

The department of revenue is authorized to adopt administrative rules concerning the administration and collection of the privilege and license tax, including the time for payment and the period covered by payment. The administration and collection of the tax should be similar to the administration and collection of the oil and gas severance tax."

### 82-11-137. Class II injection well operating fee.

**Compiler's Comments**

*2009 Amendment:* Chapter 474 inserted (1)(b) establishing an operating fee for each geologic storage operator of a carbon dioxide injection well; and made minor changes in style. Amendment effective on occurrence of contingency.

*Saving Clause:* Section 29, Ch. 474, L. 2009, was a saving clause.

*Transition — Contingent Implementation:* Section 30, Ch. 474, L. 2009, provided: "If the United States environmental protection agency adopts regulations allowing states to apply for primacy over carbon dioxide sequestration wells under the federal underground injection control program adopted by the environmental protection agency, the board of oil and gas conservation shall in consultation with the department of environmental quality and the department of natural resources and conservation develop draft rules to implement [this act] [Chapter 474, L. 2009] and seek primacy." A final rule allowing states to apply for primacy over carbon dioxide sequestration wells under the federal underground injection control program was adopted by the environmental protection agency and is found at Volume 75 of the Federal Register, pages 77229 through 77303.

### 82-11-138. Rulemaking — microbial conversion wells.

**Compiler's Comments**

*Effective Date:* Section 3, Ch. 184, L. 2011, provided that this section is effective on passage and approval. Approved April 15, 2011.

### 82-11-141. Administrative procedure.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

*1987 Amendments:* Chapter 238 inserted (4)(b) requiring written notice to record owners of oil and gas and leasehold interests sought to be spaced or pooled; and at beginning of (5) inserted "If written notice is not possible".

Chapter 503 at end of (3), after "effect", substituted "beyond the next regular meeting of the board" for "more than 15 days".

### 82-11-142. Subpoena power — civil actions.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

*1987 Amendment:* Inserted first three sentences of (3) providing for protests before the Board, in fourth sentence, after "fails to", inserted "take appropriate enforcement action or to", after "adversely affected" deleted "by the violation", and in two places, before "threatened", deleted "violation or", and in last sentence, before "threatening", deleted "violating or".

**Case Notes**

*Common-Law Offset Drilling Rule — Implied Covenant Not Altered by Enactment of Statutes:* In a suit brought by grantees of the lessor of an oil and gas lease for damages resulting from defendant lessees' failure to drill an offset well under the common-law offset drilling rule, there was nothing contained in the judicial review provisions of the 1953 oil and gas conservation law that restricts any of the common-law remedies available to private litigants, especially where the common-law cause of action would not conflict with a valid rule or order of the Board of Oil and Gas Conservation. U. V. Indus., Inc. v. Danielson, 184 M 203, 602 P2d 571 (1979).

## 82-11-143. Rehearing.

**Compiler's Comments**

*1991 Amendment:* In second sentence substituted "at the board's next regularly scheduled meeting" for "within 10 days"; and made minor changes in style. Amendment effective April 6, 1991.

*Saving Clause:* Section 3, Ch. 363, L. 1991, was a saving clause.

## 82-11-144. Court review.

**Case Notes**

*Appeal of Decision of Board of Oil and Gas Conservation — District Court Proceeding Subject to De Novo Review — Not Under MAPA:* The plaintiffs filed a petition for judicial review of a decision by the Board of Oil and Gas Conservation in District Court. In dismissing the proceeding, the District Court ruled that the plaintiffs' sole remedy was a challenge under 82-11-144. The Supreme Court reversed the dismissal, holding that an action to seek review of a decision by the Board must proceed in District Court, is subject to de novo review, and may not proceed under the Montana Administrative Procedure Act. Ostby v. Bd. of Oil & Gas Conserv., 2014 MT 105, 374 Mont. 472, 324 P.3d 1155.

*Review of MEPA Case Proper:* Plaintiffs appealed the District Court's application of 82-11-144 to a review, for compliance with the Montana Environmental Policy Act (MEPA), of the Board of Oil and Gas Conservation's issuance of gas well permits, arguing that 82-11-144 does not apply to a MEPA claim and that, in accordance with 75-1-201, the court should not have considered evidence outside of the administrative record. The Supreme Court affirmed, concluding that 82-11-144 applies to any act of the Board within its regulatory jurisdiction. Mont. Wildlife Fed'n v. Bd. of Oil & Gas Conserv., 2012 MT 128, 365 Mont. 232, 280 P.3d 877.

*Common-Law Offset Drilling Rule — Implied Covenant Not Altered by Enactment of Statutes:* In a suit brought by grantees of the lessor of an oil and gas lease for damages resulting from defendant lessees' failure to drill an offset well under the common-law offset drilling rule, there was nothing contained in the judicial review provisions of the 1953 oil and gas conservation law that restricts any of the common-law remedies available to private litigants, especially where the common-law cause of action would not conflict with a valid rule or order of the Board of Oil and Gas Conservation. U. V. Indus., Inc. v. Danielson, 184 M 203, 602 P2d 571 (1979).

*Collateral Challenge:* Order of Commission to create gas unit was res judicata except in appropriate District Court on judicial review as provided in this section; lessor's successors in interest could not collaterally challenge order by suit before different District Court. Armstrong v. High Crest Oils, Inc., 164 M 187, 520 P2d 1081 (1974).

## 82-11-145. Injunction or restraining order.

**Case Notes**

*Common-Law Offset Drilling Rule — Implied Covenant Not Altered by Enactment of Statutes:* In a suit brought by grantees of the lessor of an oil and gas lease for damages resulting from defendant lessees' failure to drill an offset well under the common-law offset drilling rule, there was nothing contained in the judicial review provisions of the 1953 oil and gas conservation law that restricts any of the common-law remedies available to private litigants, especially where the common-law cause of action would not conflict with a valid rule or order of the Board of Oil and Gas Conservation. U. V. Indus., Inc. v. Danielson, 184 M 203, 602 P2d 571 (1979).

## 82-11-146. Appeal.

**Case Notes**

*Common-Law Offset Drilling Rule — Implied Covenant Not Altered by Enactment of Statutes:* In a suit brought by grantees of the lessor of an oil and gas lease for damages resulting from defendant lessees' failure to drill an offset well under the common-law offset drilling rule, there was nothing contained in the judicial review provisions of the 1953 oil and gas conservation law that restricts any of the common-law remedies available to private litigants, especially where the common-law cause of action would not conflict with a valid rule or order of the Board of Oil and Gas Conservation. U. V. Indus., Inc. v. Danielson, 184 M 203, 602 P2d 571 (1979).

### 82-11-147. Violations.

**Compiler's Comments**

*1987 Amendment:* In (1) substituted introductory clause for "Whenever it appears"; in (1)(a), after "board", substituted "may" for "shall"; inserted (1)(b) allowing Board to assess civil penalty, require compliance, or both; and in (2), after "suit", inserted "under subsection (1)(a)".

**Case Notes**

*Injunction Not Exclusive Board Remedy in Nonemergency Situations:* The Board of Oil and Gas Conservation ordered that Hawley's oil production be terminated because of Hawley's failure to bring wells into substantial compliance. Hawley filed suit against the Board to enjoin enforcement of the Board's order, alleging that absent an emergency action under 82-11-151, the Board had no statutory authority to order termination of production and that the Board's sole remedy was to petition the District Court for an injunction under subsection (1)(a) of this section. The Supreme Court found that Hawley's contention that subsection (1)(a) of this section establishes the Board's exclusive remedy for nonemergency situations rang hollow in light of the provisions of subsection (1)(b) of this section, which clearly grant the Board express authority to issue an order requiring compliance with a prior Board order. Further, under 82-11-149, pursuance of a civil penalty does not bar enforcement by injunction "or other appropriate remedy". Thus, injunction through judicial enforcement is not the exclusive remedy available to the Board in nonemergency situations, and the District Court's vacation of the Board's termination order on those grounds was reversible error. Hawley v. Bd. of Oil & Gas Conserv., 2000 MT 2, 297 M 467, 993 P2d 677, 57 St. Rep. 5 (2000).

*Common-Law Offset Drilling Rule — Implied Covenant Not Altered by Enactment of Statutes:* In a suit brought by grantees of the lessor of an oil and gas lease for damages resulting from defendant lessees' failure to drill an offset well under the common-law offset drilling rule, there was nothing contained in the judicial review provisions of the 1953 oil and gas conservation law that restricts any of the common-law remedies available to private litigants, especially where the common-law cause of action would not conflict with a valid rule or order of the Board of Oil and Gas Conservation. U. V. Indus., Inc. v. Danielson, 184 M 203, 602 P2d 571 (1979).

### 82-11-148. Criminal penalties.

**Compiler's Comments**

*1987 Amendment:* In introductory clause, after "more than", increased fine to "$10,000 per day of violation" from "$5,000".

**Administrative Rules**

ARM 36.22.1245 Illegal production.

### 82-11-149. Civil penalties.

**Compiler's Comments**

*1995 Amendment:* Chapter 509 inserted (4) concerning depositing civil penalties in general fund. Amendment effective July 1, 1995.

*1991 Amendment:* In first sentence of (1) revised penalty from at least $5,000 to at least $75 and not more than $10,000 a day for each violation. Amendment effective April 6, 1991.

*Saving Clause:* Section 3, Ch. 363, L. 1991, was a saving clause.

**Case Notes**

*Injunction Not Exclusive Board Remedy in Nonemergency Situations:* The Board of Oil and Gas Conservation ordered that Hawley's oil production be terminated because of Hawley's failure to bring wells into substantial compliance. Hawley filed suit against the Board to enjoin enforcement of the Board's order, alleging that absent an emergency action under 82-11-151, the Board had no statutory authority to order termination of production and that the Board's sole remedy was to petition the District Court for an injunction under 82-11-147(1)(a). The Supreme Court found that Hawley's contention that 82-11-147(1)(a) establishes the Board's exclusive remedy for nonemergency situations rang hollow in light of the provisions of 82-11-147(1)(b), which clearly grant the Board express authority to issue an order requiring compliance with a prior Board order. Further, under this section, pursuance of a civil penalty does not bar enforcement by injunction "or other appropriate remedy". Thus, injunction through judicial enforcement is not the exclusive remedy available to the Board in nonemergency situations, and the District Court's vacation of the Board's termination order on those grounds was reversible error. Hawley v. Bd. of Oil & Gas Conserv., 2000 MT 2, 297 M 467, 993 P2d 677, 57 St. Rep. 5 (2000).

## 82-11-151. Emergencies — notice and hearing.

### Compiler's Comments

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### Case Notes

*Injunction Not Exclusive Board Remedy in Nonemergency Situations:* The Board of Oil and Gas Conservation ordered that Hawley's oil production be terminated because of Hawley's failure to bring wells into substantial compliance. Hawley filed suit against the Board to enjoin enforcement of the Board's order, alleging that absent an emergency action under this section, the Board had no statutory authority to order termination of production and that the Board's sole remedy was to petition the District Court for an injunction under 82-11-147(1)(a). The Supreme Court found that Hawley's contention that 82-11-147(1)(a) establishes the Board's exclusive remedy for nonemergency situations rang hollow in light of the provisions of 82-11-147(1)(b), which clearly grant the Board express authority to issue an order requiring compliance with a prior Board order. Further, under 82-11-149, pursuance of a civil penalty does not bar enforcement by injunction "or other appropriate remedy". Thus, injunction through judicial enforcement is not the exclusive remedy available to the Board in nonemergency situations, and the District Court's vacation of the Board's termination order on those grounds was reversible error. Hawley v. Bd. of Oil & Gas Conserv., 2000 MT 2, 297 M 467, 993 P2d 677, 57 St. Rep. 5 (2000).

## 82-11-161. Oil and gas production damage mitigation account — statutory appropriation.

### Compiler's Comments

*2015 Amendment:* Chapter 413 in (2)(a) and (2)(a)(ii) substituted "$650,000" for "$50,000"; in (2)(a)(i) and (2)(a)(ii) in two places substituted "$1 million" for "$200,000"; inserted (2)(b) regarding deposits in the natural resources projects state special revenue account; and made minor changes in style. Amendment effective July 1, 2015.

*2009 Amendment:* Chapter 474 in (3) at end substituted "82-11-136(1)" for "82-11-136"; and made minor changes in style. Amendment effective on occurrence of contingency.

*Saving Clause:* Section 29, Ch. 474, L. 2009, was a saving clause.

*Transition — Contingent Implementation:* Section 30, Ch. 474, L. 2009, provided: "If the United States environmental protection agency adopts regulations allowing states to apply for primacy over carbon dioxide sequestration wells under the federal underground injection control program adopted by the environmental protection agency, the board of oil and gas conservation shall in consultation with the department of environmental quality and the department of natural resources and conservation develop draft rules to implement [this act] [Chapter 474, L. 2009] and seek primacy." A final rule allowing states to apply for primacy over carbon dioxide sequestration wells under the federal underground injection control program was adopted by the environmental protection agency and is found at Volume 75 of the Federal Register, pages 77229 through 77303.

*1997 Amendment:* Chapter 34 deleted former (3)(b) that read: "(b) all fees received by the board from owners of producing wells pursuant to 82-11-162"; in (4), near end of first and second sentences after "restore the well", inserted "sump, hole"; and made minor changes in style. Amendment effective February 24, 1997.

*1993 Amendment:* Chapter 349 at beginning of (2) deleted "On July 1, 1991, and" and after "each" deleted "succeeding"; deleted (6) that read: "(6) The board shall, as provided in 5-11-210, submit to the legislature a complete financial report on the oil and gas production damage mitigation account, including a description of all expenditures made since the preceding report"; and made minor changes in style.

*1991 Amendments:* Chapter 112 near beginning of (6) inserted reference to 5-11-210 and after "legislature" deleted "at the beginning of each regular session". Amendment effective March 20, 1991.

Chapter 734 in (4), in first sentence after "well", inserted "and either reclaiming or restoring, or both, a drill site or other drilling or producing area damaged by oil and gas operations", after "hole" inserted "drill site, or drilling or producing area", and after "person" substituted "fails or refuses to properly plug, reclaim, or restore the well, drill site, or drilling or producing area within a reasonable time after demand by the board" for "does not have sufficient funds to pay the costs" and near end of second sentence, after "plug", inserted "reclaim, or restore", after "well" inserted "drill site, or drilling or producing area", and after "damage" substituted "for which he is responsible" for "caused by the well"; and made minor changes in style.

*Saving Clause:* Section 6, Ch. 734, L. 1991, was a saving clause.

*1989 Statement of Intent:* The statement of intent attached to Ch. 530, L. 1989, provided: "It is the intent of the legislature to create an oil and gas production damage mitigation account to be administered by the board of oil and gas conservation for the purpose of properly plugging and abandoning oil and gas wells when a responsible person cannot be found or when the responsible person does not have sufficient financial resources. The board shall adopt rules to help it define "sufficient financial resources", shall require a responsible person to pay the costs of plugging and abandoning to the extent of his available resources, and shall pursue full cost recovery for funds spent from the account through the procedures provided in [section 9] [82-11-164] or other lawful means. The board may adopt rules to administer instituting a lien on the person's personal and real property to cover the cost of plugging and abandoning.

The legislature intends that the board use the account for reclamation related to land, water, or wildlife resources disturbed by abandoned oil and gas wells, injection wells, sumps, and seismographic shot holes.

It is also the intent to remove producing wells completed after June 30, 1989, from drilling bonds and to limit the liability of the bond or its equivalent to the period between issuance of the bond and either proper plugging and abandoning of a dry hole or completion of a producing well. The board shall adopt forms for the producer to indicate that a well has been completed and shall, upon receipt of the information and payment required under [section 7] [82-11-162, now repealed], release and absolve the owner of the well from the bond required under 82-11-123.

It is further the intent of the legislature that the board of oil and gas conservation respond promptly to emergency situations that may arise."

*Saving Clause:* Section 12, Ch. 530, L. 1989, was a saving clause.

*Effective Date:* Section 14, Ch. 530, L. 1989, provided that this section is effective July 1, 1989.

## 82-11-163. Landowner's bond on noncommercial well.

### Compiler's Comments

*2009 Amendment:* Chapter 474 near middle of first sentence after "required in" substituted "82-11-123(1)(e)" for "82-11-123". Amendment effective on occurrence of contingency.

*Saving Clause:* Section 29, Ch. 474, L. 2009, was a saving clause.

*Transition — Contingent Implementation:* Section 30, Ch. 474, L. 2009, provided: "If the United States environmental protection agency adopts regulations allowing states to apply for primacy over carbon dioxide sequestration wells under the federal underground injection control program adopted by the environmental protection agency, the board of oil and gas conservation shall in consultation with the department of environmental quality and the department of natural resources and conservation develop draft rules to implement [this act] [Chapter 474, L. 2009] and seek primacy." A final rule allowing states to apply for primacy over carbon dioxide sequestration wells under the federal underground injection control program was adopted by the environmental protection agency and is found at Volume 75 of the Federal Register, pages 77229 through 77303.

*1999 Amendment:* Chapter 278 in three places in section after "deposit" inserted reference to surety bond. Amendment effective October 1, 1999.

*Saving Clause:* Section 2, Ch. 278, L. 1999, was a saving clause.

*Saving Clause:* Section 12, Ch. 530, L. 1989, was a saving clause.

*Effective Date:* Section 14, Ch. 530, L. 1989, provided that this section is effective July 1, 1989.

## 82-11-164. Lien created.

### Compiler's Comments

*1991 Amendment:* In middle of (1), after "person", deleted "if that person is subsequently identified or located" and after "or" substituted "in which the responsible person has an interest" for "the responsible person, if that person is known but cannot or will not fully reimburse the oil and gas production damage mitigation account"; at end of (3), before "liens", deleted "mortgages and"; and made minor changes in style.

*Saving Clause:* Section 6, Ch. 734, L. 1991, was a saving clause.

*Saving Clause:* Section 12, Ch. 530, L. 1989, was a saving clause.

*Effective Date:* Section 14, Ch. 530, L. 1989, provided that this section is effective July 1, 1989.

### 82-11-172. Short title.

**Compiler's Comments**

*Severability:* Section 8, Ch. 578, L. 2001, was a severability clause.

*Effective Date:* Section 9(1), Ch. 578, L. 2001, provided that this section is effective on passage and approval. Approved May 5, 2001.

### 82-11-173. Legislative findings — purpose.

**Compiler's Comments**

*Severability:* Section 8, Ch. 578, L. 2001, was a severability clause.

*Effective Date:* Section 9(1), Ch. 578, L. 2001, provided that this section is effective on passage and approval. Approved May 5, 2001.

### 82-11-174. Offset permitting — geographic requirements.

**Compiler's Comments**

*Severability:* Section 8, Ch. 578, L. 2001, was a severability clause.

*Contingent Effective Date:* Section 9(2), Ch. 578, L. 2001, provided: "[Section 3] [82-11-174] is effective when the director of the department of environmental quality and the administrator or the presiding officer of the board of oil and gas conservation certify to the governor that a final environmental impact statement on coal bed methane development has been prepared and a record of decision has been signed. The director of the department of environmental quality and the administrator or the presiding officer of the board of oil and gas conservation shall provide a copy of the certification to the Montana code commissioner." The contingency occurred on June 3, 2004, when the Administrator of the Board of Oil and Gas Conservation and the Director of the Department of Environmental Quality certified to the Governor that a final environmental impact statement on coal bed methane development had been prepared and that a record of decision had been signed.

### 82-11-175. Coal bed methane wells — requirements.

**Compiler's Comments**

*Severability:* Section 8, Ch. 578, L. 2001, was a severability clause.

*Effective Date:* Section 9(1), Ch. 578, L. 2001, provided that this section is effective on passage and approval. Approved May 5, 2001.

**Attorney General's Opinions**

*Extent of Conservation District Implementation of Land Use Regulations Regarding Coal Bed Methane Wastewater Operations:* The Legislature did not intend that the listing in 76-15-706 of measures necessary to protect soil and water limit the flexibility of conservation districts to devise means to control the adverse effects of coal bed methane runoff. Thus, a conservation district has authority under 76-15-706, following a referendum by the voters, to implement land use regulations in order to implement reasonable measures to conserve soils, protect soil structure from coal bed methane water, and conserve the water resources of the conservation district. 50 A.G. Op. 9 (2004).

### 82-11-180. Preservation of property rights.

**Compiler's Comments**

*Saving Clause:* Section 29, Ch. 474, L. 2009, was a saving clause.

*Effective Date:* Section 31(2), Ch. 474, L. 2009, provided that this section is effective on passage and approval. Approved May 6, 2009.

### 82-11-181. Geologic storage reservoir administrative fee — account established.

**Compiler's Comments**

*Saving Clause:* Section 29, Ch. 474, L. 2009, was a saving clause.

*Transition — Contingent Implementation:* Section 30, Ch. 474, L. 2009, provided: "If the United States environmental protection agency adopts regulations allowing states to apply for primacy over carbon dioxide sequestration wells under the federal underground injection control program adopted by the environmental protection agency, the board of oil and gas conservation shall in consultation with the department of environmental quality and the department of natural resources and conservation develop draft rules to implement [this act] [Chapter 474, L. 2009] and seek primacy." A final rule allowing states to apply for primacy over carbon dioxide sequestration wells under the federal underground injection control program was adopted by the environmental protection agency and is found at Volume 75 of the Federal Register, pages 77229 through 77303.

## 82-11-182. Liability for carbon dioxide during injection.

**Compiler's Comments**

*2013 Amendment:* Chapter 123 in (1) substituted "82-11-183(7)" for "82-11-183(8)". Amendment effective October 1, 2013.

*Saving Clause:* Section 29, Ch. 474, L. 2009, was a saving clause.

*Transition — Contingent Implementation:* Section 30, Ch. 474, L. 2009, provided: "If the United States environmental protection agency adopts regulations allowing states to apply for primacy over carbon dioxide sequestration wells under the federal underground injection control program adopted by the environmental protection agency, the board of oil and gas conservation shall in consultation with the department of environmental quality and the department of natural resources and conservation develop draft rules to implement [this act] [Chapter 474, L. 2009] and seek primacy." A final rule allowing states to apply for primacy over carbon dioxide sequestration wells under the federal underground injection control program was adopted by the environmental protection agency and is found at Volume 75 of the Federal Register, pages 77229 through 77303.

## 82-11-183. Certificate of completion — department of environmental quality participation — transfer of liability.

**Compiler's Comments**

*2011 Amendment:* Chapter 264 in (3), (4)(f), and (6) at beginning inserted exception clause and substituted "25 years" for "15 years"; in (10) substituted "25 years" for "15 years"; inserted (11) regarding adoption of rules; and made minor changes in style. Amendment effective on occurrence of contingency.

*Preamble:* The preamble attached to Ch. 264, L. 2011, provided: "WHEREAS, the federal Environmental Protection Agency has adopted federal requirements under the underground injection control program for carbon dioxide geologic sequestration wells that require minimum monitoring timeframes with an opportunity for alternative timeframes; and

WHEREAS, the Board of Oil and Gas Conservation in consultation with the Department of Environmental Quality and the Department of Natural Resources and Conservation intends to seek primacy from the Environmental Protection Agency to implement the federal requirements for carbon dioxide geologic sequestration wells in Montana."

*Saving Clause:* Section 29, Ch. 474, L. 2009, was a saving clause.

*Transition — Contingent Implementation:* Section 30, Ch. 474, L. 2009, provided: "If the United States environmental protection agency adopts regulations allowing states to apply for primacy over carbon dioxide sequestration wells under the federal underground injection control program adopted by the environmental protection agency, the board of oil and gas conservation shall in consultation with the department of environmental quality and the department of natural resources and conservation develop draft rules to implement [this act] [Chapter 474, L. 2009] and seek primacy." A final rule allowing states to apply for primacy over carbon dioxide sequestration wells under the federal underground injection control program was adopted by the environmental protection agency and is found at Volume 75 of the Federal Register, pages 77229 through 77303.

## 82-11-184. Conversion of enhanced recovery wells.

**Compiler's Comments**

*Saving Clause:* Section 29, Ch. 474, L. 2009, was a saving clause.

*Transition — Contingent Implementation:* Section 30, Ch. 474, L. 2009, provided: "If the United States environmental protection agency adopts regulations allowing states to apply for primacy over carbon dioxide sequestration wells under the federal underground injection control program adopted by the environmental protection agency, the board of oil and gas conservation shall in consultation with the department of environmental quality and the department of natural resources and conservation develop draft rules to implement [this act] [Chapter 474, L. 2009] and seek primacy." A final rule allowing states to apply for primacy over carbon dioxide sequestration wells under the federal underground injection control program was adopted by the environmental protection agency and is found at Volume 75 of the Federal Register, pages 77229 through 77303.

## 82-11-185. Makoshika state park requirements.

**Compiler's Comments**

*Saving Clause:* Section 29, Ch. 474, L. 2009, was a saving clause.

*Transition — Contingent Implementation:* Section 30, Ch. 474, L. 2009, provided: "If the United States environmental protection agency adopts regulations allowing states to apply for primacy over carbon dioxide sequestration wells under the federal underground injection control program adopted by the environmental protection agency, the board of oil and gas conservation shall in consultation with the department of environmental quality and the department of natural resources and conservation develop draft rules to implement [this act] [Chapter 474, L. 2009] and seek primacy." A final rule allowing states to apply for primacy over carbon dioxide sequestration wells under the federal underground injection control program was adopted by the environmental protection agency and is found at Volume 75 of the Federal Register, pages 77229 through 77303.

### 82-11-188. Incidental carbon dioxide storage — certification.

**Compiler's Comments**

*Effective Date:* This section is effective October 1, 2015.

## Part 2

## Unit Operations

**Part Administrative Rules**

Title 36, chapter 22, subchapter 6, ARM Permit to drill.

Title 36, chapter 22, subchapter 7, ARM Well spacing units.

**Part Law Review Articles**

Hardwicke, Antitrust Laws, et al. v. Unit Operation of Oil or Gas Pools (1961), reviewed, Sullivan, 23 Mont. L. Rev. 258 (1962).

Some Legal Aspects of the Unitization of Federal, State and Fee Land, Hinkle, 14 Mont. L. Rev. 49 (1953).

### 82-11-201. Establishment of well spacing units.

**Compiler's Comments**

*2009 Amendments — Composite Section:* Chapter 244 in (4) at beginning of third sentence after "The" inserted "well location" and after "included" inserted "in the request to establish permanent or temporary spacing units"; and made minor changes in style. Amendment effective April 16, 2009.

Chapter 474 in (1)(a) after "state for" inserted "carbon dioxide injection wells or"; and made minor changes in style. Amendment effective on occurrence of contingency.

*Saving Clause:* Section 29, Ch. 474, L. 2009, was a saving clause.

*Transition — Contingent Implementation:* Section 30, Ch. 474, L. 2009, provided: "If the United States environmental protection agency adopts regulations allowing states to apply for primacy over carbon dioxide sequestration wells under the federal underground injection control program adopted by the environmental protection agency, the board of oil and gas conservation shall in consultation with the department of environmental quality and the department of natural resources and conservation develop draft rules to implement [this act] [Chapter 474, L. 2009] and seek primacy." A final rule allowing states to apply for primacy over carbon dioxide sequestration wells under the federal underground injection control program was adopted by the environmental protection agency and is found at Volume 75 of the Federal Register, pages 77229 through 77303.

*1993 Amendment:* Chapter 313 near middle of (1), after "chapter", inserted "to avoid the drilling of unnecessary wells, or to protect correlative rights"; inserted (1)(a) regarding temporary spacing units; at beginning of (1)(b) substituted "permanent" for "well", before "pool" inserted "discovered", and after "pool" deleted "as to oil wells or as to gas wells or both" and deleted second sentence that read: "Spacing units when established shall insofar as possible be of uniform size and shape for the entire pool"; substituted (2) regarding size and shape of temporary spacing units for former language that read: "The size and the shape of spacing units shall be such as will result in the efficient and economic development of the pool as a whole, and the size shall be the area that can be efficiently drained by one well"; inserted (3) regarding size and shape of permanent spacing units; at beginning of first sentence of (4) deleted "Subject to this chapter" and before "spacing units" inserted "temporary or permanent" and inserted third and fourth sentences regarding Board action to ensure equitable production; near beginning of (5), after "establishing", inserted "temporary or permanent"; at beginning of (6) substituted "The board, upon application" for "When found necessary for the prevention of waste, an order establishing spacing units in a pool may be modified after", near middle, after "size of", inserted "a temporary or permanent", and at end substituted "a spacing unit for a purpose mentioned in subsection (1)" for "the pool on a reasonably uniform plan"; and made minor changes in style.

**Case Notes**

*Coordination of Habendum and Pugh Clauses in Oil and Gas Lease — Shut-In Gas Well Considered Producing Well for Lease Purposes — Lease Extended on Section With Producing Well, Terminated on Undeveloped Sections for Lack of Timely Rental Payments:* Plaintiff's oil and gas leases had habendum clauses, which provided that the primary leases would be extended as long as oil or gas was produced or drilling operations continued on any of the leased property, and Pugh clauses, which provided that production would not serve to extend the primary term of a lease unless the lessee paid an annual per-acre rental fee prior to the end of the primary term. By the end of the primary term, plaintiff had only one shut-in well developed on the leasehold. Depending on the habendum clauses, plaintiff concluded that there was not a producing well on the leasehold, so the Pugh clauses did not take effect and rental payments were not required. Depending on the Pugh clauses, defendants concluded that because there were no producing wells on the leasehold and because the rental fee on the shut-in well was 2 days late, all of plaintiff's leases were canceled. In reconciling the clauses, the District Court correctly found that: (1) the Pugh clauses required that rental payments be paid on or before the expiration of the primary term in order to extend leases on undeveloped sections; and (2) because time is of the essence in oil and gas leases and plaintiff did not pay timely rental, the leases expired by their own terms on all sections except the section containing the shut-in well, which was considered a producing well, and that lease would continue under the habendum clause as long as plaintiff used reasonable diligence in marketing the gas. Sandtana, Inc. v. Wallin Ranch Co., 2003 MT 329, 318 M 369, 80 P3d 1224 (2003).

*Oil Lease Construed to Make All Provisions Effective:* Texaco argued that the one productive well it had drilled was sufficient to extend the lease on all lands covered by the lease for as long as the well produced. The Supreme Court held that the general duration clause in the lease relied on by Texaco was modified by a subsequent provision that limited the lease extension to the 320-acre spacing unit on which the producing well was located. Fed. Land Bank of Spokane v. Texaco, Inc., 250 M 471, 820 P2d 1269, 48 St. Rep. 998 (1991).

*Common-Law Offset Drilling Rule — Implied Covenant Not Altered by Enactment of Statutes:* Where the parties entered into a mineral lease for the production of oil underlying plaintiff's property, there was by common law implied in this and every oil and gas lease a covenant on the part of the lessee to protect the premises of his lessor from drainage by an adjacent producing well by drilling an offset well. The implied covenant was not per se eliminated by the enactment of the 1953 oil and gas conservation law, and an oil and gas lessee still has a duty under the implied covenant to protect his premises from drainage by drilling an offset well, if doing so would not be in violation of the statutes or of a valid rule or order of the Oil and Gas Conservation Board. U. V. Indus., Inc. v. Danielson, 184 M 203, 602 P2d 571 (1979).

*Common-Law Rule Not Superseded by Authority of Board:* In an action by plaintiffs (lessor's grantees) for damages resulting from defendant lessees' failure under an oil and gas lease to protect the plaintiffs' interests by drilling an offset well, the common-law offset drilling rule, under which plaintiffs seek damages, has not been superseded by the administrative powers of the Board of Oil and Gas Conservation, as the powers of the Board do not include the authority to adjudicate private rights. As held in the case of Pattie v. Oil & Gas Conserv. Comm'n, 145 M 531, 402 P2d 596 (1965), the Legislature gave the Board the duty to consider correlative rights in making orders, but adjudication of those rights must be by civil action in the District Courts. U. V. Indus., Inc. v. Danielson, 184 M 203, 602 P2d 571 (1979).

*Limiting Production of an Exception Location Well:* Under 82-11-201, authorizing the Commission to grant exceptions to field spacing rules, the Commission must hear evidence on the issue of injury to correlative rights of adjoining landowners and determine if there are grounds for exercise of its authority to limit production of an exception location well, even in the absence of a showing of waste. Chevron Oil Co. v. Oil & Gas Conserv. Comm'n, 150 M 351, 435 P2d 781 (1968).

*Adjudication of Private Rights by Board of Oil and Gas Conservation:* Section 82-11-201(3) (now (4)) was sufficiently broad to permit the Oil and Gas Conservation Commission to consider private rights in making orders. Pattie v. Oil & Gas Conserv. Comm'n, 145 M 531, 402 P2d 596 (1965).

*Granting of Exception Allowed:* Under 82-11-201(3) (now (4)), where property lies on the projected edge of a petroleum reservoir, an exception may be granted if requiring the well to be drilled at the authorized location on the spacing units would be inequitable or unreasonable. Pattie v. Oil & Gas Conserv. Comm'n, 145 M 531, 402 P2d 596 (1965).

### 82-11-202. Pooling of interest within spacing unit.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 1, Ch. 441, L. 2023. Amendment effective October 1, 2023.

*1993 Amendment:* Chapter 313 near middle of (1)(a), after "within a", inserted "temporary or permanent"; at beginning of first sentence of (1)(b) deleted "In the absence of voluntary pooling within the spacing unit", near middle, before "spacing", inserted "permanent", and at end inserted "of the permanent spacing unit and the allocation of production if the applicant has made an unsuccessful, good faith attempt to voluntarily pool the interests within the permanent spacing unit", inserted second sentence requiring that the applicant own an interest in the oil or gas, and in third, fourth, and fifth sentences, before "spacing", inserted "permanent"; deleted former first sentence of (2)(a) that read: "The pooling order shall provide for the drilling and operating of a well on the spacing unit and for the payment of the cost thereof, which cost may include a reasonable charge for supervision, handling, and storage", near beginning of first sentence, after "costs of", substituted "development or other operations referred to in subsection (1)" for "drilling and operating the well" and near middle, before "spacing", inserted "permanent", inserted second sentence providing for drilling and payment of costs when a well has not been drilled prior to hearing on the application, in third sentence, before "order", inserted "subsequent" and after "order" inserted "after notice and hearing", and in last sentence, before "spacing", inserted "permanent"; substituted (2)(b) regarding costs included in the order for former language that read: "If an owner refuses to pay his share of the costs of drilling and operating the well, the order must include as cost"; inserted (2)(e) providing for payment of costs when an owner of an interest in a temporary spacing unit refuses to pay drilling and operating costs; inserted (3) clarifying when an owner is presumed to have refused to pay costs; and made minor changes in style.

*1985 Amendment:* In (2)(a), near end of second sentence, inserted "and excluding the royalty provided for in subsection (2)(c) of this section"; inserted (2)(b) providing for percentage of costs to be assessed against refusing owner; inserted (2)(c) referring to refusing owner's landowner royalty interest; and inserted (2)(d) referring to accounting due from operator to refusing owner.

**Case Notes**

*Common-Law Offset Drilling Rule — Implied Covenant Not Altered by Enactment of Statutes:* Where the parties entered into a mineral lease for the production of oil underlying plaintiff's property, there was by common law implied in this and every oil and gas lease a covenant on the part of the lessee to protect the premises of his lessor from drainage by an adjacent producing well by drilling an offset well. The implied covenant was not per se eliminated by the enactment of the 1953 oil and gas conservation law, and an oil and gas lessee still has a duty under the implied covenant to protect his premises from drainage by drilling an offset well, if doing so would not be in violation of the statutes or of a valid rule or order of the Oil and Gas Conservation Board. U. V. Indus., Inc. v. Danielson, 184 M 203, 602 P2d 571 (1979).

*Unitization of Reservoir Containing Multilease Lands:* Under 82-11-202, an application by an oil and gas lessee to the Oil and Gas Conservation Commission for unitization of a reservoir did not constitute breach of a one-well pooling provision in the lease since such unitization of an extensive reservoir containing multilease lands, multiproducing wells, multipools, and multispacing or drilling units was different from a lease provision relating to pooling. Armstrong v. High Crest Oil, Inc., 164 M 187, 520 P2d 1081 (1974).

*Creation of Unit an Exercise of Police Power:* Oil and gas conservation laws and rules have the effect of modifying provisions of existing leases, and statutory and administrative action creating a gas unit is an exercise of police power, and the fact that in some instances an oil and gas lease may have been procured prior to legislative or administrative pronunciation is immaterial. Armstrong v. High Crest Oil, Inc., 164 M 187, 520 P2d 1081 (1974).

*Indian Lands:* Under 82-11-202, the matter in controversy in a suit by Indian tribes for an injunction to restrain the Oil and Gas Conservation Commission from enforcing an order "pooling" tribes' lands with lands of another to form a "spacing unit" was not the lands or royalties but the regulation and right to be free from it. Since the tribes failed to show the jurisdictional amount in controversy, the suit was not properly brought in Federal Court. Yoder v. Assiniboine & Sioux Tribes of Fort Peck Indian Reservation, 339 F2d 360 (1964).

## 82-11-204. Hearing on operation of pool as unit.

### Compiler's Comments

*2009 Amendment:* Chapter 474 inserted (1)(b) requiring a hearing to consider the need for the operation of a unit for the long-term storage of carbon dioxide; inserted (2)(b) requiring notice of an applicant's intention to make an application; and made minor changes in style. Amendment effective on occurrence of contingency.

*Saving Clause:* Section 29, Ch. 474, L. 2009, was a saving clause.

*Transition — Contingent Implementation:* Section 30, Ch. 474, L. 2009, provided: "If the United States environmental protection agency adopts regulations allowing states to apply for primacy over carbon dioxide sequestration wells under the federal underground injection control program adopted by the environmental protection agency, the board of oil and gas conservation shall in consultation with the department of environmental quality and the department of natural resources and conservation develop draft rules to implement [this act] [Chapter 474, L. 2009] and seek primacy." A final rule allowing states to apply for primacy over carbon dioxide sequestration wells under the federal underground injection control program was adopted by the environmental protection agency and is found at Volume 75 of the Federal Register, pages 77229 through 77303.

### Case Notes

*Unitization of Entire Reservoir:* Application by oil and gas lessee to the Commission for unitization of a reservoir did not constitute a breach of one-well pooling provision in lease; unitization of an entire reservoir under this section is entirely different from one-well pooling pursuant to 82-11-202. Armstrong v. High Crest Oils, Inc., 164 M 187, 520 P2d 1081 (1974).

## 82-11-205. Board order for unit operation — criteria.

### Compiler's Comments

*2009 Amendment:* Chapter 474 in introductory clause after "pools" inserted "or of a geologic storage reservoir"; in (1) at end after "gas" inserted "or the operation is necessary for the long-term storage of carbon dioxide"; inserted (3)(b) concerning geologic storage reservoir; and made minor changes in style. Amendment effective on occurrence of contingency.

*Saving Clause:* Section 29, Ch. 474, L. 2009, was a saving clause.

*Transition — Contingent Implementation:* Section 30, Ch. 474, L. 2009, provided: "If the United States environmental protection agency adopts regulations allowing states to apply for primacy over carbon dioxide sequestration wells under the federal underground injection control program adopted by the environmental protection agency, the board of oil and gas conservation shall in consultation with the department of environmental quality and the department of natural resources and conservation develop draft rules to implement [this act] [Chapter 474, L. 2009] and seek primacy." A final rule allowing states to apply for primacy over carbon dioxide sequestration wells under the federal underground injection control program was adopted by the environmental protection agency and is found at Volume 75 of the Federal Register, pages 77229 through 77303.

## 82-11-206. Terms and conditions of plan for unit operations.

### Compiler's Comments

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

## 82-11-207. Approval of plan for unit operations by persons paying costs.

### Compiler's Comments

*2009 Amendment:* Chapter 311 in first and second sentences reduced percentages from 80% to 70% and from 80% to 60%; and made minor changes in style. Amendment effective July 1, 2009.

## 82-11-209. Units established by previous order.

### Compiler's Comments

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

## 82-11-211. Operations considered as done by all owners in unit.

### Case Notes

*Common-Law Offset Drilling Rule — Implied Covenant Not Altered by Enactment of Statutes:* Where the parties entered into a mineral lease for the production of oil underlying plaintiff's property, there was by common law implied in this and every oil and gas lease a covenant on the part of the lessee to protect the premises of his lessor from drainage by an adjacent producing well by drilling an offset well. The implied covenant was not per se eliminated by the enactment of the 1953 oil and gas conservation law, and an oil and gas lessee still has a duty under the implied covenant to protect his premises from drainage by drilling an offset well, if doing so would not be in violation of the statutes or of a valid rule or order of the Oil and Gas Conservation Board. U. V. Indus., Inc. v. Danielson, 184 M 203, 602 P2d 571 (1979).

### 82-11-212. Property rights and operator's lien.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 82-11-214. Title to oil and gas rights not affected by board order.

**Compiler's Comments**

*2009 Amendment:* Chapter 474 near beginning of first sentence after "agree" inserted "and in accordance with 82-11-183(8)" and near end before "oil" inserted "carbon dioxide rights or"; and made minor changes in style. Amendment effective on occurrence of contingency.

*Saving Clause:* Section 29, Ch. 474, L. 2009, was a saving clause.

*Transition — Contingent Implementation:* Section 30, Ch. 474, L. 2009, provided: "If the United States environmental protection agency adopts regulations allowing states to apply for primacy over carbon dioxide sequestration wells under the federal underground injection control program adopted by the environmental protection agency, the board of oil and gas conservation shall in consultation with the department of environmental quality and the department of natural resources and conservation develop draft rules to implement [this act] [Chapter 474, L. 2009] and seek primacy." A final rule allowing states to apply for primacy over carbon dioxide sequestration wells under the federal underground injection control program was adopted by the environmental protection agency and is found at Volume 75 of the Federal Register, pages 77229 through 77303.

## Part 3

## Interstate Oil and Gas Conservation Compact

### 82-11-301. Authorization to join interstate compact for conservation of oil and gas.

**Compiler's Comments**

*Extension of Interstate Oil Compact:* The interstate compact to conserve oil and gas has been extended from time to time by the various states with the approval of Congress. See compiler's comment to 82-11-302.

### 82-11-302. Interstate oil and gas compact.

**Compiler's Comments**

*Interstate Compact Extended:* The original interstate compact to conserve oil and gas, which was to expire September 1, 1937, has been extended from time to time by the various states with the approval of Congress. It had been extended to 1947 at the time Montana ratified the compact. The latest extension was granted on May 2, 1979, by Senate Joint Resolution 72, which provides for the approval by Congress effective from January 1, 1979, "until Congress withdraws such consent".

All the states mentioned in Article I, except California, have ratified the compact. Additional states which have ratified the compact are Alabama, Alaska, Arizona, Arkansas, Colorado, Florida, Illinois, Indiana, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Montana, Nebraska, Nevada, New York, North Dakota, Ohio, Pennsylvania, South Dakota, Tennessee, Utah, West Virginia, and Wyoming.

### 82-11-303. Extension of expiration date.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 82-11-304. Governor as member of interstate oil compact commission.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 82-11-305. Limitation on power of representative.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 82-11-306. Expenses of representative.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

# CHAPTER 15
# REGULATION OF PETROLEUM PRODUCTS

## Part 1
## Regulation of Manufacture and Distribution

**Part Administrative Rules**

Title 24, chapter 351, subchapter 4, ARM Petroleum.

### 82-15-101. Definitions.

**Compiler's Comments**

*2005 Amendment:* Chapter 452 inserted definition of antiknock index number; and made minor changes in style. Amendment effective April 28, 2005.

*2001 Amendment:* Chapter 483 in definition of department substituted reference to department of labor and industry for reference to department of commerce and substituted "part 17" for "part 18"; and made minor changes in style. Amendment effective July 1, 2001.

*1993 Amendment:* Chapter 65 inserted definitions of liquefied petroleum product, liquefied petroleum product container, and owner; and made minor changes in style.

*1981 Amendment:* Substituted "department of commerce" for "department of business regulation" in (2).

### 82-15-102. Enforcement of part — rules.

**Compiler's Comments**

*2021 Amendment:* Chapter 324 in (3) in introductory clause near beginning of first sentence substituted "department of environmental quality" for "board of environmental review"; and in (3)(a) near beginning of last sentence and in (3)(c) substituted "department of environmental quality" for "board". Amendment effective July 1, 2021.

*2005 Amendments — Composite Section:* Chapter 385 in (1) at beginning inserted exception clause; inserted (2) requiring the department to enforce prohibitions against use of methyl tertiary butyl ether; inserted (3) requiring the department to adopt rules for the regulation of methyl tertiary butyl ether; and made minor changes in style. Amendment effective January 1, 2006.

Chapter 452 in (1) at beginning inserted exception clause; inserted (2) regarding enforcement of 82-15-110(8); inserted (3) regarding requiring adoption of rules by board of environmental review; and made minor changes in style. Amendment effective April 28, 2005.

### 82-15-103. Standards and specifications for petroleum products.

**Compiler's Comments**

*2017 Amendment:* Chapter 15 after "determined by the department and" deleted "subject to the provisions of 82-15-121(1)"; and made minor changes in style. Amendment effective October 1, 2017.

*2005 Amendments — Composite Section:* Chapter 130 at end of first sentence after "testing" inserted "and"; and made minor changes in style. Amendment effective October 1, 2005.

Chapter 452 in first sentence near beginning inserted "ethanol-blended gasoline" and inserted "subject to the provisions of 82-15-121(1)"; and made minor changes in style. Amendment effective April 28, 2005.

Style changes were slightly different in the chapters. In each case, the codifier chose appropriate text.

## 82-15-104. Departments authorized to employ laboratory for testing.

**Compiler's Comments**

*2005 Amendments — Composite Section:* Chapter 385 near beginning after "department" inserted "and, when testing for methyl tertiary butyl ether, the department of environmental quality"; and made minor changes in style. Amendment effective January 1, 2006.

Chapter 452 near beginning inserted "and, when testing for methyl tertiary butyl ether, the department of environmental quality"; and made minor changes in style. Amendment effective April 28, 2005.

## 82-15-105. Licenses and fees — status of license on transfer of ownership.

**Compiler's Comments**

*2007 Amendment:* Chapter 62 deleted former (4) that read: "(4) If ownership of a measuring device changes and the device:

(a) remains at the same location, the license transfers to the new owner and remains in effect until December 31 of that year;

(b) is moved to a new location, the license is void, and the new owner shall:

(i) apply for a new license that will expire on the anniversary date of that year, as provided in subsection (3); and

(ii) pay the applicable fees"; and made minor changes in style. Amendment effective October 1, 2007.

*1999 Amendment:* Chapter 54 in second sentence in (3) substituted "within 60 days of the licensee's anniversary date" for "before March 1 of each year in which the vehicle tank, meter, or measuring device is in use". Amendment effective March 15, 1999.

*1997 Amendment:* Chapter 366 in (2) inserted second sentence regarding payment of fees by credit card and discounting of fees; in (3), at end of first sentence, substituted "the anniversary date established by rule by the board of review established in 30-16-302" for "December 31 of each year"; and in (4)(b)(i), after "expire on", substituted "the anniversary date of that year, as provided in subsection (3)" for "December 31 of that year".

*1997 Statement of Intent:* The statement of intent attached to Ch. 366, L. 1997, provided: "A statement of intent is required for this bill because [section 1] [30-16-104] grants rulemaking authority to the board of review established in 30-16-302 for the purpose of implementing a one-stop business licensing pilot project required by the 54th Legislature."

*1993 Amendment:* Chapter 498 substituted (2) requiring Department to adopt rules establishing licensing fees based upon the measuring devices used by dealers and requiring fees to be deposited in special revenue account for administering and enforcing this part for former (2) that read: "The fee for this license is determined as follows and depends upon the number of devices utilized by the dealer:

(a) each gasoline pump, diesel pump, or fuel oil pump measuring device—$7;

(b) each petroleum vehicle tank meter or bulk petroleum meter of 2 inches (5.08 centimeters) and under—$20;

(c) each bulk petroleum meter over 2 inches (5.08 centimeters)—$25;

(d) each liquefied petroleum liquid meter—$30;

(e) each vapor meter—$4;

(f) each petroleum and liquefied petroleum vehicle tank up to and including 2,000 gallons (7,570 liters)—$25;

(g) each petroleum and liquefied petroleum vehicle tank over 2,000 gallons (7,570 liters)—$25 plus $5 for each additional 1,000 gallons (3,785 liters)"; at end of (4)(b)(ii) deleted "prescribed in subsection (2)"; and made minor changes in style. Amendment effective January 1, 1994.

*1993 Statement of Intent:* The statement of intent attached to Ch. 498, L. 1993, provided: "A statement of intent is required for this bill in order to provide the department of commerce the authority to establish by rule license fees for petroleum dealers and liquefied petroleum dealers. The fees must be set in an amount necessary to cover costs of the department to administer and enforce the provisions of Title 82, chapter 15, part 1."

*Implementation:* Section 2, Ch. 498, L. 1993, provided: "The department of commerce may adopt rules implementing [this act] to be in place on January 1, 1994." Effective April 24, 1993.

*Effective Date — Applicability:* Section (3)(1), Ch. 498, L. 1993, provided: "[Section 1] [82-15-105] is effective January 1, 1994, and applies to license fees beginning after December 31, 1993."

*1991 Amendment:* In (2)(a) increased fee from $5 to $7; in (2)(b) increased fee from $15 to $20; in (2)(c) increased fee from $20 to $25; in (2)(d) increased fee from $25 to $30; in (2)(e) increased fee from $3 to $4; in (2)(f) increased fee from $20 to $25; in (2)(g) increased fee from $20 plus $4 to $25 plus $5; in first sentence of (3), after "annual", deleted "and nontransferable as to person or location"; inserted (4) clarifying status of licenses upon change of ownership of measuring devices; and made minor changes in style. Amendment effective January 1, 1992.

*Effective Date — Applicability:* Section 2, Ch. 56, L. 1991, provided: "[This act] is effective January 1, 1992, and applies to licenses and fees for years beginning after December 31, 1991."

*1983 Amendment:* Increased the fee in (2)(a) from $3 to $5, in (2)(b) from $10 to $15, in (2)(c) from $15 to $20, and in (2)(d) from $15 to $25.

### 82-15-106. Refusing, suspending, and revoking licenses — hearing required.

**Compiler's Comments**

*2005 Amendments — Composite Section:* Chapter 385 in second sentence after "part" inserted "except 82-15-110(8)"; and made minor changes in style. Amendment effective January 1, 2006.

Chapter 452 in second sentence near beginning after "of this part" inserted exception clause; and made minor changes in style. Amendment effective April 28, 2005.

### 82-15-110. Unlawful acts.

**Compiler's Comments**

*2005 Amendments — Composite Section:* Chapter 385 inserted (8) providing that it is unlawful to engage in certain actions with respect to gasoline containing more than trace amounts of methyl tertiary butyl ether; and made minor changes in style. Amendment effective January 1, 2006.

Chapter 452 in (6) near middle substituted "fuel product" for "commodities"; inserted (8) regarding gasoline that contains methyl tertiary butyl ether; and made minor changes in style. Amendment effective April 28, 2005.

### 82-15-111. Penalty for violations.

**Compiler's Comments**

*2005 Amendments — Composite Section:* Chapter 385 near beginning after "who" inserted "purposely, knowingly, or negligently" and after "part" inserted "except 82-15-110(8)"; and made minor changes in style. Amendment effective January 1, 2006.

Chapter 452 near beginning inserted "purposely, knowingly, or negligently" and after "provisions of this part" inserted exception clause. Amendment effective April 28, 2005.

### 82-15-120. Department of environmental quality to enforce prohibition on methyl tertiary butyl ether — notice requirements — hearing — penalties.

**Compiler's Comments**

*2021 Amendment:* Chapter 535 in (5) in last sentence after "The action must be brought" deleted "in the district court of the first judicial district, Lewis and Clark County, or". Amendment effective October 1, 2021.

*Effective Dates — Composite Section:* Section 8, Ch. 385, L. 2005, provided that this section is effective January 1, 2006.

Section 20, Ch. 452, L. 2005, provided that this section is effective on passage and approval. Approved April 28, 2005.

This section was enacted by Ch. 385 and Ch. 452 in identical form with minor variations in style. The code commissioner chose to codify the Ch. 452 text because it had an immediate effective date.

## Part 2
## Price Discrimination

### 82-15-204. Investigation of complaints — revocation of license.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 82-15-205. County attorney to prosecute violations.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

# TITLES 83 AND 84
## RESERVED

# TITLE 85
## WATER USE

**Title Law Review Articles**

The Prior Appropriation Doctrine in Montana: Rooted in Mid-Nineteenth Century Goals—Responding to Twenty-First Century Needs, MacIntyre, 55 Mont. L. Rev. 303 (1994).

Privatization of the Water Resource: Salvage, Leases and Changes, Stone, 54 Mont. L. Rev. 99 (1993).

Antidegradation Policy and Outstanding National Resource Waters in the Northern Rocky Mountain States, Brawer, 20 Pub. Land. & Resources L. Rev. 13 (1999).

"Moral Obligations of the Highest Responsibility and Trust": An Analysis of the Federal Trust Responsibility in Parravano v. Babbitt, Lombardi, 18 Pub. Land & Resources L. Rev. 213 (1997).

Preserving Stream Flows in Montana Through the Constitutional Public Trust Doctrine: An Underrated Solution, Clifford, 16 Pub. Land L. Rev. 117 (1995).

Montana's Nondegradation Laws: Will We Allow Continued Degradation of Montana's Waters?, Parker, 14 Pub. Land L. Rev. 185 (1993).

Water Quality Nondegradation in Montana: Is Any Deterioration Too Much?, Horwich, 14 Pub. Land L. Rev. 145 (1993).

Instream Flow Policy in Montana: A History and Blueprint for the Future, McKinney, 11 Pub. Land L. Rev. 81 (1990).

**Title Collateral References**

Water Rights in Montana, Montana Environmental Quality Council.

Montana Environmental Policy Act Handbook, Environmental Quality Council.

A Guide to Montana Water Quality Regulation, Legislative Environmental Policy Office.

Montana's Water—Where Is It? Who Can Use It? Who Decides?, Environmental Quality Council (2004).

## CHAPTER 1
## WATER RESOURCES

**Chapter Compiler's Comments**

*Sections Not Codified:* Sections 89-3001 and 89-3002, R.C.M. 1947, a temporary provision relating to international apportionment of the waters of Sage Creek, were not codified in the MCA. The sections have not been repealed and are still valid law. Reference may be made to Ch. 23, L. 1957.

### Part 1
### General Provisions

**Part Compiler's Comments**

*Study of Water User Fees — 1992 Report:* Section 6, Ch. 659, L. 1991, provided for a study by the Department of Natural Resources and Conservation on the feasibility of increasing fees charged to diversionary water users. A written report must be submitted to the Water Policy Committee by July 1, 1992.

**85-1-101. Policy considerations.**

**Compiler's Comments**

*Section Not Codified:* Section 89-101.1, R.C.M. 1947, a short title clause, was not codified in the MCA. This clause has not been repealed and is still valid law. Reference may be made to sec. 1, Ch. 158, L. 1967, as amended by sec. 118, Ch. 253, L. 1974.

**Case Notes**

*Crow Compact Upheld — Compact Held Reasonable — Public Property and Water Rights Reasonable Under Compact — Public Comment Satisfied Due Process:* Individual objectors to the Crow Water Compact appealed to the Supreme Court following the Water Court's determination that the Compact was valid. This action was subsequent to In re Crow Water Compact, 2015 MT 217, 380 Mont 168, 354 P.3d 1217. The objectors, who were not parties to the Compact but who owned land and water rights near the reservation, argued that the Water Court did not apply the proper legal standard, that they sustained injury because the Compact was unreasonable, and that their due process rights were violated during the Compact negotiation process. The Supreme Court disagreed with the objectors, holding that the Water Court correctly applied the correct standard articulated in Crow I, that the Compact was reasonable and had reasonable protection of state water and property rights, that the objectors' argument of future potential problems was beyond the scope of its review, that reservation of water for public recreation, wildlife, and aquatic life was for the benefit of the public, and that the record demonstrated sufficient opportunities for public comment during the Compact approval process. In re Crow Water Compact, 2015 MT 353, 382 Mont. 46, 364 P.3d 584.

### 85-1-102. Definitions.

**Compiler's Comments**

*2007 Amendment:* Chapter 432 deleted definition of renewable resource grant and loan program state special revenue account that read: ""Renewable resource grant and loan program state special revenue account" means a separate account created by 85-1-604 within the state special revenue fund of the state treasury for the purposes of the renewable resource grant and loan program as set forth in 85-1-604"; and made minor changes in style. Amendment effective July 1, 2007.

*1997 Amendment:* Chapter 436 inserted definition of tribal government; and made minor changes in style. Amendment effective July 1, 1997.

*1995 Amendments:* Chapter 18 in definition of cost of works, in (e) after "legal", substituted "services" for "expenses"; near end of definition of renewable resource grant and loan program state special revenue account substituted reference to renewable resource grant and loan program for reference to water development program; and made minor changes in style.

Chapter 418 deleted definition of Board that read: ""Board" means the board of natural resources and conservation provided for in 2-15-3302"; adjusted subsection references; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1993 Amendment:* Chapter 478 inserted definitions of renewable resource grant and loan program state special revenue account and renewable resource loan debt service fund; deleted water development account as defined term and applied former definition to renewable resource loan proceeds account and substituted "renewable resource grant and loan program" for "water development program"; deleted definition of water development debt service fund that read: ""Water development debt service fund" means a separate fund created by 85-1-603 within the debt service fund type of the state treasury to be used as provided in 85-1-619"; in definition of water development project inserted (b) providing that for purposes of renewable resource grant and loan program, water development activities must be included; deleted definition of water development state special revenue account that read: ""Water development state special revenue account" means a separate account created by 85-1-604 within the state special revenue fund of the state treasury for the purposes of the water development program as set forth in 85-1-604"; and made minor changes in style. Amendment effective July 1, 1993.

*1989 Amendment:* In definition of water development account, after "recipients", inserted "and to purchase liens and operate property, as provided in 85-1-615"; and made minor changes in phraseology. Amendment effective April 11, 1989.

*1987 Amendment:* Inserted definitions of administrative costs and cost of operation and maintenance; in (4), after "cost of construction", inserted "including any rehabilitation or alteration of the project"; and in (13) changed reference to subsection (6) to subsection (8).

*1983 Amendment:* In definition of water development account, near beginning before "account" deleted "clearance", and substituted "state special revenue fund" for "bond proceeds and insurance clearance fund"; and in definition of water development state special revenue account substituted "state special revenue account" for "earmarked account" and "state special revenue fund" for "earmarked revenue fund"; in definition of water development debt service fund substituted references to debt service fund for references to sinking account and sinking fund.

*1981 Amendment:* Inserted (5) defining private person; and inserted (7) through (12) defining public benefits, water development clearance account, water development activity, water development earmarked account, water development project, and water development sinking account.

## 85-1-111. Public ways.

### Case Notes

*Remand for Determination of Appropriate Findings and Damages Related to Ditch Rights — Sanctions Dismissed Absent Specific Findings of Sanctionable Conduct:* The parties entered a settlement agreement in 1998 regarding use and maintenance of a ditch that crossed plaintiffs' property and conveyed irrigation water to defendants' property. In 2002, plaintiffs alleged breach of the agreement, nuisance, and trespass. Defendants counterclaimed, alleging breach of the agreement, interference with water rights and easements, and nuisance. The District Court found that plaintiffs' claims were without merit and awarded sanctions against plaintiffs pursuant to former Rule 11, M.R.Civ.P. (now superseded). The court also found that all the counterclaims were unfounded and dismissed the counterclaims with prejudice. Plaintiffs appealed, and defendants cross-appealed. The Supreme Court concluded that the findings of fact regarding plaintiffs' claims were supported by substantial credible evidence and not clearly erroneous, so the trial court's holding that defendants did not breach the agreement was affirmed. Dismissal of defendants' counterclaims, however, was not affirmed. Although claims of plaintiffs' physical interference were not supported by the evidence, under Kephart v. Portmann, 259 M 232, 855 P2d 120 (1993), plaintiffs' filing of the lawsuit and forcing defendants into court to defend their established rights constituted an impairment of defendants' acknowledged ditch rights under 70-17-112, so the Supreme Court remanded for a determination of defendants' damages, if any. In addition, the District Court failed to set out specific findings concerning whether plaintiffs breached the settlement agreement, so evaluation of the counterclaims was not possible, and the Supreme Court directed the District Court to enter appropriate findings on remand. Last, the District Court failed to set out specific findings concerning plaintiffs' acts warranting sanctions, stating only that plaintiffs' case was so strongly without merit that it was frivolous. Without more specific findings as to why sanctions were assessed, the Supreme Court vacated the award and directed the District Court on remand to enter specific findings of fact in support of its determination that plaintiffs violated former Rule 11 and, if so, as to the appropriateness of the choice of sanction imposed (see Akin v. Q-L Investments, Inc., 959 F2d 521 (5th Cir. 1992)). Byrum v. Andren, 2007 MT 107, 337 M 167, 159 P3d 1062 (2007).

*Public Right to Use Beaverhead River for Recreational Purposes:* Following the decision in Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984), the Supreme Court held that: (1) the Beaverhead River is navigable for recreational purposes and the public has a right to use its bed and banks up to the ordinary high-water mark with limited right to portage across private property in order to bypass barriers in the water; (2) determination of navigability for title is not necessary; (3) the public does not have the right to trespass over private property in order to reach the state-owned waters; and (4) plaintiff's action did not constitute inverse condemnation because public use of waters, rather than title, was determined. Mont. Coalition for Stream Access, Inc. v. Hildreth, 211 M 29, 684 P2d 1088, 41 St. Rep. 1192 (1984). (Annotator's note: Chapters 429, 556, and 599, L. 1985, pertained to recreational use of waterways and related issues.)

*Navigability for Title Purposes — Federal Test — Dearborn River Navigable:* Federal law controlled the issue of whether the Dearborn River was, at the time Montana became a state, navigable for the purpose of determining title to its bed. Under federal law, rivers are navigable in law if they are navigable in fact, and they are navigable in fact if they were used or capable of being used, in their ordinary condition, as highways for commerce over which trade and travel were or could be conducted in the customary modes of trade and travel on the water at the time of the state's admission to the Union. Navigability in fact can be determined by using the log-floating test. That test was satisfied by evidence that in 1887, 2 years before Montana became a state, the Dearborn was used to float about 100,000 railroad ties and that in 1888 or 1889, one or two log drives a year were floated down the river, one of them containing 700,000 board feet. Title to the riverbed was thus in the federal government when Montana became a state in 1889 and was transferred to the State upon its admission to the Union. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984). (Annotator's note: Chapters 429, 556, and 599, L. 1985, pertained to recreational use of waterways and related issues.)

*Public Recreational Use of Dearborn River — No Inverse Condemnation:* Landowner along Dearborn River was sued by parties seeking a determination of the public's right to use the river for recreational uses. Landowner counterclaimed for inverse condemnation, basing the counterclaim on his claim to ownership of the riverbed. The Supreme Court held that the question of title to the bed was irrelevant to determining navigability for use by the public; that landowner had no claim to the waters; that since there was no claim to the waters, nothing was taken and thus there was no ground for an inverse condemnation claim; and that, consequently, the District Court did not err in dismissing the counterclaim. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984). (Annotator's note: Chapters 429, 556, and 599, L. 1985, pertained to recreational use of waterways and related issues.)

*Public Recreational Use Rights on Dearborn River — Limits:* Navigability for public use is governed by state law and is separate from the question of navigability under federal law for title purposes. The question is whether waters owned by the State under Art. IX, sec. 3(3), Mont. Const., are susceptible to recreational use by the public. The capability of use of the waters for recreational purposes determines the availability of the waters for recreational use by the public. Whether or not a private party owns the bed beneath the waters is irrelevant. The constitution and the Public Trust Doctrine bar a private party from interfering with the public's right to use of the surface of the waters owned by the State, and any surface waters that are capable of recreational use may be so used by the public without regard to streambed ownership or navigability for nonrecreational purposes. The public's recreational use right extends to the point of the high-water marks. The public does not have the right to cross over private property to reach waters upon which they have a recreational use right, though they may portage around barriers in the water in the least intrusive way possible, avoiding damage to any private property holder's rights. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984). (Annotator's note: Chapters 429, 556, and 599, L. 1985, pertained to recreational use of waterways and related issues.)

*Title to and Public Use of Dearborn River — Federal Commerce Clause Navigability Immaterial:* In action for determination of the public's right to use the Dearborn River, whether Montana has adopted the log-floating test of commercial navigability and whether the Dearborn is navigable under the federal commercial use test were immaterial because the question was one of recreational use or navigability, not commercial navigability. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984). (Annotator's note: Chapters 429, 556, and 599, L. 1985, pertained to recreational use of waterways and related issues.)

*Title to and Public Use of Dearborn River — Subject Matter Jurisdiction Found:* Landowner along the Dearborn River claimed the District Court lacked subject matter jurisdiction over action for determination of the public's right to use the river, basing his claim on the presumption that he held title to the riverbed and that the State had no power to strip him of that title under the guise of determining navigability of the waters over the riverbed. The claim lacked merit because the State holds title to the riverbed and the water flowing over it, so that there was no question of the District Court's subject matter jurisdiction. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984). (Annotator's note: Chapters 429, 556, and 599, L. 1985, pertained to recreational use of waterways and related issues.)

**Law Review Articles**

Public Use of the Banks and Beds of Montana Streams, Stone, 52 Mont. L. Rev. 107 (1991).

The Remarkable Odyssey of Stream Access in Montana, Lane, 36 Pub. Land. & Resources L. Rev. 69 (2015).

Preserving Stream Flows in Montana Through the Constitutional Public Trust Doctrine: An Underrated Solution, Clifford, 16 Pub. Land L. Rev. 117 (1995).

Judicial Recognition of the Public Interest in Water Recreation: Nebraska and United States Supreme Court Realities, Longo & Elder, 15 Pub. Land L. Rev. 199 (1994).

The Shadow of the Mono Lake [National Audubon Society v. The Superior Court of Alpine County, 658 P.2d 709 (Cal.)] Decision in Montana, Summerville, 6 Pub. Land L. Rev. 203 (1985).

Forging Public Rights in Montana's Waters, Thorson, Brown, & Desmond, 6 Pub. Land L. Rev. 1 (1985).

Recreational Use of Montana's Waterways: An Analysis of Public Rights, Frantz, 3 Pub. Land L. Rev. 133 (1982).

## 85-1-112. Navigable waters.

**Case Notes**

*Navigability for Title Test for Missouri, Clark Fork, and Madison Rivers — Equal Footing Doctrine — State Ownership of Riverbeds:* The District Court granted the state's motion for summary judgment on the issue of whether the Missouri, Clark Fork, and Madison Rivers were navigable for determining whether title to the riverbeds resided with the state. The concept of navigability for title means that a river does not have to experience actual use at or before the time of statehood, as long as the river was susceptible of providing a channel for commerce. Commerce is very broadly construed, and emerging and newly discovered forms of commerce can be applied retroactively to considerations of navigability. Thus, present day use of a river may be probative of its status as a navigable river at the time of statehood. Under the navigability for title test, the state has held title to the riverbeds beginning at statehood in 1889, and according to the equal footing doctrine, the disposition, use, and ownership interests in the beds of the rivers in question have been governed by state law since that time. The evidence presented by the state was clearly sufficient to demonstrate navigability in fact, and the state was therefore entitled to judgment as a matter of law. The District Court was affirmed. PPL Mont., LLC v. St., 2010 MT 64, 355 Mont. 402, 229 P.3d 421.

Following the Montana Supreme Court's decision, PPL appealed to the United States Supreme Court. The United States Supreme Court reversed the Montana court's ruling, holding that the Montana court had not properly considered the rivers in question on a segment-by-segment basis and had not determined whether they were navigable in fact at the time of statehood. The United States Supreme Court remanded the case for proceedings consistent with its opinion. PPL Montana, LLC v. Montana, 565 US 576, 132 S Ct 1215 (2012).

*Public Right to Use Beaverhead River for Recreational Purposes:* Following the decision in Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984), the Supreme Court held that: (1) the Beaverhead River is navigable for recreational purposes and the public has a right to use its bed and banks up to the ordinary high-water mark with limited right to portage across private property in order to bypass barriers in the water; (2) determination of navigability for title is not necessary; (3) the public does not have the right to trespass over private property in order to reach the state-owned waters; and (4) plaintiff's action did not constitute inverse condemnation because public use of waters, rather than title, was determined. Mont. Coalition for Stream Access, Inc. v. Hildreth, 211 M 29, 684 P2d 1088, 41 St. Rep. 1192 (1984). (Annotator's note: Chapters 429, 556, and 599, L. 1985, pertained to recreational use of waterways and related issues.)

*Navigability for Title Purposes — Federal Test — Dearborn River Navigable:* Federal law controlled the issue of whether the Dearborn River was, at the time Montana became a state, navigable for the purpose of determining title to its bed. Under federal law, rivers are navigable in law if they are navigable in fact, and they are navigable in fact if they were used or capable of being used, in their ordinary condition, as highways for commerce over which trade and travel were or could be conducted in the customary modes of trade and travel on the water at the time of the state's admission to the Union. Navigability in fact can be determined by using the log-floating test. That test was satisfied by evidence that in 1887, 2 years before Montana became a state, the Dearborn was used to float about 100,000 railroad ties and that in 1888 or 1889, one or two log drives a year were floated down the river, one of them containing 700,000 board feet. Title to the riverbed was thus in the federal government when Montana became a state in 1889 and was transferred to the State upon its admission to the Union. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984). (Annotator's note: Chapters 429, 556, and 599, L. 1985, pertained to recreational use of waterways and related issues.)

*Navigability for Title Purposes — Summary Judgment — Dearborn River:* The District Court properly granted the coalition for stream access and two state departments summary judgment on the issue of navigability of the Dearborn River in 1889 for title purposes. The affidavits and depositions of plaintiffs' two competent historians were admissible because the historians were qualified experts who provided evidence of the history of the river, their affidavits and depositions disclosed circumstantial guarantees of trustworthiness, and the facts and data they relied on were of a type reasonably relied on by experts in their field; the facts and data did not themselves have to be admissible. The affidavits of defendant landowner's witnesses were worthless, were not admissible, and did not create any genuine issue of material fact concerning the navigability of the river at the time Montana became a state in 1889. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984). (Annotator's note: Chapters 429, 556, and 599, L. 1985, pertained to recreational use of waterways and related issues.)

*Public Recreational Use of Dearborn River — No Inverse Condemnation:* Landowner along Dearborn River was sued by parties seeking a determination of the public's right to use the river for recreational uses. Landowner counterclaimed for inverse condemnation, basing the counterclaim on his claim to ownership of the riverbed. The Supreme Court held that the question of title to the bed was irrelevant to determining navigability for use by the public; that landowner had no claim to the waters; that since there was no claim to the waters, nothing was taken and thus there was no ground for an inverse condemnation claim; and that, consequently, the District Court did not err in dismissing the counterclaim. Mont. Coalition for Stream Access, Inc. v.

Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984). (Annotator's note: Chapters 429, 556, and 599, L. 1985, pertained to recreational use of waterways and related issues.)

*Title to and Public Recreation on Dearborn River — Ex Post Facto, Contract Clause, and Irrevocable Privileged Considerations:* The Supreme Court held that the State, not the landowner along the Dearborn River, held title to the bed of the river under the federal test of navigability for purposes of determining title to the riverbed. The court also held that landowner had no right to exclude the public from recreational use of the waters of the Dearborn. Because of these holdings, landowner's questions relating to ex post facto laws, violation of the contract clause of the constitution, and irrevocable rights and privileges were not germane to the case. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984). (Annotator's note: Chapters 429, 556, and 599, L. 1985, pertained to recreational use of waterways and related issues.)

*Title to and Public Use of Dearborn River — Federal Commerce Clause Navigability Immaterial:* In action for determination of the public's right to use the Dearborn River, whether Montana has adopted the log-floating test of commercial navigability and whether the Dearborn is navigable under the federal commercial use test were immaterial because the question was one of recreational use or navigability, not commercial navigability. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984). (Annotator's note: Chapters 429, 556, and 599, L. 1985, pertained to recreational use of waterways and related issues.)

*Title to and Public Use of Dearborn River — Subject Matter Jurisdiction Found:* Landowner along the Dearborn River claimed the District Court lacked subject matter jurisdiction over action for determination of the public's right to use the river, basing his claim on the presumption that he held title to the riverbed and that the State had no power to strip him of that title under the guise of determining navigability of the waters over the riverbed. The claim lacked merit because the State holds title to the riverbed and the water flowing over it, so that there was no question of the District Court's subject matter jurisdiction. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984). (Annotator's note: Chapters 429, 556, and 599, L. 1985, pertained to recreational use of waterways and related issues.)

**Attorney General's Opinions**

*Access to Rivers and Streams Via County Road Right-of-Way and Bridges:* Given that the public has the right to use public highways in any manner and for any purpose consistent with or reasonably incidental to public travel, this right includes the use of public rights-of-way created by county roads to gain access to rivers and streams. Using a county road right-of-way as an access point to a river or stream right-of-way is consistent with and reasonably incidental to the public's right to travel on county roads. Further, a bridge and its abutments, as part of a public highway, offer the same access to rivers and streams for recreational use as the highway to which they are attached. However, the public's right of access is not unlimited and is subject to the following limitations: (1) the recreating public must stay within the county road and bridge right-of-way, which is assumed to be 60 feet unless otherwise stated by petition or dedication; (2) access may be limited by the reasonable exercise of a governing body's police power to control the use of roads for purposes such as safety and parking; and (3) use of a public highway may be limited by the manner in which it was created, such as a road created by prescriptive easement, which is limited both in size and usage to the original use during the prescriptive period and may include access for hunting, fishing, and recreation. 48 A.G. Op. 13 (2000).

## Part 2
## Administration

**Part Administrative Rules**

Title 36, chapter 30, ARM State water projects.

**Part Case Notes**

*Federal Court Without Jurisdiction of Action Against Board — Under Section 89-101, R.C.M. 1947:* The Montana Water Conservation Board, precursor to the Department of Natural Resources and Conservation, is a mere arm of the state; hence, an action by a nonresident corporation against the Board and its members to enjoin interference with corporation's water rights was in effect an action against the state, so that federal District Court was without jurisdiction to entertain it. (Citing sections 89-101 to 89-141, R.C.M. 1947, now partially contained in Title 85, ch. 1.) Broadwater-Missouri Water Users' Ass'n v. Mont. Power Co., 139 F2d 998 (9th Cir. 1944).

## 85-1-201. Rules.

### Compiler's Comments

*1995 Amendment:* Chapter 418 at beginning substituted "department" for "board". Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*Subsection Not Codified:* Subsection (6) of section 89-132.1, R.C.M. 1947, was not codified in the MCA as it is redundant with this section. The subsection has not been repealed and is still valid law. Reference may be made to sec. 5, Ch. 158, L. 1967, as amended by sec. 138, Ch. 253, L. 1974.

## 85-1-203. State water plan.

### Compiler's Comments

*2021 Amendments — Composite Section:* Chapter 261 in (6) substituted "to the water policy interim committee and to the legislature in accordance with 5-11-210" for "to the water policy committee established in 5-5-231 and to the legislature at the beginning of each regular session". Amendment effective April 20, 2021.

Chapter 284 in (2) in third sentence after "the state's water resources and" inserted "must"; in (3) substituted "Missouri River basin, the Yellowstone River basin, and the Clark Fork and Kootenai River basins" for "Missouri, Yellowstone, and Clark Fork River basins" and substituted "2035 legislature" for "2015 legislature"; inserted (3)(b) regarding identified data gaps; in (4)(a) near beginning substituted "basin advisory council in the Missouri River basin, in the Yellowstone River basin, and in the Clark Fork and Kootenai River basins" for "water user council in both the Yellowstone and Missouri River basins" and deleted last sentence that read: "For the Clark Fork River basin, the department shall continue to utilize the Clark Fork River basin task force established pursuant to 85-2-350"; in (4)(b) substituted current language regarding membership on the basin advisory councils for former (4)(b) that read: "The councils in the Missouri and Yellowstone River basins consist of representatives of existing watershed groups or councils within the basins"; in (4)(c) inserted "basin advisory"; in (4)(d) near beginning substituted "basin advisory council" for "water user council"; inserted (4)(e) regarding existing basin councils; in (5) in first sentence near beginning inserted "entire" and after "hold public hearings" substituted "across" for "in", and in second sentence near middle substituted "newspaper of general circulation published" for "newspaper of general county circulation"; and made minor changes in style. Amendment effective October 1, 2021.

*2015 Amendment:* Chapter 122 in (6) and (10) substituted "water policy committee established in 5-5-231" for "environmental quality council established in 5-16-101"; and in (10) after "advice of the" substituted "water policy committee" for "environmental quality council". Amendment effective March 25, 2015.

*2009 Amendment:* Chapter 404 in (2) near middle of second sentence following "in sections" inserted "with some of" and near middle of third sentence following "utilization" inserted "and sustainability"; inserted (3) regarding timelines for various sections of the state water plan to be completed and the information that must be included; inserted (4) creating a water user council for both the Yellowstone and Missouri River basins; in (10) near end following "advice of the" substituted "environmental quality council" for "committee"; and made minor changes in style. Amendment effective October 1, 2009.

*1995 Amendments:* Chapter 418 in (2), near beginning after "formulate and", deleted "with the approval of the board". Amendment effective July 1, 1995.

Chapter 545 in (3) and (7) substituted "environmental quality council established in 5-16-101" for "water policy committee established in 85-2-105". Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1995 Transition:* Section 81, Ch. 545, L. 1995, provided: "(1) The members of the legislative council, as provided in 5-11-101, the members of the legislative finance committee, as provided in 5-12-202, the members of the legislative audit committee, as provided in 5-13-202, and the members of the environmental quality council, as provided in 5-16-101, must be appointed as soon as possible following [the effective date of this section] [effective April 27, 1995].

(2) To implement the changes provided in [this act], the office of the legislative council, the office of budget and program planning, and the department of administration shall establish all

necessary authorizations during the accounting preparation process known as the "turnaround" process, beginning in April or May 1995, to administer the several appropriations made by any means to programs of the legislative branch agencies consolidated under [sections 3 and 4] [5-2-503 and 5-2-504] for fiscal year 1996 or 1997 or the biennium ending June 30, 1997, as appropriations to a single legislative agency while maintaining the specific identification, legislative intent, and purpose for which the appropriations were made. During this transition, the executive director may authenticate documents as required to accomplish the purposes of [this act]. Appropriate changes on the statewide budgeting and accounting system and the payroll, personnel, and position control system must also be made and authorized as required to accomplish the purposes of [this act].

(3) Personnel and property of the environmental quality council are transferred to the legislative services division effective July 1, 1995."

*1985 Amendment:* In (2)(a) near middle, after "environmental quality council", inserted "of the state library"; and in (2)(b) near beginning, substituted "state library" for "department of administration", and near end substituted "library's" for "department's".

*1989 Amendment:* Inserted (4) authorizing Legislature to revise state water plan by resolution; and made minor changes in phraseology, style, and grammar.

*1985 Amendment:* In (3) near beginning, after "submit to", inserted "the water policy committee established in 85-2-105 and to"; and inserted (6) requiring the Department to consult and solicit the advice of the Water Policy Committee in developing and revising the state water plan.

## 85-1-204. Department powers over state water.

**Compiler's Comments**

*2001 Amendment:* Chapter 125 in (1) near end inserted reference to Title 70, chapter 30; and made minor changes in style. Amendment effective October 1, 2001.

*Interim Study Bill — Eminent Domain:* Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

*1995 Amendments:* Chapter 301 in (1), in first and third sentences after "department", deleted "with the approval of the board" and in last sentence, after "acquire", deleted "with the approval of the board"; in last sentence in (4) substituted "measure" for "police"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 418 in (1), in first and second sentences after "department", and in fourth sentence, after "acquire", deleted "with the approval of the board"; and made minor changes in style. Amendment effective July 1, 1995.

*Severability:* Section 19, Ch. 301, L. 1995, was a severability clause.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1985 Amendment:* In (1) inserted second sentence authorizing the Department to lease water under state water leasing program upon approval of the Board of Natural Resources and Conservation.

## 85-1-205. Acquisition of water in federal reservoirs.

**Compiler's Comments**

*1985 Amendment:* In first sentence, after "distribution for", substituted "any beneficial use" for "industrial and other uses" and at end deleted "except as provided in subsection (2)"; and deleted former (2) that read: "Until a final decree has been issued pursuant to 85-2-234 concerning the waters in a federal reservoir, the department may sell, rent, or distribute such water only after a permit has been issued to an applicant for purchase, rent, or distribution of water in accordance with part 3 of this chapter."

*Temporary Changes Made Permanent:* Section 7, Ch. 706, L. 1983, provided that the amendments made by Ch. 706 were to terminate on July 1, 1985. Section 23, Ch. 573, L. 1985, amended sec. 7, Ch. 706, L. 1983, to provide that only one section (Ch. 706, sec. 4), that established the Select Committee on Water Marketing, would terminate on July 1, 1985. Thus the amendments to this section made by Ch. 706, L. 1983 (set forth below in the 1983 amendment note), are now permanent, except insofar as the section was further amended in 1985.

*1983 Amendment:* Near beginning of (1), after "acquire water" inserted "or water storage"; after "federal government from" substituted "any federal reservoir" for "the Fort Peck Reservoir"; at end of first sentence of (1), after "industrial" deleted "use" and inserted "and other uses"; at end of (1) added "except as provided in subsection (2)"; and inserted (2) authorizing the Department to sell, rent, or distribute water in a federal reservoir until a final decree is issued only after an applicant has been issued a permit for purchase, rent, or distribution of water.

### 85-1-206. Construction of works by department.

**Compiler's Comments**

*1995 Amendments — Composite Section:* Chapter 301 at beginning of (1) deleted "Subject to the approval of the board"; at end of first sentence in (3), after "projects", deleted "designed for those purposes", in second sentence, after "approved", deleted "by the board", and in last sentence, after "failure", deleted "of the board"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 418 in (1), at beginning, deleted "Subject to the approval of the board"; in (3), in two places, substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

Style changes in the chapters were slightly different. In each case, the codifier chose the most appropriate.

*Severability:* Section 19, Ch. 301, L. 1995, was a severability clause.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1987 Amendment:* In (1), in middle of first sentence after "grant", inserted "or loan", in second and third sentences, after "cost of", substituted "operation and maintenance" for "maintaining, repairing, and operating it", and in third sentence, before "the principal", deleted "to pay" and before "revenue bonds" inserted "loans or"; and in (3), at end of second sentence after "maintenance", substituted "and the principal and interest of loans and revenue bonds issued to finance the construction" for "and repair and the amortization of the cost of the construction".

### 85-1-207. Determination of costs of works.

**Compiler's Comments**

*1987 Amendment:* Substituted language concerning determination of cost of water projects for former language that read: "The department, in determining the cost of works, may make nonreimbursable allowances for costs of public benefits, including but not limited to irrigation, recreation, flood prevention, fish and wildlife, and stream stabilization."

### 85-1-208. Construction across streams, highways, or other obstacles.

**Case Notes**

*Affirmative Duty to Maintain Bridges:* The State Water Conservation Board (precursor to the Department of Natural Resources and Conservation) built bridges over its irrigation ditch where the ditch intersected city streets. Concomitant with the duty to construct bridges so as to restore streets to their former usefulness is a duty to maintain the bridges. Although this section is silent regarding the duty to maintain, such a duty can be implied from reading all the sections of the Water Conservation Act (section 89-101, et seq., R.C.M. 1947, now partially contained in Title 85, ch. 1) together. State ex rel. Livingston v. St. Water Conserv. Bd., 134 M 403, 332 P2d 913 (1958).

### 85-1-209. Acquisition of property by department.

**Compiler's Comments**

*2001 Amendment:* Chapter 125 in (1) in first sentence substituted "Title 70, chapter 30" for "laws applicable to the condemnation of property for public use"; in (2) near beginning of first sentence substituted "Title 70, chapter 30" for "the powers of eminent domain"; and made minor changes in style. Amendment effective October 1, 2001.

*Interim Study Bill — Eminent Domain:* Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

*1995 Amendments:* Chapter 301 near beginning of (1), after "department", deleted "subject to the approval of the board under 85-1-202"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 418 in (1), at beginning after "department", deleted "subject to the approval of the board under 85-1-202"; and made minor changes in style. Amendment effective July 1, 1995.

*Severability:* Section 19, Ch. 301, L. 1995, was a severability clause.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

**Case Notes**

*Ditches — Under Former Law:* Ditches of the State Water Conservation Board (precursor to the Department of Natural Resources and Conservation) belong to the state. State ex rel. Livingston v. St. Water Conserv. Bd., 134 M 403, 332 P2d 913 (1958).

## 85-1-210. Disposal of property by department.

**Compiler's Comments**

*1995 Amendments:* Chapter 301 near middle of first sentence and at beginning of second sentence, after "department", deleted "with the approval of the board"; at beginning of third sentence inserted exception clause; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 418 in first and second sentences, after "department", deleted "with the approval of the board"; and made minor changes in style. Amendment effective July 1, 1995.

*Severability:* Section 19, Ch. 301, L. 1995, was a severability clause.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1987 Amendment:* In second sentence, after "issued", deleted "by the board"; and inserted last sentence requiring determination of market value of water project to consider liens, encumbrances, and project limitations.

*Severability:* Section 4, Ch. 305, L. 1987, was a severability section.

*1981 Amendment:* Inserted "with the approval of the board" after "The department" in the second sentence; substituted "water project" for "waterworks system which is not operated for the purpose of irrigation or development of power" near the beginning of the second sentence; substituted "The department shall make a determination of the market value of the water project prior to its sale or other disposition" for "however, no such sale or other disposition may be made except to a municipality, political subdivision, authority, or other public body of the state" at the end of the section.

## 85-1-211. Management of property — water contracts.

**Compiler's Comments**

*2015 Amendment:* Chapter 275 in (5)(b) substituted "Willow Creek Dam project by June 30, 2015" for "Cataract Creek Dam project by June 30, 2013". Amendment effective April 23, 2015.

*Preamble:* The preamble attached to Ch. 275, L. 2015, provided: "WHEREAS, the Willow Creek Dam water project is a state water project constructed in 1938, owned and managed by the Department of Natural Resources and Conservation, and operated by the Willow Creek Water Users Association; and

WHEREAS, the Legislature in the 1990s directed the Department to transfer and dispose of various state water projects throughout Montana to water users associations; and

WHEREAS, the Legislature in 2011 directed the Department to attempt to dispose of another dam project to a local water users association, which has been completed; and

WHEREAS, the Willow Creek Water Users Association has expressed interest in taking over the project from the Department, if economically feasible, owning and operating the system, making necessary repairs and improvements to the project so that water from the system could be used for the benefit of the users, and addressing shortcomings with the project that have not been addressed by the state and previous owners over the years."

*2011 Amendment:* Chapter 144 inserted (5)(b) relating to the Cataract Creek Dam project; and made minor changes in style. Amendment effective April 7, 2011.

*Preamble:* The preamble attached to Ch. 144, L. 2011, provided: "WHEREAS, the Cataract Creek Dam water project is a state water project operated by the Department of Natural Resources and Conservation as successor to the project originally constructed by and through the Montana State Water Conservation Board; and

WHEREAS, the State of Montana in the 1990s authorized the Department of Natural Resources and Conservation to transfer and dispose of components of various state water projects throughout Montana to water user associations interested in taking over the components of the projects; and

WHEREAS, the Cataract Creek Dam project was constructed in the 1950s by the State Water Conservation Board to supply water to irrigators below the dam and resulted in the Cataract Water Users Association being formed to contract with the Department to market and distribute the project's water; and

WHEREAS, the project has never been identified in previous disposal efforts as a project that could be disposed of to the users of the system; and

WHEREAS, the Cataract Water Users Association has expressed interest in taking over the project from the Department, if economically feasible, to own and operate the system, to make necessary repairs and improvements to the project so that water from the system could be used for the benefit of the users, and to address shortcomings with the project that have not been addressed by the state over the years during which the project has been owned by the Department or its predecessor."

*1999 Amendment:* Chapter 120 in (5) inserted fourth sentence requiring the department to comply with 85-6-109 and give purchase preference in the disposal of a project; deleted former (6) that read: "(6) (a) The department shall attempt to dispose of its canal projects by June 30, 1995. The canal projects to be disposed of include the:

(i) Columbus canal;
(ii) Delphia-Melstone canals;
(iii) Hysham pumping canals;
(iv) Lewistown ditch;
(v) Livingston ditch;
(vi) Florence canal;
(vii) Paradise canal;
(viii) Park Branch canal;
(ix) Sidney pumping canals;
(x) South Side canal;
(xi) Vigilante canal; and
(xii) West Bench canal.

(b) The department may dispose of a canal project by sale, transfer to a water users' association, abandonment, or other legal conveyance. If there is an existing water users' association on the canal project, the provisions of 85-6-109 must be complied with in the disposal of the canal project. The department shall give preference to existing water users' associations operating and maintaining the canal project.

(c) Upon the sale or transfer of a canal project, the department shall either cancel or write off from the accounts receivable carried on the books of the department a sum not to exceed any previous 1-year cost of operating and maintaining the canal project or make a payment not to exceed any previous 1-year cost of operating and maintaining the canal project. For a canal project not disposed of by June 30, 1995, the water users of the canal project are responsible for the department's administrative costs and the actual costs of operation and maintenance of the canal project"; in (6) in first sentence in two places before "project" deleted "canal"; and made minor changes in style. Amendment effective March 19, 1999.

*1995 Amendments — Composite Section:* Chapter 301 at beginning of first sentence of (5) deleted "Subject to the approval of the board under 85-1-202" and after "abandon" inserted "lease or rent" and at beginning of second sentence inserted exception clause; in (6)(b) deleted reference to subsection (5) of 85-6-109; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 418 in (5), at beginning, deleted "Subject to the approval of the board under 85-1-202"; and made minor changes in style. Amendment effective July 1, 1995.

Style changes in the chapters were slightly different. In each case, the codifier chose the most appropriate.

*Severability:* Section 19, Ch. 301, L. 1995, was a severability clause.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1993 Amendment:* Chapter 53 in (6)(a) inserted reference to Lewistown ditch; and made minor changes in style. Amendment effective February 18, 1993.

*1991 Amendment:* Inserted (6) listing canal projects to be disposed of and specifying means of disposal; and inserted (7) allowing entry on land to facilitate disposal. Amendment effective April 15, 1991.

*1987 Amendment:* In two places in (5), after "easements", substituted "properties, or interests" for "or property", after "therefrom" inserted language concerning disposition of property, in second sentence, before "a determination", inserted "Prior to the department's sale, transfer, or other disposition", and inserted last sentence requiring determination of market value of water project to consider liens, encumbrances, and project limitations.

*Severability:* Section 4, Ch. 305, L. 1987, was a severability section.

*1981 Amendment:* Deleted "when it determines that they are no longer needed for the purposes of this chapter" after "the department may sell . . . easements, or property" in (5).

**Case Notes**

*Mixed or Common Possession of Land — Possession to Person With Legal Title — No Adverse Possession as Against Legal Title:* In reversing a District Court grant of a first priority water right for irrigation on the basis of adverse use, the Supreme Court adopted the rule that in case of a mixed or common possession of land by both parties to a suit, the law adjudges the rightful possession to the party who holds legal title, and no length of time of possession can give title by adverse possession as against the legal title. Mielke v. Daly Ditches Irrigation District, 225 M 172, 731 P2d 927, 44 St. Rep. 129 (1987).

### 85-1-215. Department duties — records and operations.

**Compiler's Comments**

*1995 Amendment:* Chapter 301 in first sentence substituted language requiring Department to keep accounting records of each project and to prepare financial statements by July 1 of each year for former language that required full and complete accounts concerning all matters and things relating to the works and annual preparation of balance sheets and income and profit and loss statements, after "financial" substituted "status" for "condition", and after "project" deleted "and file copies thereof with the secretary of state"; and made minor changes in style. Amendment effective July 1, 1995.

*Severability:* Section 19, Ch. 301, L. 1995, was a severability clause.

### 85-1-219. State-owned works — department approval — bids — procurement of goods and services.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 1, Ch. 136, L. 2023. Amendment effective July 1, 2023.

*2003 Amendment:* Chapter 162 inserted (3)(f) concerning cost of architectural, engineering, and land surveying services; at beginning of (4)(d)(i) inserted exception clause; inserted (4)(d)(ii) concerning cost of architectural, engineering, and land surveying services; and made minor changes in style. Amendment effective March 28, 2003.

*2001 Amendment:* Chapter 382 in (3)(c) at end substituted "$50,000 or less" for "less than $25,000"; inserted (3)(e) allowing the department to negotiate a contract without competitive bidding if the cost of goods, nonconstruction services, or professional services is $15,000 or less; at beginning of (4)(a) inserted exception clause and after "awarded" inserted "for construction"; at end of (4)(b) substituted "$50,000 or less" for "less than $25,000"; inserted (4)(c) exempting the department from solicitation and selection procedures for contracts up to $15,000 for goods or nonconstruction services; inserted (4)(d) allowing the department to contract by direct negotiation for professional services costing less than $15,000; and made minor changes in style. Amendment effective April 28, 2001.

### 85-1-220. State water project hydroelectric power generation special revenue account created — revenue allocated.

**Compiler's Comments**

*1997 Amendment:* Chapter 422 deleted (5) and (6) that read: "(5) There is a statutory appropriation pursuant to 17-7-502 to allow the department to transfer available funds from the state water project hydroelectric power generation special revenue account when needed to pay debt service on state water project bonds, including but not limited to broadwater power project bonds.

(6) There is a statutory appropriation pursuant to 17-7-502 for the department to transfer available funds from the broadwater replacement and renewal account when needed to pay debt service on the broadwater power project bonds"; and made minor changes in style. Amendment effective July 1, 1997.

*Effective Date:* Section 5, Ch. 370, L. 1991, provided: "[This act] is effective July 1, 1991."

## Part 3
## Finance

### 85-1-301. Water conservation revenue bonds.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 in (1), in four places, and (2), in three places, substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1981 Amendment:* Deleted "not exceeding 6% per annum" after "bonds shall bear" near the middle of (1); deleted language in (2) relating to sale of the bonds at less than a price which would yield 6% per annum to the purchaser.

**Case Notes**

*Issuance of Revenue Bonds in Aid of Emergency Relief Act:* Issuance of revenue bonds by the Water Conservation Board, formed pursuant to prior law, to aid in the construction of a dam and reservoir under sec. 1, Ch. 85, L. 1937 (omitted), to the extent of agreeing to take up relief warrants issued by the county sponsoring the project with the proceeds, the bonds to be secured by revenue obtained from the members of a water users' association using the stored water, is not a lending of the credit of the state or any of its subdivisions to the association, within the meaning of Art. XIII, sec. 1, 1889 Mont. Const., or a violation of Art. XIII, sec. 4, 1889 Mont. Const., prohibiting the state from assuming the debt of a county or municipal corporation. Kraus v. Riley, 107 M 116, 80 P2d 864 (1938).

*Power of Board to Issue Revenue Bonds to Be Retired by Funds Obtained From Water Users:* Contention that the Water Conservation Board, formed pursuant to prior law, was without power to issue revenue bonds to be retired by funds obtained from water users was erroneous since such power is expressly conferred by sections 89-109, R.C.M. 1947 (85-1-301), and 89-111, R.C.M. 1947 (85-1-307). Kraus v. Riley, 107 M 116, 80 P2d 864 (1938).

*Bonds Issued Not State Indebtedness — Under 1889 Constitution:* Issuance of bonds by the Water Conservation Board, formed pursuant to prior law, does not create a debt of the state in excess of the constitutional limit prescribed by Art. XIII, sec. 2, 1889 Mont. Const. (revised by Art. VIII, sec. 8, 1972 Mont. Const.), since section 89-109, R.C.M. 1947 (85-1-302), provides that all bonds shall contain a statement that they do not constitute a state debt or liability and the bonds are made payable only from revenue of the works to be constructed. State ex rel. Normile v. Cooney, 100 M 391, 47 P2d 637 (1935).

### 85-1-303. Procedure in case of insufficient bond proceeds.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 in third sentence substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

### 85-1-304. Lien upon bond proceeds.

**Compiler's Comments**

*1983 Amendment:* Substituted "debt service fund" for "sinking fund".

### 85-1-305. Use of trust indenture to secure bonds.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 in first sentence, in two places, substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

### 85-1-306. Provisions for protecting bondholders.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 in first sentence, near middle after "state", deleted "the board"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

### 85-1-307. Provisions to secure payment of bonds.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 near end of introductory clause, (4)(c), (5), (6), and (12) substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1983 Amendment:* At end of (1), substituted "debt service fund" for "sinking fund".

### 85-1-308. Provisions for conveyance in trust or mortgage.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 in first and third sentences substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

### 85-1-309. Actions by trustee and bondholders.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 in (1)(b), before "department", deleted "board or the"; in (2), in two places, substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

### 85-1-310. Refunding revenue bonds.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 in three places substituted "department" for "board". Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

### 85-1-321. Funds in general.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 in first, second, and third sentences substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1983 Amendment:* In first sentence, substituted "debt service fund" for "sinking fund".

### 85-1-322. Construction capital projects funds.

**Compiler's Comments**

*1983 Amendment:* Substituted "construction capital projects fund" for "construction fund" in four places; and near end of section, substituted "debt service fund" for "sinking fund".

### 85-1-323. Debt service funds.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 in (1) and (2)(a)(i) substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1983 Amendment:* Throughout section, substituted "debt service fund" for "sinking fund".

**85-1-332. Disposition of money collected.**

**Compiler's Comments**

*1999 Amendment:* Chapter 144 at end of (1) substituted "water storage state special revenue account created by 85-1-631" for "renewable resource grant and loan program state special revenue account created by 85-1-604"; and made minor changes in style. Amendment effective July 1, 1999.

*Code Commissioner Correction:* The Code Commissioner substituted reference to renewable resource for reference to water development. Chapter 478, L. 1993, combined the water development and renewable resource development programs. The Code Commissioner has made the change to reflect changes made by Ch. 478. Authority for the change is found in sec. 84, Ch. 10, L. 1993.

*1985 Amendment:* Deleted former (1) that read: "all sums of money donated or contributed by the federal government or any department or agencies thereof"; renumbered introductory clause as (1) and former subsections as subsections of (1); and inserted (2) requiring all money donated or contributed by the federal government or a federal department or agency to be deposited in a federal special revenue account.

*1983 Amendment:* In introductory clause, substituted "water development state special revenue account" for "water development earmarked account".

*1981 Amendment:* In introductory clause of (1), substituted "water development earmarked account created by 85-1-604" for "earmarked revenue fund for the use of the department"; deleted the lead-in to former (2) that read "The following shall be deposited in the state general fund"; renumbered former (2)(a) and (2)(b) as (6) and (7); and inserted "except as otherwise provided by law" at the beginning of (6) and (7).

**Case Notes**

*Acts Not Impliedly Repealed:* This section did not impliedly repeal Ch. 35, L. Ex. Sess. 1933-34 (Section 89-101, et seq., R.C.M. 1947), or Ch. 95, L. 1935, amending the same. State ex rel. Normile v. Cooney, 100 M 391, 47 P2d 637 (1935).

## Part 5

## Power Generation at Projects

**Part Compiler's Comments**

*1981 Preamble:* The preamble to Ch. 503, L. 1981 (SB 229), provided: "WHEREAS, the availability of energy from traditional sources is diminishing; and

WHEREAS, the demand for energy from the state's citizens is increasing, due to population growth and economic expansion; and

WHEREAS, because of newly developing technology and increasing energy costs, small-scale hydroelectric power generation is becoming an economically feasible additional source of energy; and

WHEREAS, the state of Montana currently owns and controls many water projects which may have potential capacity for the small-scale generation of hydroelectric energy; and

WHEREAS, it is in the best interest of the people of Montana to utilize Montana's water resources to the fullest extent possible."

**Part Case Notes**

*Private Appropriations — Control by State Required:* Plaintiff filed a complaint for declaratory judgment in the Supreme Court seeking to determine the validity of several acts of the Legislature allowing the issuance of state revenue bonds. Section 2 of Ch. 705, L. 1983, authorized the creation of state debt for development of hydroelectric power at three state-owned dams. Under Title 85, ch. 1, part 5, the Department of Natural Resources and Conservation and Board of Natural Resources and Conservation (functions now transferred to Department of Natural Resources and Conservation) are mandated to make the completed projects available for lease to utilities, electric cooperatives, or a state corporation proposing to use a substantial portion of the generated power. Plaintiff contended that this scheme violated Art. V, sec. 11, Mont. Const., by benefiting the public utilities, electric cooperatives, or a private corporation. The court stated that as long as the provisions relating to the expenditure of the funds derived from the proceeds of the bonds are under the control of the State, the constitutional mandate is satisfied. In this case, the proceeds of the coal severance tax bonds will be expended by a state agency under the control of the State for construction of hydroelectric projects. The appropriations therefore are made for an agency of the State. The fact that the State may afterwards lease the projects to a private association or corporation is no more offensive constitutionally than is the power of the State to lease its state-held lands to private parties. Grossman v. St., 209 M 427, 682 P2d 1319, 41 St. Rep. 804 (1984).

### 85-1-501. Survey of power generation capacity.

**Compiler's Comments**

*2021 Amendment:* See 2021 Session Law for amendment made by sec. 114, Ch. 261, L. 2021. Amendment effective April 20, 2021.

*2011 Amendment:* Chapter 275 inserted (1)(h) pertaining to potential impacts on water supply and streamflows; inserted (2) requiring department to update certain legislative interim committees on past and current studies; and made minor changes in style. Amendment effective April 22, 2011.

**Case Notes**

*Delegation of Legislative Authority — Contingent Authorization Allowed:* Plaintiff filed a complaint for declaratory judgment in the Supreme Court seeking to determine the validity of several acts of the Legislature allowing the issuance of state revenue bonds. Plaintiff contended that Ch. 705, L. 1983, granted the Board of Natural Resources and Conservation (BNRC) (now abolished) the power and authority to determine the feasibility of various water conservation projects and make recommendations on the projects to the Board of Examiners. Plaintiff contended the delegation was unconstitutional in that it failed to set forth adequate standards or to place limits on the discretion of the BNRC. The court found standards imposed with reasonable clarity in 85-1-501 and 85-1-502. Under these statutes, the Department of Natural Resources and Conservation (DNRC) is required to study the economic and environmental feasibility of constructing and operating power generating facilities on water projects. Once DNRC has reached its determination, it is the BNRC's duty to determine feasibility and public interest. The court found the legislative enactments complete and sufficiently clear, definite, and certain to enable the agencies to know their respective rights and obligations. The court found that determinations of economic and environmental feasibility are more appropriate in the administrative than the legislative sector. The court found nothing improper in the Legislature's making its authorizations contingent upon administrative decisions properly made in the executive side of state government. Grossman v. St., 209 M 427, 682 P2d 1319, 41 St. Rep. 804 (1984).

### 85-1-502. Notice of availability of lease sites.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 at beginning of (1) and in (2) substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1983 Amendment:* At end of (1), inserted "unless" clause relating to forfeiture.

**Case Notes**

*Delegation of Legislative Authority — Contingent Authorization Allowed:* Plaintiff filed a complaint for declaratory judgment in the Supreme Court seeking to determine the validity of several acts of the Legislature allowing the issuance of state revenue bonds. Plaintiff contended that Ch. 705, L. 1983, granted the Board of Natural Resources and Conservation (BNRC) (now abolished) the power and authority to determine the feasibility of various water conservation projects and make recommendations on the projects to the Board of Examiners. Plaintiff contended the delegation was unconstitutional in that it failed to set forth adequate standards or to place limits on the discretion of the BNRC. The court found standards imposed with reasonable clarity in 85-1-501 and 85-1-502. Under these statutes, the Department of Natural Resources and Conservation (DNRC) is required to study the economic and environmental feasibility of constructing and operating power generating facilities on water projects. Once DNRC has reached its determination, it is the BNRC's duty to determine feasibility and public interest. The court found the legislative enactments complete and sufficiently clear, definite, and certain to enable the agencies to know their respective rights and obligations. The court found that determinations of economic and environmental feasibility are more appropriate in the administrative than the legislative sector. The court found nothing improper in the Legislature's making its authorizations contingent upon administrative decisions properly made in the executive side of state government. Grossman v. St., 209 M 427, 682 P2d 1319, 41 St. Rep. 804 (1984).

### 85-1-503. Receipt of applications.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 in (2) and (3) substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1985 Amendment:* In (1) after "submitted by any", substituted "person qualified to do business in Montana" for "public utility, as defined in 69-3-101, or electric cooperative, organized under Title 35, chapter 18, that sells power to Montana customers or by any Montana corporation proposing to use a substantial portion of the electricity to be generated in its own operation".

### 85-1-504. Determinations by department.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 in (1) and (2) substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

### 85-1-505. Lease conditions.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 in (2) substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

### 85-1-506. Compliance with federal law.

**Compiler's Comments**

*1985 Amendment:* At beginning of sentence substituted "The department may" for "If the project must", and after "federal law", substituted "on a project" for "the license, permit, or exemption shall be held by the department".

### 85-1-508. Duties of the department.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 deleted second sentence that read: "Any disputes that arise between the department and the lessee may be appealed to the board, upon written petition of either party"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

### 85-1-509. Power generation by department authorized.

**Compiler's Comments**

*1999 Amendment:* Chapter 209 deleted (3) prohibiting department sale of power generated at a facility except to a public utility, rural electric cooperative, or federal power-marketing agency organized in Montana and selling to Montana customers; and made minor changes in style. Amendment effective March 30, 1999.

*1995 Amendment:* Chapter 418 in (1) and (2) substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

### 85-1-510. Sale of power and allocation of revenue.

**Compiler's Comments**

*1991 Amendment:* Inserted (2) requiring deposit of revenue in state water project hydroelectric power generation special revenue account and designating use of funds in the account. Amendment effective July 1, 1991.

### 85-1-514. Power generation negotiation process.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 deleted (6) that read: "(6) Department actions under this section are subject to prior approval of the board as provided in 85-1-202." Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

## Part 6
## Renewable Resource Grant and Loan Program

**Part Compiler's Comments**

*1993 Statement of Intent:* The statement of intent attached to Ch. 478, L. 1993, provided: "This bill is introduced as a result of a legislative request to combine the water development and renewable resource development programs. These grant and loan programs have been administered as essentially one program for the past 4 bienniums. The renewable resource grant and loan program keeps the critical elements of both the water development and renewable resource development programs and does not expand either eligible projects or eligible applicants.

The long-range planning subcommittee of the appropriations and finance and claims committees stated its intent to establish minimum funding levels for these grant programs in House Bill No. 6 (Chapter 551, Laws of 1991) and House Bill No. 8 (Chapter 552, Laws of 1991) passed by the 1991 legislature. Over the past several bienniums grant funding has decreased. At the same time, revenues allocated to the water development, renewable resource development, and reclamation and development accounts have increased. Appropriations to natural resource agencies have made up the difference and have increased at a rate surpassing the growth in resource indemnity trust (RIT) interest income. This bill establishes minimum funding levels for the renewable resource grant and loan program, the reclamation and development grants program, and the water storage account.

In order to reflect the combining of the water development and renewable resource development programs, the allocation of interest earnings from the RIT is changed. Currently, 30% and 8%, respectively, of the RIT interest earnings are allocated to water development and the renewable resource development state special revenue accounts. This bill would eliminate these accounts. In their place, the renewable resource grant and loan program state special revenue account would be established and 38% of the RIT interest earnings would be allocated to this account.

Resource indemnity tax proceeds are allocated to the renewable resource grant and loan program and the reclamation and development grants state special revenue accounts. This will ensure funding for the operation of state natural resource agencies."

*Severability:* Section 18, Ch. 613, L. 1993, was a severability clause.

*Study of Recreational User Fees — 1992 Report:* Section 5, Ch. 659, L. 1991, provided for a study by the Department of Fish, Wildlife, and Parks, in cooperation with the Department of Natural Resources and Conservation, of the feasibility of charging recreational beneficiaries of water storage projects fees to assist in the repayment of a portion of those project costs. A written report must be submitted to the Water Policy Committee by July 1, 1992.

*1989 Statement of Intent:* The statement of intent attached to Ch. 491, L. 1989, provided: "This bill would allow the department of natural resources and conservation to use funds in the water development special revenue account and water development general obligation bond proceeds to protect loans made under the water development private loan program.

The program has made approximately 55 loans totalling [sic] $4 million to private individuals, primarily for irrigation projects. In the event that any lien holder or the department would have to foreclose on any of these loans, the department would need to be in a position to protect its security interests. These loans are primarily secured with real estate mortgages. In those instances where the department is not in first lien position and a foreclosure is necessary, the department would need funds to buy out the first lien holder to gain control of the property. The property would then be resold to recoup the funds used to buy out the first lien as well as the department's initial loan funds.

This bill would also allow the department to use these funds to operate a project if a loan should go into default. If the loan recipient should walk away from a project, the department may need to temporarily operate the project to secure its interests until foreclosure proceedings are complete. An example would be a hydropower project that requires continual attention to guard against breakdown or damage.

This bill is intended to give the department access to funds that would be used to protect its security interests when other loan collection efforts have not worked. It is the intent of the legislature that every effort be made to avoid forced loan collections. It is further the intent of the legislature that any property acquired in the manner provided for in HB 367 be resold as expeditiously as possible to recover funds used under 85-1-65 [sic, 85-1-605] and funds loaned to the borrower."

**Part Administrative Rules**

Title 36, chapter 17, ARM Renewable resource grants and loans.

Title 36, chapter 18, ARM Renewable resource development program.

**Part Case Notes**

*Special Legislation — Permissible When General Act Cannot Be Provided:* Plaintiff filed a complaint for declaratory judgment in the Supreme Court seeking to determine the validity of several acts of the Legislature allowing the issuance of state revenue bonds. The bonds would be financed by coal severance taxes to provide proceeds for development of state water resources. Plaintiff contended that the appropriation of funds for favorable loans to a score of small municipalities, water districts, and portions of counties constituted special legislation and was unconstitutional. The court noted that Art. V, sec. 12, Mont. Const., is not absolutely prohibitory. The court noted that the Legislature can not draft a general act of statewide application providing for the issuance and sale of revenue bonds and at the same time keep a handle on the way the proceeds are to be spent or loaned except through its direct authorization of projects. The court held that the passage of Ch. 705, L. 1983, was an implementation of Title 85, ch. 1, part 6, and excluded no class of governmental entity. Therefore, those enactments were "general" legislation within the meaning of Art. V, sec. 12, Mont. Const. The court also held sections 5 and 6 of Ch. 705, L. 1983, were valid in any event because even though local in effect, these were provisions for which a general act could not be provided. Grossman v. St., 209 M 427, 682 P2d 1319, 41 St. Rep. 804 (1984).

**Part Law Review Articles**

How the West Is Won: Advancing Water Law for Watershed Health, Ziemer, 42 Pub. Land & Resources L. Rev. 81 (2020).

**85-1-601. Purpose and policies.**

**Compiler's Comments**

*2017 Amendment:* Chapter 341 inserted (7) concerning source watersheds; and inserted (8) concerning soil and range health. Amendment effective October 1, 2017.

*Preamble:* The preamble attached to Ch. 341, L. 2017, provided: "WHEREAS, one of five key recommendations in the 2015 State Water Plan's "Water Supply and Demand" section is to use natural storage to benefit water supplies; and

WHEREAS, the maintenance and repair of source watersheds in Montana are essential to maintaining the reliability, quantity, timing, and quality of Montana's water supplies; and

WHEREAS, section 85-1-601(6), MCA, states that the renewable resource grant and loan program "supports, in part, the implementation...of the 'state water plan'" and that "the department shall give preference to projects that will implement state water plan priorities"; and

WHEREAS, because clean water delivered from source watersheds reduces the costs of treatment for drinking water, the health of source watersheds could be a cost benefit to the state's water supply."

*1997 Amendment:* Chapter 436 near end of (1) inserted reference to tribal government entities; and made minor changes in style. Amendment effective July 1, 1997.

*1993 Amendment:* Chapter 478 in (1), after "enjoy", substituted "the benefits of the state's water and other renewable resources" for "the full economic and recreational benefits of the state's water resources", after "long-term" substituted "renewable resource grant and loan program" for "water development program", and after "assistance" substituted "to private for-profit, private nonprofit, local government, and state government entities for renewable resource grant and loan projects" for "to private, local, and state entities for water resource development projects and activities"; near beginning of (2) substituted "renewable resource grant and loan program" for "water development program" and after "water resources" inserted "and to invest in renewable natural resource projects that will preserve for the citizens of Montana the economic and other benefits of the state's natural heritage"; in (3) substituted "The legislature recognizes the value of Montana's renewable resources; therefore, it is appropriate that a portion of the taxes and other revenue from nonrenewable resources be invested in the replacement of nonrenewable resources with the development of renewable resource projects that will continue to provide tax and other revenue and will preserve for the citizens the economic and other benefits of the state's natural heritage" for "The legislature recognizes that water is one of the most valuable and important renewable resources in Montana; therefore, it is appropriate that a portion of the taxes on the removal of nonrenewable resources be dedicated to the conservation, development, and beneficial use of water resources"; at beginning of (4) substituted "The conservation, development, management, and preservation of water and other renewable resources are high priorities" for "The development of water resources is of a high priority" and at end substituted "these resources" for "water"; inserted (5) providing that developments supported by this part may not significantly diminish the quality of existing public resources, such as land, air, fish, wildlife, and recreational opportunities; at beginning of (6) substituted "This renewable resource grant and loan program supports in part" for "This water development program is an integral part of" and inserted second sentence requiring the Department in making funding recommendations to give preference to projects that will implement state water plan priorities if, in all other respects, the proposed projects are equal in public benefit and technical feasibility; and made minor changes in style. Amendment effective July 1, 1993.

**85-1-602. Objectives.**

**Compiler's Comments**

*2017 Amendment:* Chapter 341 in (2)(b) inserted "natural"; in (2)(c) after "85-2-113" inserted "monitoring"; in (2)(d) at end inserted "soil and range health projects, and the maintenance and repair of source watersheds"; inserted (2)(e) concerning water-related projects that improve water quantity; inserted (4) prohibiting award of grant or loan for projects that affect source watersheds or soil and range health by reducing, restricting, or prohibiting lawful access to property; and made minor changes in style. Amendment effective October 1, 2017.

*Preamble:* The preamble attached to Ch. 341, L. 2017, provided: "WHEREAS, one of five key recommendations in the 2015 State Water Plan's "Water Supply and Demand" section is to use natural storage to benefit water supplies; and

WHEREAS, the maintenance and repair of source watersheds in Montana are essential to maintaining the reliability, quantity, timing, and quality of Montana's water supplies; and

WHEREAS, section 85-1-601(6), MCA, states that the renewable resource grant and loan program "supports, in part, the implementation...of the 'state water plan'" and that "the department shall give preference to projects that will implement state water plan priorities"; and

WHEREAS, because clean water delivered from source watersheds reduces the costs of treatment for drinking water, the health of source watersheds could be a cost benefit to the state's water supply."

*2005 Amendment:* Chapter 117 inserted (2)(f) providing that projects facilitating the use of alternative renewable energy sources are projects included in those that may enhance renewable resources; and made minor changes in style. Amendment effective March 24, 2005.

*2001 Amendment:* Chapter 169 inserted (2)(d) authorizing funding of water-related projects that improve water quality, including livestock containment facility projects; and made minor changes in style. Amendment effective July 1, 2001.

*1997 Amendment:* Chapter 436 at end of (1)(c) substituted "state, tribal, and federal water projects" for "state-tribal, state-federal, and state-tribal-federal water projects". Amendment effective July 1, 1997.

*1993 Amendment:* Chapter 478 substituted present language concerning enhancement of renewable resources through various projects for former section that read: "The department shall administer a water development program to accomplish such objectives as rehabilitation of state-owned water projects and works; promotion of private, local government, and state water development; development of water-based recreation and the protection of water resources for the benefit of agriculture, flood control, and other uses; development of offstream and tributary storage; encouragement of projects or programs that improve water use efficiency, including development of new, efficient water systems, rehabilitation of older, less efficient water systems, and acquisition and installation of measuring devices required under 85-2-113; and development of state-tribal, state-federal, and state-tribal-federal water projects. The storage of water for existing and future beneficial uses shall be given the highest priority unless a water development project or activity designed to accomplish another objective is demonstrated to be more beneficial to a greater number of people. The water development program is the key implementation portion of the state water plan and shall be administered to accomplish the objectives of the plan." Amendment effective July 1, 1993.

*1991 Amendment:* Near end of first sentence, after "less efficient water systems", inserted "and acquisition and installation of measuring devices required under 85-2-113"; and made minor change in style.

*1989 Amendment:* Near end of first sentence inserted clause relating to improving water use efficiency.

### 85-1-603. Renewable resource loan debt service fund created — coal severance tax allocated — renewable resource loan loss reserve fund created.

**Compiler's Comments**

*2007 Amendment:* Chapter 432 in (1)(b)(iv) substituted "natural resources projects state special revenue account pursuant to 15-38-302" for "renewable resource grant and loan program state special revenue account pursuant to 85-1-604". Amendment effective July 1, 2007.

*1997 Amendment:* Chapter 332 in (1)(b)(ii) substituted "85-1-613(5)(a)" for "85-1-613(4)(a)"; and in (2)(b) substituted "85-1-613(5)(b)" for "85-1-613(4)(b)". Amendment effective April 21, 1997.

*Applicability:* Section 4, Ch. 332, L. 1997, provided: "(1) [This act] applies retroactively, within the meaning of 1-2-109, to loans made by the department of natural resources and conservation from the renewable resource grant and loan program to water users' associations for existing projects that were initiated after July 1, 1995.

(2) [This act] applies to loans made by the department of natural resources and conservation from the renewable resource grant and loan program to water users' associations for new projects initiated after [the effective date of this act]." Effective April 21, 1997.

*1995 Amendment:* Chapter 442 in (1)(b)(i), at beginning, substituted "0.95%" for "2 ½%" and at end deleted "and remaining after allocation of the tax under 15-35-108(1) and (2)". Amendment effective July 1, 1995.

*1993 Amendment:* Chapter 478 in (1)(a) and (1)(b), before "debt service", substituted "renewable resource loan" for "water development"; at beginning of (1)(b)(i) increased 1 ¼% to 2 ½%; in (1)(b)(ii) substituted "85-1-613(4)(a)" for "85-1-613(3)(a)"; in (1)(b)(iii) substituted "renewable resource grant and loan program bonds" for "water development bonds"; in (1)(b)(iv) substituted "renewable resource grant and loan program state special revenue account" for "water development state special revenue account"; in (1)(b)(v), (2)(a), (2)(b), and (2)(c) substituted "renewable resource loan" for "water development loan"; in (2)(c) substituted "renewable resource loan debt service" for "water development debt service"; and made minor changes in style. Amendment effective July 1, 1993.

*1989 Amendment:* In (1)(b)(ii) inserted "under 85-1-613(3)(a)"; inserted (1)(b)(v) relating to loan loss money received from the water development loan loss reserve fund; and inserted (2) relating to creation of and allocation to a water development loan loss reserve fund. Amendment effective April 11, 1989.

*1987 Amendment:* At end of (2)(a) substituted "under 15-35-108(1) and (2)" for "to the trust fund established under Article IX, section 5, of The Constitution of the State of Montana".

*1986 Amendment:* Inserted (2)(b) through (2)(d) relating to allocation of money received from water development bonds or revenue paid into the water development state special revenue account.

*1983 Amendment:* In (1), substituted "debt service fund within the debt service fund type" for "sinking account within the sinking fund"; and in (2), substituted "debt service fund" for "sinking account".

### 85-1-605. Grants, loans, and bonds for state, local, or tribal government assistance.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 1, Ch. 541, L. 2023. Amendment effective May 18, 2023.

*2021 Amendment:* See 2021 Session Law for amendment made by sec. 115, Ch. 261, L. 2021. Amendment effective April 20, 2021.

*2013 Amendment:* Chapter 120 in (4) at end substituted "legislative fiscal analyst" for "legislative finance committee of the legislature". Amendment effective July 1, 2013.

*2007 Amendment:* Chapter 432 in (1) and (4) in first sentences substituted "natural resources projects state special revenue account established in 15-38-302" for "renewable resource grant and loan program state special revenue account". Amendment effective July 1, 2007.

*1999 Amendment:* Chapter 498 in (1) near end of first sentence inserted reference to regional water and wastewater authorities; and made minor changes in style. Amendment effective April 27, 1999.

*Severability:* Section 26, Ch. 498, L. 1999, was a severability clause.

*1997 Amendments:* Chapter 50 in (4), in first sentence, substituted "$10 million" for "$1 million"; and made minor changes in style. Amendment effective March 13, 1997.

Chapter 436 in (1), at end of first sentence, inserted reference to tribal government; in middle of (3) inserted reference to tribal government; in (4), in second sentence, inserted reference to tribal government; inserted (6) providing additional grant and loan conditions; and made minor changes in style. Amendment effective July 1, 1997.

*1993 Amendment:* Chapter 478 at beginning of (1) substituted "The department may recommend to the legislature that grants and loans be made from revenue deposited in the renewable resource grant and loan program state special revenue account, that loans be made from renewable resource bond proceeds deposited in the renewable resource loan proceeds account established in 85-1-617(5)" for "The department may recommend to the legislature that grants and loans be made from coal severance tax proceeds deposited in the water development state special revenue account, that loans be made from water development bond proceeds deposited in the water development account"; inserted (2) providing that nothing in this part creates or expands the state's or a local government's authority to incur debt and that the Legislature may authorize loans only to state and local government entities otherwise structured to incur debt; inserted (3) providing that loans may not be authorized except to a state or local government entity that agrees to secure the authorized loan with its bond; in first sentence of (4) substituted "In addition to implementing those projects approved by the legislature, the department may request up to 10% of the grant funds available and up to $1 million for loans from the renewable resource grant and loan program state special revenue account and the renewable resource loan proceeds account in any biennium to be used for emergencies. These emergency grant projects or loan projects, or both, may not be made because of the gross negligence of the state or local government applicant, must be approved by the department, and must be defined as those projects otherwise eligible for either grant funding or loan funding, or both, that" for "In addition to implementing those projects approved by the legislature, the department may request up to 10% of the funds available for grants from the water development special revenue account in any biennium to be used for emergencies. These emergency projects must be approved by the department and be defined as those projects which"; in (5) substituted "The grants and loans provided for by this section may be made for projects that enhance renewable resources in the state through conservation, development, management, or preservation; for assessing feasibility or planning; for implementing renewable resource projects" for "The grants and loans provided for by this section may be made for the purchase, lease, development, or construction of water development projects and activities for the conservation, management, use, development, or protection of the water and related agricultural, land, fish, wildlife, and water recreation resources in the state; for the purpose of feasibility and design studies for such projects; for development of plans for and the rehabilitation, expansion, and modification of water development projects; for other water development projects and activities that will enhance the water resources of the state"; and made minor changes in style. Amendment effective July 1, 1993.

*1985 Amendment:* Inserted (2) authorizing the Department, for emergencies, to request up to 10% of the funds available for grants from the water development special revenue account in any biennium.

*1983 Amendments:* Chapter 149, in middle of (1), inserted "and that coal severance tax bonds be authorized pursuant to Title 17, chapter 5, part 7, to provide financial assistance".

Chapter 298, in first sentence of (1), substituted "water development state special revenue account" for "water development earmarked account" and "water development account" for "water development clearance account".

**85-1-606. Grants and loans to private persons.**

**Compiler's Comments**

*2007 Amendment:* Chapter 432 in (1) substituted "natural resources projects state special revenue account established in 15-38-302" for "renewable resource grant and loan program state special revenue account". Amendment effective July 1, 2007.

*1993 Amendment:* Chapter 478 near beginning of (1) and in (2) and (3) substituted "water-related projects" for "water development projects and activities"; in (1) substituted "renewable resource grant and loan program state special revenue account" for "water development state special revenue account" and substituted "renewable resource loan proceeds account" for "water development account"; and made minor changes in style. Amendment effective July 1, 1993.

*1983 Amendment:* In (1), substituted "water development state special revenue account" for "water development earmarked account" and "water development account" for "water development clearance account".

### 85-1-608. Applications for grants and loans to private persons.

**Compiler's Comments**

*1993 Amendment:* Chapter 478 in (1) substituted "water-related project" for "water development project or activity"; and in (2), after "prescribed by", substituted "rule" for "the board" and in two places, after "project", deleted "or activity". Amendment effective July 1, 1993.

### 85-1-609. Eligibility for a loan or grant to a private person.

**Compiler's Comments**

*1993 Amendment:* Chapter 478 in (1)(h), (2), (3), (4), and (5) substituted "project" for "water development project or activity"; in (1) substituted "water-related project" for "water development project or activity"; in (1)(a) substituted "renewable resource grant and loan program" for "water development program"; in (1)(c), after "A project", deleted "or activity" and substituted "quantifiable" for "tangible"; in (1)(g), after "project", deleted "or activity"; at end of (2) substituted "renewable resource grant or loan" for "water development grant or loan"; and made minor changes in style. Amendment effective July 1, 1993.

### 85-1-610. Evaluation of grants and loans to private persons.

**Compiler's Comments**

*1993 Amendment:* Chapter 478 in introductory clause, (2), and (3) substituted "water-related project" for references to water development project or activity; deleted second sentence in (3) defining activity; in (4) substituted "renewable resource grant and loan projects" for "water development projects and activities"; in (5) substituted "project will effectively utilize" for "water development project or activity will fully utilize"; in (6), after "Projects", deleted "or activities"; in (7) substituted "project" for "water development project or activity" and substituted "renewable resource grant and loan program" for "water development program"; and made minor changes in style. Amendment effective July 1, 1993.

*1985 Amendment:* In (3) inserted second sentence defining activity to include all necessary work associated with a project, from application preparation through the implementation of a water reservation by a qualified state applicant.

### 85-1-611. Department to solicit views.

**Compiler's Comments**

*1997 Amendment:* Chapter 436 near end inserted reference to tribal government. Amendment effective July 1, 1997.

*1993 Amendment:* Chapter 478 after "projects" deleted "and activities". Amendment effective July 1, 1993.

### 85-1-612. Rulemaking authority.

**Compiler's Comments**

*1993 Amendment:* Chapter 478 at beginning substituted "department" for "board"; in (1), after "prescribing", inserted "a reasonable application fee and"; inserted (5) requiring rules describing the ranking criteria used to evaluate and prioritize grants to governmental entities; and inserted (6) requiring rules specifying any other procedures necessary to accomplish the objectives of the renewable resource grant and loan program. Amendment effective July 1, 1993.

*Statement of Intent:* The statement of intent attached to SB 409 (Ch. 505, L. 1981) provided: "A statement of intent is required for this bill because it delegates rulemaking authority to the Board of Natural Resources and Conservation [functions now transferred to Department of Natural Resources and Conservation] in section 13.

The intent is to provide the Board with the authority to adopt those rules necessary to administer the loan and grant portion of the water development program. The authority is limited by section 13 to prescribing the form and content of applications for grants and loans, to adopting rules governing the application of the criteria for awarding loans and grants to private persons, to adopting rules providing for the servicing of loans including arrangements for obtaining security interests and the establishment of reasonable fees or charges to be made, and to prescribing the terms and conditions for making grants and loans, the security instruments, and the agreements necessary."

**85-1-613. Limits on loans.**

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 2, Ch. 541, L. 2023. Amendment effective May 18, 2023.

*2019 Amendment:* Chapter 271 in (1) in first sentence near middle substituted "pursuant to Title 35, chapter 14, or Title 85, chapter 6, part 1" for "pursuant to Title 85, chapter 6, part 1, or Title 35, chapter 1, part 2"; in (2) in first sentence substituted "Title 35, chapter 14" for "Title 35, chapter 1, part 2"; and made minor changes in style. Amendment effective June 1, 2020.

*2007 Amendment:* Chapter 432 in (1), (2), and (3) substituted "natural resources projects state special revenue account established in 15-38-302" for "renewable resource grant and loan program state special revenue account". Amendment effective July 1, 2007.

*Termination Provision Repealed:* Section 1, Ch. 239, L. 2007, repealed sec. 2, Ch. 418, L. 2005, which terminated the 2005 amendments to this section June 30, 2007. Effective April 25, 2007.

*2005 Amendment:* Chapter 418 in (1) in first sentence near end substituted "$400,000" for "$200,000"; and in (2) near middle substituted "$3 million" for "$300,000". Amendment effective October 1, 2005.

*Termination:* Section 2, Ch. 418, L. 2005, provided: "The amendment to 85-1-613(2) terminates June 30, 2007."

*1997 Amendments:* Chapter 332 in (1), near beginning, inserted "that is not a water users' association or ditch company organized and incorporated pursuant to Title 35, chapter 1, part 2, or Title 85, chapter 6, part 1"; inserted (2) providing guidelines for loans to certain water users' associations or ditch companies from the renewable resource grant and loan program special revenue account or the renewable resource loan proceeds account; inserted (6) providing "A loan made under this part may not be used for the cost of operation and maintenance of a project"; and made minor changes in style. Amendment effective April 21, 1997.

Chapter 436 near beginning of (3) inserted reference to tribal government; and made minor changes in style. Amendment effective July 1, 1997.

*Applicability:* Section 4, Ch. 332, L. 1997, provided: "(1) [This act] applies retroactively, within the meaning of 1-2-109, to loans made by the department of natural resources and conservation from the renewable resource grant and loan program to water users' associations for existing projects that were initiated after July 1, 1995.

(2) [This act] applies to loans made by the department of natural resources and conservation from the renewable resource grant and loan program to water users' associations for new projects initiated after [the effective date of this act]." Effective April 21, 1997.

*1993 Amendment:* Chapter 478 substituted first sentence in (1) concerning restrictions on a loan to a private person for a renewable resource grant and loan program project for "No loan for a water development project or activity may be made from the water development state special revenue account or water development account that exceeds the least of $200,000, 10% of the estimated total funds potentially available for loans in the water development state special revenue account and water development account in the biennium in which the loan will be made, or 80% of the fair market value of the security given therefor"; inserted (2) providing that the Department may not make a loan to the state or a local government for a renewable resource grant and loan program project from the renewable resource grant and loan program state special revenue account or renewable resource loan proceeds account if the loan exceeds the lesser of $200,000 or the project sponsor's remaining debt capacity; in (4), before "interest", deleted "board shall from time to time establish the"; and made minor changes in style. Amendment effective July 1, 1993.

*1989 Amendment:* In (3), at end of introductory clause, inserted "that is sufficient to"; inserted (3)(a) relating to bond debt service; and inserted (3)(b) relating to establishment and maintenance of a loan loss reserve fund. Amendment effective April 11, 1989.

*1983 Amendments:* Chapter 149, in (1), increased specified dollar amount loan limit alternative from $100,000 to $200,000.

Chapter 298, in first sentence of (1), substituted two references to the water development state special revenue account for the water development earmarked account and substituted two references to the water development account for the water development clearance account.

## 85-1-614. Limits on grants from natural resources projects state special revenue account.

**Compiler's Comments**

*2017 Amendment:* Chapter 341 in (1)(b) substituted "50%" for "25%". Amendment effective October 1, 2017.

*Preamble:* The preamble attached to Ch. 341, L. 2017, provided: "WHEREAS, one of five key recommendations in the 2015 State Water Plan's "Water Supply and Demand" section is to use natural storage to benefit water supplies; and

WHEREAS, the maintenance and repair of source watersheds in Montana are essential to maintaining the reliability, quantity, timing, and quality of Montana's water supplies; and

WHEREAS, section 85-1-601(6), MCA, states that the renewable resource grant and loan program "supports, in part, the implementation...of the 'state water plan'" and that "the department shall give preference to projects that will implement state water plan priorities"; and

WHEREAS, because clean water delivered from source watersheds reduces the costs of treatment for drinking water, the health of source watersheds could be a cost benefit to the state's water supply."

*2007 Amendment:* Chapter 432 in (1)(a) substituted "natural resources projects state special revenue account established in 15-38-302" for "renewable resource grant and loan state special revenue account". Amendment effective July 1, 2007.

*1993 Amendment:* Chapter 478 in (1)(a) substituted "renewable resource grant and loan state special revenue account" for "water development state special revenue account" and before "grants" inserted "public or private"; inserted (2) providing that this part does not limit the amount of grant funds that may be appropriated by the Legislature to fund state or local government projects; and made minor changes in style. Amendment effective July 1, 1993.

*1983 Amendment:* Substituted "state special revenue account" for "earmarked account".

## 85-1-615. Security interests — purchase, operation, and resale of encumbered property.

**Compiler's Comments**

*2017 Amendment:* Chapter 351 in (2) inserted reference to 85-1-603. Amendment effective July 1, 2017.

*Severability:* Section 19, Ch. 351, L. 2017, was a severability clause.

*2007 Amendment:* Chapter 432 in (1) near beginning substituted "natural resources projects state special revenue account established in 15-38-302" for "renewable resource grant and loan state special revenue account"; and in (2) substituted "15-38-301" for "85-1-604". Amendment effective July 1, 2007.

*2001 Amendment:* Chapter 7 in introductory clause of (2) substituted "85-1-604" for "85-1-604(3)(d)". Amendment effective October 1, 2001.

*1997 Amendment:* Chapter 332 in (1), in second sentence, inserted "shares of stock in a water users' association, revenue of a water users' association, accounts receivable of a water users' association, water purchase agreements"; and made minor changes in style. Amendment effective April 21, 1997.

*Applicability:* Section 4, Ch. 332, L. 1997, provided: "(1) [This act] applies retroactively, within the meaning of 1-2-109, to loans made by the department of natural resources and conservation from the renewable resource grant and loan program to water users' associations for existing projects that were initiated after July 1, 1995.

(2) [This act] applies to loans made by the department of natural resources and conservation from the renewable resource grant and loan program to water users' associations for new projects initiated after [the effective date of this act]." Effective April 21, 1997.

*1993 Amendment:* Chapter 478 in (1) substituted "renewable resource grant and loan state special revenue account or the renewable resource loan proceeds account" for "water development state special revenue account or water development account"; in (2) substituted "85-1-604(3)(d)" for "85-1-604(3)(c)"; and made minor changes in style. Amendment effective July 1, 1993.

*1989 Amendment:* Inserted (2) relating to purchase of a prior lien and operation of encumbered property; and inserted (3) relating to resale of encumbered property. Amendment effective April 11, 1989.

*1983 Amendment:* In first sentence, substituted "water development state special revenue account or water development account" for "water development earmarked or clearance account".

## 85-1-616. Administration of loans and grants.

### Compiler's Comments

*2007 Amendment:* Chapter 432 in (3) at end substituted "natural resources projects state special revenue account established in 15-38-302" for "renewable resource grant and loan program state special revenue account established in 85-1-604". Amendment effective July 1, 2007.

*1993 Amendment:* Chapter 478 in second sentence of (3) substituted "renewable resource grant and loan program state special revenue account" for "water development state special revenue account"; and made minor changes in style. Amendment effective July 1, 1993.

*1983 Amendments:* Chapter 149 inserted last sentence requiring the deposit of fees and charges for servicing water development loans into the water development state special revenue account.

Chapter 281, in last sentence, substituted "water development state special revenue account" for "water development earmarked account".

## 85-1-617. Issuing renewable resource bonds — renewable resource loan proceeds account.

### Compiler's Comments

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 3, Ch. 541, L. 2023. Amendment effective May 18, 2023.

*1999 Amendment Void:* The amendment to this section made by sec. 10, Ch. 3, L. 1999, was rendered void by sec. 16, Ch. 3, L. 1999, a contingent voidness section, which provided that if Constitutional Initiative No. 75, enacting Article VIII, section 17, of the Montana constitution, was declared invalid, then [this act] was void. The initiative was declared invalid February 24, 1999.

*1993 Amendment:* Chapter 478 in (1), (2), and (3) substituted "renewable resource bonds" for "water development bonds"; in (1), at end of first sentence, substituted "renewable resource grant and loan program" for "water development loan program"; in (2), near beginning, substituted "department" for "board of natural resources and conservation"; near middle of (3) substituted "renewable resource loan debt service" for "water development debt service"; in (5) substituted "renewable resource loan proceeds account" for "water development account"; near beginning of (6) substituted "renewable resource loan proceeds account" for "water development account", in two places, before "debt service", substituted "renewable resource loan" for "water development", near end of first sentence substituted "renewable resource loan loss reserve fund" for "water development loan loss reserve fund", and near end of second sentence, after "board", inserted "of examiners"; and made minor changes in style. Amendment effective July 1, 1993.

*1989 Amendment:* In (6) inserted reference to the water development loan loss reserve fund. Amendment effective April 11, 1989.

*1986 Amendment:* In (6) at end of first sentence substituted "debt service fund pursuant to 85-1-603" for "state special revenue account pursuant to 85-1-604".

*1985 Amendment:* At end of (2) inserted reference to 17-5-731; in (4) inserted reference to notes after each occurrence of "bonds"; near beginning of (6) inserted "or notes" after "proceeds of bonds".

*1983 Amendments — Composite:* House Bill 533 (Ch. 298, L. 1983) was entitled in part: "AN ACT TO GENERALLY REVISE LANGUAGE IN CODE SECTIONS DEALING WITH THE ISSUANCE OF BONDS IN ORDER THAT REFERENCES TO THE TREASURY FUND STRUCTURE CONFORM TO CHAPTER 28, LAWS OF 1981." Section 42 of Ch. 298, at end of first sentence of 85-1-617(6) after "deposited in the", substituted "water development debt service fund" for "water development sinking account". Chapter 149, in the same subsection of 85-1-617, substituted "water development earmarked account pursuant to 85-1-604" for "water development sinking account and must be applied to the payment, redemption premiums, and interest on the particular bond issue from whose proceeds the loan was made". The Code Commissioner determined that the change made by Ch. 149 took precedence over that made by Ch. 298 because Ch. 149 made a substantive change whereas Ch. 298 substituted one term for its equivalent in the former treasury fund structure. Under the authority of sec. 55 of Ch. 298, the Code Commissioner then changed "water development earmarked account" to "water development state special revenue account" as that account was renamed by sec. 36 of Ch. 298.

Further changes made by Ch. 298 are as follows: in (3) and (6), substituted "water development debt service fund" for "water development sinking account"; in (5), substituted "water development account within the state special revenue fund" for "water development clearance account within the bond proceeds and insurance clearance fund"; and in (6), substituted "water development account" for "water development clearance account".

### 85-1-618. Restrictions on use of bond proceeds.

**Compiler's Comments**

*1993 Amendment:* Chapter 478 at beginning substituted "Renewable resource" for "Water development" and near middle substituted "renewable resource grant and loan program" for "water development program". Amendment effective July 1, 1993.

*1989 Amendment:* At end inserted "or for purchasing liens and operating property as provided in 85-1-615". Amendment effective April 11, 1989.

### 85-1-619. Debt service fund — pledge and administration of sufficient balance.

**Compiler's Comments**

*2009 Amendment:* Chapter 2 in (3) near end before "state" substituted "natural resources projects" for "renewable resource grant and loan program"; and made minor changes in style. Amendment effective October 1, 2009.

*1999 Amendment Void:* The amendment to this section made by sec. 11, Ch. 3, L. 1999, was rendered void by sec. 16, Ch. 3, L. 1999, a contingent voidness section, which provided that if Constitutional Initiative No. 75, enacting Article VIII, section 17, of the Montana constitution, was declared invalid, then [this act] was void. The initiative was declared invalid February 24, 1999.

*1993 Amendment:* Chapter 478 throughout section, before "debt service", substituted "renewable resource loan" for "water development"; in (2) substituted "renewable resource bonds" for "water development bonds"; in (3), at end, substituted "renewable resource grant and loan program state special revenue account" for "water development state special revenue account"; and made minor changes in style. Amendment effective July 1, 1993.

*1985 Amendment:* Near beginning of (2) before "to pay interest", deleted "first"; in (2) substituted "and for bonds issued prior to 1985" for "second", and at end of (2) deleted "to the amount required each month to meet those payments due within 12 months thereafter; and third, to restore the reserve to this amount after each payment"; near beginning of (3) inserted "for bonds issued prior to 1985", and deleted last sentence of (3) that read: "If the balance on hand at any time in the water development debt service fund is not sufficient to accumulate required reserves under subsection (2) and is not restored to the required amount within 3 months thereafter from funds specifically pledged and appropriated to the water development debt service fund, the treasurer in accordance with the pledge of the full faith and credit and taxing powers of the state shall transfer an amount sufficient to restore the required balance from the general fund to the water development debt service fund."

*1983 Amendment:* Throughout section, substituted "water development debt service fund" for "water development sinking account"; and in first sentence of (3), substituted "water development state special revenue account" for "water development earmarked account".

### 85-1-620. Renewable resource refunding bonds.

**Compiler's Comments**

*1999 Amendment Void:* The amendment to this section made by sec. 12, Ch. 3, L. 1999, was rendered void by sec. 16, Ch. 3, L. 1999, a contingent voidness section, which provided that if Constitutional Initiative No. 75, enacting Article VIII, section 17, of the Montana constitution, was declared invalid, then [this act] was void. The initiative was declared invalid February 24, 1999.

*1993 Amendment:* Chapter 478 throughout section substituted "renewable resource loan debt service" for "water development debt service"; and made minor changes in style. Amendment effective July 1, 1993.

*1983 Amendment:* In two places in (1) and (2), substituted "water development debt service fund" for "water development sinking account".

### 85-1-621. Report.

**Compiler's Comments**

*2021 Amendment:* See 2021 Session Law for amendment made by sec. 116, Ch. 261, L. 2021. Amendment effective April 20, 2021.

*2015 Amendment:* Chapter 122 at end substituted "water policy committee established in 5-5-231" for "environmental quality council established in 5-16-101". Amendment effective March 25, 2015.

*1995 Amendment:* Chapter 545 at end substituted "environmental quality council established in 5-16-101" for "water policy committee established in 85-2-105". Amendment effective July 1, 1995.

*1995 Transition:* Section 81, Ch. 545, L. 1995, provided: "(1) The members of the legislative council, as provided in 5-11-101, the members of the legislative finance committee, as provided in 5-12-202, the members of the legislative audit committee, as provided in 5-13-202, and the members of the environmental quality council, as provided in 5-16-101, must be appointed as soon as possible following [the effective date of this section] [effective April 27, 1995].

(2) To implement the changes provided in [this act], the office of the legislative council, the office of budget and program planning, and the department of administration shall establish all necessary authorizations during the accounting preparation process known as the "turnaround" process, beginning in April or May 1995, to administer the several appropriations made by any means to programs of the legislative branch agencies consolidated under [sections 3 and 4] [5-2-503 and 5-2-504] for fiscal year 1996 or 1997 or the biennium ending June 30, 1997, as appropriations to a single legislative agency while maintaining the specific identification, legislative intent, and purpose for which the appropriations were made. During this transition, the executive director may authenticate documents as required to accomplish the purposes of [this act]. Appropriate changes on the statewide budgeting and accounting system and the payroll, personnel, and position control system must also be made and authorized as required to accomplish the purposes of [this act].

(3) Personnel and property of the environmental quality council are transferred to the legislative services division effective July 1, 1995."

*1985 Amendment:* In (2)(a) near middle, after "environmental quality council", inserted "of the state library"; and in (2)(b) near beginning, substituted "state library" for "department of administration", and near end substituted "library's" for "department's".

*1993 Amendments:* Chapter 349 in first sentence, after "report", deleted "to the legislature"; and in fifth sentence, after "submitted", deleted "to the president of the senate and the speaker of the house", after "to" deleted "the members of", and after "85-2-105" deleted "and, as provided in 5-11-210, to the legislature".

Chapter 478 at end of first sentence substituted "renewable resource grant and loan program" for "water development program"; in second sentence, after "projects", deleted "and activities"; in third sentence, after "department", substituted "has received applications" for "desires to seek congressional authorization and funding and the efforts the department will undertake in attempting to secure such authorization and funding"; and made minor changes in style. Amendment effective July 1, 1993.

*1991 Amendment:* In last sentence inserted reference to 5-11-210, before "the legislature" deleted "such other members of", and after "legislature" deleted "as may request a copy". Amendment effective March 20, 1991.

*1985 Amendment:* Inserted third sentence requiring Department's biennial report to the Legislature to identify and prioritize water development projects and the efforts to be undertaken to secure Congressional authorization and funding; and in fifth sentence, after "speaker of the house", inserted "to the members of the water policy committee established in 85-2-105", and after "other members", inserted "of the legislature".

## 85-1-622. Penalty.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

## 85-1-624. Authorization of bonds.

**Compiler's Comments**

*2003 Amendment:* Chapter 113 at end increased "$20 million" to "$30 million". Amendment effective July 1, 2003.

*1999 Amendment:* Chapter 14 at end increased outstanding principal amount for bonds from $10 million to $20 million. Amendment effective July 1, 1999.

*Effective Date:* Section 5, Ch. 437, L. 1995, provided: "[This act] is effective on passage and approval." Approved April 14, 1995.

### 85-1-631. Water storage state special revenue account created — revenues allocated — appropriations from account.

**Compiler's Comments**

*2007 Amendment:* Chapter 432 inserted (2)(a) relating to proceeds of resource indemnity and ground water assessment tax for biennium beginning July 1, 2007; in (3) at end after "operation" substituted "rehabilitation, expansion, maintenance, and modification of state-owned water storage projects" for "maintenance, and rehabilitation of the works"; in (6) after "money" deleted "for loans and grants", after "for" deleted "(a) water storage projects, including the purchase or lease of property;

(b) planning, feasibility, and design studies; and

(c) other costs related to", after "construction" inserted "operation", after "expansion" inserted "maintenance", and before "water storage projects" inserted "state-owned"; deleted former (7) and (8) that read: "(7) The department shall administer this section as an integral part of the renewable resource grant and loan program, using, to the extent possible, the same procedures for soliciting, determining eligibility, and rating water storage project proposals and for administering grants and loans, subject to the same limitations, as applied to other renewable resource grants and loans.

(8) The following preferences must be considered in ranking proposals for water storage grants and loans:

(a) first preference is for the rehabilitation of water storage projects that resolve threats to life and property;

(b) second preference is for the improvement or expansion of existing water storage projects; and

(c) third preference is for the development of new water storage projects"; and made minor changes in style. Amendment effective July 1, 2007.

*1999 Amendment:* Chapter 144 at end of (2) inserted "and all revenue of the works and other money as provided in 85-1-332"; inserted (3) concerning restriction on appropriation of money; and made minor changes in style. Amendment effective July 1, 1999.

*1993 Amendment:* Chapter 478 in (2), after "account", substituted "money allocated from the resource indemnity trust fund interest earnings pursuant to 15-38-202" for "(a) money from the water development state special revenue account as provided in 85-1-604; and

(b) money from the renewable resource development account as provided in 90-2-111"; inserted (4) requiring deposits into the water storage state special revenue account to be placed in short-term investments and the interest accrued to also be placed into the water storage state special revenue account; in (6) substituted "renewable resource grant and loan program" for "water development program" and near end substituted "renewable resource grants and loans" for "water development grants and loans"; and made minor changes in style. Amendment effective July 1, 1993.

*1991 Statement of Intent:* The statement of intent attached to Ch. 659, L. 1991, provided: "A statement of intent is required for this bill to provide guidance in the preparation of rules and other matters pertaining to the allocation of grants and loans from the water storage state special revenue account. This bill is introduced as a result of and should be interpreted consistently with the 1990 state water plan section on water storage. It is the legislature's intent that money may not be expended from the water storage state special revenue account during fiscal years 1992 and 1993. Rather, money deposited in the account is to accumulate for expenditure during fiscal years 1994 and 1995. Deposits to the account are to be placed in short-term investments and accrue interest, which is also to be deposited in the water storage state special revenue account.

Rules are to be adopted and implemented that govern the process of application, administrative application review and ranking, and conditions for the disbursal of grants and loans as soon as possible after this bill is enacted. Applications for grants and loans from the account are to be accepted by May 1992. These application and administrative recommendations will be considered during the 1993 legislative session, and that legislature may appropriate money accumulated in the account for expenditure during fiscal years 1994 and 1995.

It is also the legislature's intent that rules governing the allocation of money from the water storage state special revenue account do not limit the amount that may be provided to any one applicant. Also, private entities, as well as public entities, are to be eligible for grants and loans from the account."

*Effective Date:* Section 13, Ch. 659, L. 1991, provided: "[This act] is effective July 1, 1991."

**85-1-632. Exemption from environmental review.**

**Compiler's Comments**

*Effective Date:* This section is effective October 1, 2023.

## Part 7
## Water Storage Policy

**Part Compiler's Comments**

*Effective Date:* Section 13, Ch. 659, L. 1991, provided: "[This act] is effective July 1, 1991."

**85-1-703. Water storage policy.**

**Compiler's Comments**

*1991 Statement of Intent:* The statement of intent attached to Ch. 659, L. 1991, provided: "A statement of intent is required for this bill to provide guidance in the preparation of rules and other matters pertaining to the allocation of grants and loans from the water storage state special revenue account. This bill is introduced as a result of and should be interpreted consistently with the 1990 state water plan section on water storage. It is the legislature's intent that money may not be expended from the water storage state special revenue account during fiscal years 1992 and 1993. Rather, money deposited in the account is to accumulate for expenditure during fiscal years 1994 and 1995. Deposits to the account are to be placed in short-term investments and accrue interest, which is also to be deposited in the water storage state special revenue account.

Rules are to be adopted and implemented that govern the process of application, administrative application review and ranking, and conditions for the disbursal of grants and loans as soon as possible after this bill is enacted. Applications for grants and loans from the account are to be accepted by May 1992. These application and administrative recommendations will be considered during the 1993 legislative session, and that legislature may appropriate money accumulated in the account for expenditure during fiscal years 1994 and 1995.

It is also the legislature's intent that rules governing the allocation of money from the water storage state special revenue account do not limit the amount that may be provided to any one applicant. Also, private entities, as well as public entities, are to be eligible for grants and loans from the account."

**85-1-704. Prioritization of water storage projects — governor's report.**

**Compiler's Comments**

*2021 Amendment:* See 2021 Session Law for amendment made by sec. 117, Ch. 261, L. 2021. Amendment effective April 20, 2021.

## Part 8
## Lease Management Program

**Part Compiler's Comments**

*Severability:* Section 19, Ch. 301, L. 1995, was a severability clause.

*Effective Date:* Section 21, Ch. 301, L. 1995, provided: "[This act] [85-1-801 through 85-1-811] is effective July 1, 1995."

**85-1-802. Leases authorized.**

**Compiler's Comments**

*1999 Amendment:* Chapter 121 in (2) inserted language restricting the lease of project lands to the department of fish, wildlife, and parks for public recreational purposes to not more than 30 years; deleted former (3) that read: "(3) All cabin site leases issued prior to July 1, 1994, expire March 31, 1996"; and made minor changes in style. Amendment effective March 19, 1999.

**85-1-803. Rulemaking.**

**Compiler's Comments**

*1995 Statement of Intent:* The statement of intent attached to Ch. 301, L. 1995, provided: "A statement of intent is necessary for this bill because [section 3] [85-1-803] authorizes the department of natural resources and conservation to adopt rules implementing the leasing program established in this bill.

The legislature intends that rules adopted by the department specify the procedure to be used by the department in determining how it will lease project lands and specify the standards, conditions, limitations, and requirements it will use as terms of the lease under the statutory guidelines provided in [section 3] [85-1-803]."

*Severability:* Section 19, Ch. 301, L. 1995, was a severability clause.

### 85-1-811. Project lands lease and sales account.

**Compiler's Comments**

*2021 Amendment:* Chapter 378 in first sentence after "project lands lease" inserted "and sales"; in second sentence before "lease fees" inserted "sale proceeds and". Amendment effective October 1, 2021.

### 85-1-812. Sale of leased cabin or home sites — rulemaking.

**Compiler's Comments**

*Effective Date:* This section is effective October 1, 2021.

### 85-1-813. Valuation of cabin or home sites and improvements.

**Compiler's Comments**

*Effective Date:* This section is effective October 1, 2021.

## Part 9
## Western Montana Conservation Commission Act

**Part Compiler's Comments**

*Effective Date:* Section 11, Ch. 428, L. 2023, provided: "[This act] is effective July 1, 2023."

*Termination:* Section 12, Ch. 428, L. 2023, provided: "[This act] terminates June 30, 2029."

*Codification Change:* Section 10, Ch. 428, L. 2023, provided that sections 2 through 8 were to be codified as a new chapter in Title 85. The Code Commissioner has codified those sections as Title 85, chapter 1, part 9, to more closely reflect the subject matter.

# CHAPTER 2
# SURFACE WATER AND GROUND WATER

**Chapter Compiler's Comments**

*Preamble:* The preamble attached to Ch. 497, L. 1997, provided: "WHEREAS, the Montana Supreme Court, in In the Matter of the Application for Beneficial Water Use Permit Nos. 66459-76L, Ciotti; 64988-g76L, Starner; and Application for Change of Appropriation Water Right No. G15152-s761, Pope, which was decided August 22, 1996, held that an applicant for a permit or change of use authorization on the Flathead Indian Reservation may not as a matter of law meet the applicant's burden of proof to establish that the proposed use will not interfere unreasonably with planned uses or developments for which water has been reserved until the Confederated Salish and Kootenai Tribes' federal reserved water rights are quantified; and

WHEREAS, in 1973, Montana enacted comprehensive legislation referred to as the Montana Water Use Act of 1973, codified in Title 85, chapter 2, to implement Article IX, section 3(4), of the Montana Constitution, which requires that the Legislature provide for the administration, control, and regulation of water rights and establish a system of centralized records of all water rights, and to implement Article IX making the water of the state subject to appropriation for beneficial use by its citizens; and

WHEREAS, Title 85, chapter 2, as amended, provides for the comprehensive adjudication of water rights and the continued development of Montana's water resources through a permit and change authorization process; and

WHEREAS, historically in Montana, water has been developed, water use rights acquired, and changes in water use completed in the absence of the adjudication of water rights in a source of supply; and

WHEREAS, since July 1, 1973, it has been the intent of the Legislature that provisional permits and change authorizations be issued pursuant to statutory standards in the absence of a completed adjudication in a source of supply; and

WHEREAS, the dissent filed with the Montana Supreme Court decision raises a concern that the majority decision may be interpreted to apply statewide, but that interpretation does not reflect the intent of the Legislature to allow for the continued wise and efficient use of Montana's water resources and Montana's growing economy as required under Title 85, chapter 2."

*Water Claims Rulemaking Authority:* See compiler's comments under 85-2-243.

*Section Not Codified:* Section 89-8-102.1, R.C.M. 1947, a saving clause, was not codified in the MCA. It has not been repealed and is still valid law. Reference may be made to sec. 14, Ch. 485, L. 1975.

**Chapter Administrative Rules**

Title 36, chapter 12, subchapter 1, ARM Water Rights Bureau — Montana Water Use Act.
Title 36, chapter 16, ARM Water reservations — Water Resources Division.

**Chapter Case Notes**

*Failure to Show by Preponderance of Evidence That Claim Should Be Rejected:* In an appeal concerning water rights along the Teton River, the objectors disputed claims to divert water for irrigation and stock water that were based on activity beginning in 1874 by an early settler on the basis that the claimants could not point to precise facts and dates of activities of the early settler that established water rights. The claimants cross-appealed the Water Court's determination that recognized two separate irrigation rights, dating 1880 and 1887. The Supreme Court concluded that the objectors failed to overcome the statutory presumption in favor of the truth of the elements set forth in the statement of claim and failed to show by a preponderance of the evidence that the claims should be rejected. Evidence that the early settler was cropping a precise number of acres, along with the fact that crops will not grow in the area without irrigation, and evidence of historical accounts of the settler's stock water use supported the existence of the claims. In regard to the cross-appeal, the Supreme Court concluded that the Water Court misapprehended the evidence and that the evidence demonstrated a continuation of the irrigation effort, which the early settler began in 1880 and completed in 1887. Therefore, the claimants were entitled to a single irrigation right with a priority date of 1880. In re Danreuther Ranches, 2017 MT 241, 389 Mont. 15, 403 P.3d 332.

*United States Water Rights for Stock Watering in Pothole Lake — Reservation Based on 1926 Federal Reservation — Prior Reservation Not Limited by 1976 Act of Congress:* The Water Court did not err in concluding that the United States owned reserved water rights for stock watering by permittees in a pothole lake on federal grazing land based on Public Water Reserve (PWR) 107, which was signed by the President of the United States in April 1926. The original PWR 107 reserved "every spring or waterhole, located on unsurveyed public land." The broad language of the reservation clearly included the pothole lake and there was nothing to indicate that the original reservation had been reversed. A 1980 federal regulation did not retroactively unreserve water sources like the pothole lake that had been reserved since 1926. Rather, the regulation implemented statutory changes that Congress made in 1976 intended to limit future reservations of federal land. The BLM's failure to inventory the pothole was likewise not significant in light of the original withdrawal, and while the BLM could have submitted its claim to the Reserved Water Rights Compact Commission, it was not required to do so. The Supreme Court found no evidence that the Water Court made any determination based on contested issues of material fact. U.S. v. Barthelemess Ranch Corp., 2016 MT 348, 386 Mont. 121, 386 P.3d 952.

*Water Court — Demonstrated by Uncontradicted Evidence That Predecessors Constructed Diversion — Construction of Reservoir Not Until 1930s:* In a water adjudication action involving multiple reservoirs, claimants, and diversion points along the Teton River, the Water Court found that the canal's predecessors never developed the water diversion point referenced in the 1890 Notice. Additionally, the Water Court found that one reservoir was properly administered under the 1890 Notice. On appeal, the Supreme Court reversed, holding that substantial uncontradicted evidence established that a diversion point was developed as contemplated in the 1890 Notice and that there was not a good faith effort to establish one of the reservoirs until the mid-1930s. The case was remanded to establish a new priority date. Teton Co-op Canal Co. v. Teton Co-op Reservoir Co., 2015 MT 344, 382 Mont. 1, 365 P.3d 442. See also In re Teton Co-op Reservoir Co., 2018 MT 66, 391 Mont. 66, 414 P.3d 1249.

*Water Rights — Abandonment Determined by Flume Capacity:* Claimants sharing a diversion point filed statements of claim for existing rights based on notices of appropriation filed between 1895 and 1913. The Chief Water Judge found that the flume historically limited the quantity of water that had been put to beneficial use and the claimants were limited to this amount. The Supreme Court held that abandonment of a water right requires both nonuse and intent to abandon, which may be inferred from the circumstances of each case. Based on the evidence, the claimed water in excess of the flume's historical capacity had been abandoned. Skelton Ranch, Inc. v. Pondera County Canal & Reservoir Co., 2014 MT 167, 375 Mont. 327, 328 P.3d 644.

*Retroactive Applicability of 79 Ranch — Presumption of Abandonment Rebutted:* The state appealed the Water Court's decision that the plaintiffs produced sufficient evidence to overcome the presumption that they abandoned their water right claim. The Supreme Court affirmed, concluding that the Water Court properly retroactively applied 79 Ranch, Inc. v. Pitsch, 204 Mont. 426, 666 P.2d 215 (1983), in analyzing the abandonment of a pre-1973 water right and that the claimants submitted sufficient evidence to overcome the presumption of abandonment. Heavirland v. St., 2013 MT 313, 372 Mont. 300, 311 P.3d 813.

*Motion to Amend Priority Date Properly Denied — Insufficient Evidence to Infer Mistake by Predecessor:* Seeking to amend the priority date of a water right, the owner alleged that the initial owner of the water right had intended to designate a different section of land in the notice of water right filed more than a century ago. The Water Master concluded that the facts in the record were insufficient to require an inference that the preceding owner had meant to designate any section of land other than the one contained in the notice. On appeal, the Supreme Court affirmed the Water Master's denial of the ranch's motion to amend the priority date, concluding that the preponderance of the evidence did not suggest that the earlier owner had made a mistake in the notice of filing. Weinheimer Ranch, Inc. v. Pospisil, 2013 MT 87, 369 Mont. 419, 299 P.3d 327.

*Water Right Held Through Pre-1973 Mesne Conveyances — Summary Judgment Incorrectly Granted — Abandonment of Right Factually Dependent:* Duncan, who lived on a tract of land in Madison County, used water from a spring located on property (the large parcel) now owned separately from the parcel (the small parcel) lived on by Duncan. In 1950, Duncan conveyed all the property in what is now the large and small parcels to Baker. In 1951, Baker divided the property, conveying the large parcel and all appurtenances to Halse and reserving the small parcel for herself. Baker made no express reservation of water rights with the reserved property, and the deed to Halse conveying the large parcel made no express grant of water rights. For the next 10 years, Baker made no use of the house located on the small parcel. In 1961, Baker conveyed the small parcel to the Hunts, expressly conveying water rights on the property. In 1963, Halse filed a declaration of vested ground water rights for the "total flow of all springs" located on the large parcel. Fosseco, who acquired the large parcel from Halse, conveyed it, through mesne conveyances, to M.S. Consulting. The Hunts conveyed the small parcel, through mesne conveyances, to the Axtells. All uses of the water were for livestock and domestic use. In 1993, the Axtells filed a notice of water rights with the Department of Natural Resources and Conservation. M.S. Consulting subsequently served the Axtells with notice that their water rights would be cut off in 45 days, and the Axtells brought an action to enjoin the discontinuance of their water supply. The District Court granted summary judgment for the Axtells, and M.S. Consulting appealed. The Supreme Court reviewed the background of the prior appropriation law in Montana, noting that because the current statutes recognize existing water rights, the law before the 1973 statutes were enacted is still the law with regard to water rights acquired before 1973. The Supreme Court reviewed the pre-1973 law and concluded that the water rights appurtenant to all the property passed to Baker but that there was a factual issue whether, as a result of Baker's nonuse of the property and its water rights for over 10 years, Baker had abandoned the water rights conveyed to her by Duncan. If the abandonment occurred, there was no reservation of conveyance and no right to use of the water after that period of nonuse. The issue of abandonment, the Supreme Court noted, depended in turn upon several other issues, such as whether Baker intended to abandon her water right. The Supreme Court also agreed with M.S. Consulting that several other issues of fact raised by the company may also exist, although it noted that these other issues were only material if the District Court ruled a particular way on the question of abandonment. Because there were genuine issues of material fact, the Supreme Court held that the District Court erred in granting summary judgment to the Axtells. Axtell v. M.S. Consulting, 1998 MT 64, 288 M 150, 955 P2d 1362, 55 St. Rep. 276 (1998).

*EPA Regulations Granting "Treatment as State" Status to Develop Water Standards Within Flathead Indian Reservation Upheld:* In 1987, Congress added section 518(e) to the Clean Water Act, which authorized the Environmental Protection Agency (EPA) to permit Indian tribes "to be treated as a state" (TAS) for purposes of promulgating water quality standards. In 1992, the Confederated Salish and Kootenai Tribes (tribes) applied for TAS status for all surface waters within the Flathead Indian Reservation. Montana opposed the EPA's grant of TAS status to the tribes because it would extend to lands and surface water within reservation boundaries owned in fee by nontribal members. After the EPA Director, upon determining that the tribes possessed inherent authority over nonmembers on fee land, approved the tribes' TAS application, Montana filed suit, arguing that the EPA's regulations granting TAS status to all sources of pollutant emissions within the boundaries of the Flathead Indian Reservation permitted the tribes to exercise broader authority over nonmembers than the inherent tribal powers recognized as necessary to self-governance. The District Court granted summary judgment to the EPA and tribes. In affirming the District Court decision, the Ninth Circuit Court, citing its previous holdings in Mont. v. U.S., 450 US 544 (1981), and Strate v. A-1 Contractors, 520 US 438, 137

L Ed 2d 661, 117 S Ct 1404 (1997), ruled that based upon the finding that the activities of the nonmembers posed such a serious and substantial threat to tribal health and welfare, the EPA's decision to grant the tribes TAS authority was valid and reflected the appropriate application of inherent tribal regulatory authority over nonconsenting nonmembers. Mont. v. U.S. Envtl. Protection Agency, 137 F3d 1135 (9th Cir. 1998), certiorari denied, 142 L Ed 2d 227, 119 S Ct 275 (1998).

*Abandonment of Water Right by Nonuse Distinguished From Abandonment of Easement or Ditch Right:* After hearing, the Water Court determined that three water rights held by appellants Pitsch had been abandoned because of nonuse over approximately 40 years. The Supreme Court held that the Water Court did not err in holding that the case was not governed by E.E. Eggebrecht, Inc. v. Waters, 217 M 291, 704 P2d 422 (1985), and that there was no conflict between Eggebrecht and 79 Ranch, Inc. v. Pitsch, 204 M 426, 666 P2d 215 (1983). Eggebrecht concerns the abandonment of easements by grant, more analogous to a ditch right by grant than a water right, while 79 Ranch concerns abandonment of a water right. There is no reason why Montana law on abandonment of those interests should be identical. In re Adjudication of Musselshell River Rights, 255 M 43, 840 P2d 577, 49 St. Rep. 866 (1992).

*State Water Court — Jurisdiction to Adjudicate Indian Reserved Water Rights:* In an original proceeding to determine jurisdiction over controversies involving federal water rights of the Water Court over Indian tribes and water flowing through state reservations, the Supreme Court held that Article I of the Montana Constitution does not bar state jurisdiction to adjudicate Indian reserved water rights. With the 1952 McCarran amendment, the U.S. Congress diminished the scope of absolute federal jurisdiction over controversies involving federal water rights by allowing state courts concurrent jurisdiction to adjudicate federal water rights. In Colo. River Water Conserv. District v. U.S., 424 US 800 (1976), the U.S. Supreme Court held that the McCarran amendment applied to Indian water rights. The state Legislature's enactment of the Water Use Act (Title 85, ch. 2) pursuant to Art. IX, sec. 3, Mont. Const., constitutes a valid and binding consent of the people of Montana to Congress' grant of state jurisdiction over Indian reserved water rights. State ex rel. Greely v. Confederated Salish & Kootenai Tribes, 219 M 76, 712 P2d 754, 42 St. Rep. 1856 (1985), followed in Blackfeet Indian Nation v. Hodel, 634 F. Supp. 646, 43 St. Rep. 863 (D.C. Mont. 1986).

*Water Use Act — Adjudication of Federal and Indian Reserved Water Rights:*

The Montana Water Use Act (Title 85, ch. 2) is adequate on its face to adjudicate federal reserved water rights. Although federal reserved rights differ from state appropriative rights in origin, determination of priority date, and quantification standards, the Water Use Act recognizes the distinction between federal reserved rights and state-created appropriative rights. As the Act permits each different class of water rights to be treated differently, the Act is adequate to allow for adjudication of federal reserved rights. State ex rel. Greely v. Confederated Salish & Kootenai Tribes, 219 M 76, 712 P2d 754, 42 St. Rep. 1856 (1985), followed in Blackfeet Indian Nation v. Hodel, 634 F. Supp. 646, 43 St. Rep. 863 (D.C. Mont. 1986).

The Montana Water Use Act (Title 85, ch. 2) is adequate on its face to adjudicate Indian reserved water rights. Although state appropriative water rights and Indian reserved water rights differ in origin and definition, the Water Use Act, as amended, permits the Water Court to treat Indian reserved water rights differently from state appropriative rights. The Water Use Act does not state explicitly that the Water Court shall apply federal law in adjudicating Indian reserved rights; however, state courts are required to follow federal law with regard to those water rights. State ex rel. Greely v. Confederated Salish & Kootenai Tribes, 219 M 76, 712 P2d 754, 42 St. Rep. 1856 (1985), followed in Blackfeet Indian Nation v. Hodel, 634 F. Supp. 646, 43 St. Rep. 863 (D.C. Mont. 1986).

*Forty Years of Nonuse as Raising Rebuttable Presumption of Intent to Abandon:* In litigation to establish plaintiff's and defendant's respective priorities to water appropriated from Big Coulee Creek, the evidence showed that neither had used previously appropriated water for a period of at least 40 years. Thus, the District Court did not err in holding that under section 89-802, R.C.M. 1947 (now repealed), the appropriation rights of both parties had been abandoned for lack of use of the water. While abandonment of a water right is a question of fact, nonuse for a period of at least 40 years raises, in effect, a rebuttable presumption of abandonment. A claim that the predecessors of the parties could not afford to use the water by irrigating their land did not excuse the failure to use the water or rebut the presumption of abandonment since economics could excuse nearly every otherwise abandoned water right. 79 Ranch, Inc. v. Pitsch, 204 M 426, 666 P2d 215, 40 St. Rep. 981 (1983), followed in In re Adjudication of Clark Fork River Drainage, 254 M 11, 833 P2d 1120, 49 St. Rep. 591 (1992), in which nonuse for 23-plus years was sufficient to constitute a presumption of abandonment despite the fact that the water right was carried as an asset on the county's books during the period of nonuse. See also Axtell v. M.S. Consulting, 1998 MT 64, 288 M 150, 955 P2d 1362, 55 St. Rep. 276 (1998), and Heavirland v. St., 2013 MT 313, 372 Mont. 300, 311 P.3d 813, in which the Supreme Court concluded that the 79 Ranch abandonment analysis applies retroactively.

*Lack of Reasonable Diligence Shown in Three-Year and Three-Month Delay in Diversion:* Where the evidence, in litigation between the plaintiff and defendant to establish their relative rights to appropriated water, showed that the defendant's predecessor in interest filed a notice of appropriation for 30 cfs of water on May 30, 1973, but failed to divert the water to a sprinkler irrigation system until 3 years and 3 months later, the District Court did not err in holding that the defendant's predecessor failed to exercise reasonable diligence in diversion of the water. Under the rationale of Dept. of Natural Resources and Conservation v. Intake Water Co., 171 M 416, 558 P2d 1110 (1976), the defendant was required to show there had been an ongoing effort to divert the water. The lack of parts for the sprinkler system notwithstanding, the record showed no ongoing effort to proceed to completion of the sprinkler system and the diversion. 79 Ranch, Inc. v. Pitsch, 204 M 426, 666 P2d 215, 40 St. Rep. 981 (1983). See also Teton Co-op Canal Co. v. Teton Co-op Reservoir Co., 2015 MT 344, 382 Mont. 1, 365 P.3d 442.

*Priority of Senior Main Stem Water Rights Over Junior Tributary Water Rights:* Appellant owns water rights in Clear Creek dating to 1910. Petitioners have water rights in Rock Creek dating to 1896. Clear Creek is a tributary of Rock Creek. In 1970, appellant obtained a court order directing the Rock Creek Water Commissioner to "carry out" the Clear Creek water rights of appellant. Following the District Court order, the Water Commissioner honored in full the requests of appellant for water without regard to any priority in the relationship of the creeks' water rights. As a result, at times of water shortage, senior Rock Creek decreed waters are cut off. In 1977, petitioners filed this action to rescind the 1970 order and to direct the Water Commissioner to subject the Clear Creek water rights to the priorities of Rock Creek water rights. The District Court ruled that the 1970 court order, applied by the Water Commissioner to fulfill junior appropriations ahead of prior decreed rights, was improper. The Supreme Court affirmed the District Court's order and further stated that the order did not violate due process. The Supreme Court reasoned that the only rights affected by the District Court order were the rights of the parties before the court. Granite Ditch Co. v. Anderson, 204 M 10, 662 P2d 1312, 40 St. Rep. 630 (1983).

*Chapter's Application to Rights Perfected Prior to Its Effective Date:* Except where it indicates a contrary intent, this chapter applies to water rights perfected prior to the effective date of this chapter; and failure to comply with the terms of this chapter does not render a conveyance or reservation void but suspends ability to use the right until the statutorily mandated permission is granted by the Department of Natural Resources and Conservation. Castillo v. Kunnemann, 197 M 190, 642 P2d 1019, 39 St. Rep. 460 (1982), modifying, on rehearing, 38 St. Rep. 1618 (1981).

**Chapter Law Review Articles**

Montana Groundwater Law in the Twenty-First Century, Carter, 70 Mont. L. Rev. 221 (2009).

Indian Aboriginal and Reserved Water Rights, an Opportunity Lost, Carter, 64 Mont. L. Rev. 377 (2003).

The Adjudication of Montana's Waters—A Blueprint for Improving the Judicial Structure, MacIntyre, 49 Mont. L. Rev. 211 (1988).

A New Rule of Law for the Abandonment of Water Rights, Hightower, 45 Mont. L. Rev. 167 (1984).

Montana Water Rights—A New Opportunity, Stone, 34 Mont. L. Rev. 57 (1973).

Modern Western Legislation as a Pattern for Changes in the Montana Law of Water Rights, 28 Mont. L. Rev. 95 (1966).

Problems Arising Out of Montana's Law of Water Rights, Stone, 27 Mont. L. Rev. 1 (1965).

Improving Montana Water Law, Stone, 20 Mont. L. Rev. 60 (1958).

Water Justice Under the Big Sky: Locating a Human Right to Water in Montana Law, Brown, 45 Pub. Land & Resources L. Rev. 41 (2022), https://scholarworks.umt.edu/plrlr/vol45/iss1/5/.

Constitutional Protections of Property Interests in Western Water, Huffman, Lund, & Scoones, 41 Pub. Land & Resources L. Rev. 27, 32 (2019).

Ground Water Management in Montana: On the Road From Beleaguered Law to Science-Based Policy, Ziemer, Kendy, & Wilson, 27 Pub. Land & Resources L. Rev. 75 (2006).

**Chapter Collateral References**

Data Quality in the Montana Water Rights Information System, Performance Audit, Mont. Leg. Audit Div. (November 2022), https://leg.mt.gov/content/Publications/Audit/Report/21P-01.pdf.

Water Rights in Montana, Montana Environmental Quality Council.

Montana's Water—Where Is It? Who Can Use It? Who Decides?, Environmental Quality Council (2004).

## Part 1
## General Provisions

**Part Administrative Rules**

Title 36, chapter 12, subchapter 1, ARM Water Rights Bureau — Montana Water Use Act.

Title 36, chapter 13, ARM Water measurement.

Title 36, chapter 16, ARM Water reservations — Water Resources Division.

### 85-2-101. Declaration of policy and purpose.

**Compiler's Comments**

*1997 Amendment:* Chapter 497 inserted (5) concerning provisional permitting in absence of complete adjudication of water rights in source of supply; inserted (6) concerning legislative intent that state retain and exercise authority to regulate water use; and made minor changes in style. Amendment effective May 1, 1997.

*Saving Clause:* Section 22, Ch. 497, L. 1997, was a saving clause.

*Severability:* Section 23, Ch. 497, L. 1997, was a severability clause.

*Retroactive Applicability:* Section 24, Ch. 497, L. 1997, provided: "[Section 1] [85-2-101] applies retroactively, within the meaning of 1-2-109, to all permits and change authorizations issued by the department of natural resources and conservation after July 1, 1973."

*1973 Title:* The title of Ch. 452, L. 1973, read: "An act providing a system for the appropriation and use of surface and groundwater; providing a procedure for the determination and confirmation of existing water rights; establishing a system of centralized records of all water rights; repealing sections 89-121 through 89-123, 89-801 through 89-804, 89-807 through 89-816, 89-829 through 89-842, 89-844 and 89-845, 89-847 through 89-855, 89-857 through 89-864, 89-2912, 89-2913, 89-2919 through 89-2925, and 89-2935, R.C.M. 1947; amending sections 89-1001, 89-2911, 89-2915, 89-2917, and 89-2918, R.C.M. 1947."

*Section Not Codified:* Section 89-865, R.C.M. 1947, a short title clause, was not codified in the MCA. The clause has not been repealed and is still valid law. Reference may be made to sec. 1, Ch. 452, L. 1973.

**Case Notes**

*Discretion of Water Court to Review All Elements of Water Right When Priority Date Disturbed on Appeal:* In Teton Co-op Canal Co. v. Teton Co-op Reservoir Co., 2015 MT 344, 382 Mont. 1, 365 P.3d 442 (Teton I), the Supreme Court reversed the priority date of the plaintiff's water rights and remanded the matter to the Water Court to determine the correct priority date. The Water Court determined a priority date for the water rights and also apportioned volume limits for those rights. The plaintiff appealed, contending that the Water Court had improperly expanded the scope of the remand by apportioning water limits. The Supreme Court disagreed, holding that when a priority date of a water right is disturbed on appeal the Water Court has discretion to consider whether other elements of the right are affected. Given that the volume assigned by the Water Court was based on substantial evidence, the Supreme Court affirmed the decision. Teton Co-op Canal Co. v. Teton Co-op Reservoir Co., 2018 MT 20, 390 Mont. 210, 412 P.3d 1.

*Storage of Water — Beneficial Use:* The Water Court held that the plaintiff water right owner was permitted to store its direct flow water in a reservoir during irrigation season as long as it used that water in the same irrigation season and did not exceed the amount of direct flow to which it was entitled. The defendant, a neighbor, had argued that storing the water could not be considered a beneficial use and appealed the decision to the Supreme Court. The court affirmed, noting that the storage can be considered a beneficial use because it stabilizes and conserves water supplies, as long as it does not interfere with another water right. Teton Co-op Canal Co. v. Teton Co-op Reservoir Co., 2018 MT 20, 390 Mont. 210, 412 P.3d 1.

*Storage Right Added to Direct Flow Water Right — Entitled to Priority Dates of Existing Rights:* Storage may be added to a direct flow water right as long as the water user does not store water at a rate exceeding the volumetric flow rate allowed by its direct flow rate or store water at times outside of the diversion period allowed by the direct flow right. Therefore, although the claimant's reservoirs were not part of the original irrigation system, the reservoirs were entitled to the same priority dates as the original water rights because they did not expand the amount of water diverted or its period of diversion. Teton Co-op Reservoir Co. v. Farmers Co-op Canal Co., 2015 MT 208, 380 Mont. 146, 354 P.3d 579. See also Teton Co-op Canal Co. v. Teton Co-op Reservoir Co., 2018 MT 20, 390 Mont. 210, 412 P.3d 1, and In re Teton Co-op Reservoir Co., 2018 MT 66, 391 Mont. 66, 414 P.3d 1249.

*Issuance of Permits for Ground Water on Indian Reservations Precluded Until Tribes' Federally Reserved Water Rights Defined and Quantified:* The Department of Natural Resources and Conservation (DNRC) granted a permit for the use of ground water on the Flathead Indian Reservation. Despite prior holdings in In re Application for Beneficial Water Use Permit, 278 M 50, 923 P2d 1073 (1996), and Confederated Salish & Kootenai Tribes v. Clinch, 1999 MT 342, 297 M 448, 992 P2d 244 (1999), that the state does not have jurisdiction to issue new use permits prior to formal adjudication of the tribes' reserved water rights, DNRC contended that this case was distinguishable because the tribes' federally reserved water right concerning ground water is legally uncertain. However, the only federal authority cited by either party, Tweedy v. Tex. Co., 286 F. Supp. 383 (D.C. Mont. 1968), supported the conclusion that there is no distinction between surface water and ground water for purposes of determining what water rights are reserved because those rights are necessary to the purpose of an Indian reservation. Further, neither of the prior state cases excluded ground water. The tribes contended that as a sovereign nation, they should not be required to defend their water rights in piecemeal fashion before a hostile forum and that pursuant to 85-2-311 and the prior case law, the ground water permit was illegal. The Supreme Court agreed with the tribes and vacated the permit, finding no reason to limit the scope of the prior holdings by excluding ground water from the tribes' federally reserved water rights in this case. Two statutory methods for comprehensively adjudicating Indian reserved water rights already exist—a general inter sese adjudication or negotiations with the Montana Reserved Water Rights Compact Commission. Therefore, the tribes should not be required to defend their water rights by participating in the DNRC hearings process. Thus, DNRC cannot determine whether water is available on the Flathead Reservation, whether surface water or ground water, because DNRC cannot determine whether the issuance of permits would affect existing water rights until the tribes' preeminent water rights are defined and quantified. Confederated Salish & Kootenai Tribes v. Stults, 2002 MT 280, 312 M 420, 59 P3d 1093 (2002).

*Quantification of Tribal Water Rights Required — 1997 Amendment Unconstitutional:* In an effort to avoid the result created by In re Application for Beneficial Water Use Permit, 278 M 50, 923 P2d 1073, 53 St. Rep. 777 (1996), the 1997 Legislature passed Senate Bill No. 97, which substantively eliminated the former protection of Indian reserved water rights provided by 85-2-311. The state conceded that the protection of existing water rights in Art. IX, sec. 3, Mont. Const., includes water rights reserved for Indian reservations and contended that those rights were not affected by Senate Bill No. 97, but rather that those rights would be considered in that part of the analysis requiring that water be legally available. The state also pointed out the provisional nature of any water use permit and alleged that there were some uses that would not diminish instream flow and that use permits could thus be issued without affecting reserved Indian water rights, regardless of the quantification of those rights. However, under State ex rel. Greely v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 219 M 76, 712 P2d 754 (1985), it was found that Indian reserved water rights are owned by the Indians, and because that ownership interest exists under federal law and does not depend on the use of the water, the Supreme Court was not persuaded that the state's permitting process might allow uses of Indian reserved water that in the long term might not diminish instream flows. The provisional nature of permits was not determinative either because use of water that may have been reserved by federal law for the tribes was no less impermissible simply because it was temporary and subject to termination following final quantification of the tribes' rights by adjudication or negotiation. Under the 1997 amendments, permits are still limited to water that is "legally available", but that phrase is not defined. Construing the phrase in a manner that sustains its constitutional validity, the Supreme Court interpreted "legally available" to mean that there is water available that, among other things, has not been federally reserved for Indian tribes. Therefore, as in In re Application for Beneficial Water Use Permit, the state cannot determine whether water is legally available on the Flathead Reservation because it cannot determine whether the issuance of permits would affect existing water rights until the tribes' rights are quantified by a compact negotiation under 85-2-702 or by a general inter sese water rights adjudication. To allow the issuance of water use permits on the reservation prior to quantification of the tribes' pervasive reserved right would require use of water that might belong to the tribes, in violation of Art. IX, sec. 3, Mont. Const., which protects existing water rights whether adjudicated or not. Confederated Salish & Kootenai Tribes v. Clinch, 1999 MT 342, 297 M 448, 992 P2d 244, 56 St. Rep. 1356 (1999).

*No Implied Severance of Water From School Trust Lands:* Neither 77-6-115, nor the principles of the Water Use Act set forth in 85-2-101, nor the prior appropriation doctrine gives rise to an implied severance of water from land in the school trust land leases or estops the state from claiming title to the water rights on school trust land. Dept. of State Lands v. Pettibone, 216 M 361, 702 P2d 948, 42 St. Rep. 869 (1985). See also Advocates for School Trust Lands v. St., 2022 MT 46, 408 Mont. 39, 505 P.3d 825, holding that 85-2-441, which allows a water right owner to put water from a well or developed spring located on private land to beneficial use on state trust land and presumes against a state ownership in that water right, was not facially unconstitutional.

*Navigability for Title Purposes — Federal Test — Dearborn River Navigable:* Federal law controlled the issue of whether the Dearborn River was, at the time Montana became a state, navigable for the purpose of determining title to its bed. Under federal law, rivers are navigable in law if they are navigable in fact, and they are navigable in fact if they were used or capable of being used, in their ordinary condition, as highways for commerce over which trade and travel were or could be conducted in the customary modes of trade and travel on the water at the time of the state's admission to the Union. Navigability in fact can be determined by using the log-floating test. That test was satisfied by evidence that in 1887, 2 years before Montana became a state, the Dearborn was used to float about 100,000 railroad ties and that in 1888 or 1889, one or two log drives a year were floated down the river, one of them containing 700,000 board feet. Title to the riverbed was thus in the federal government when Montana became a state in 1889 and was transferred to the State upon its admission to the Union. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984). (Annotator's note: Chapters 429, 556, and 599, L. 1985, pertained to recreational use of waterways and related issues.)

*Public Recreational Use Rights on Dearborn River — Limits:* Navigability for public use is governed by state law and is separate from the question of navigability under federal law for title purposes. The question is whether waters owned by the State under Art. IX, sec. 3(3), Mont. Const., are susceptible to recreational use by the public. The capability of use of the waters for recreational purposes determines the availability of the waters for recreational use by the public. Whether or not a private party owns the bed beneath the waters is irrelevant. The constitution and the Public Trust Doctrine bar a private party from interfering with the public's right to use of the surface of the waters owned by the State, and any surface waters that are capable of recreational use may be so used by the public without regard to streambed ownership or navigability for nonrecreational purposes. The public's recreational use right extends to the point of the high-water marks. The public does not have the right to cross over private property to reach waters upon which they have a recreational use right, though they may portage around barriers in the water in the least intrusive way possible, avoiding damage to any private property holder's rights. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984). (Annotator's note: Chapters 429, 556, and 599, L. 1985, pertained to recreational use of waterways and related issues.)

*Public Use — Irrigation — Eminent Domain:* Pursuant to Title 69, ch. 4, part 4, an agricultural landowner may request a utility to relocate an overhead utility line for the purpose of installing an improved irrigation system. The use of water in the irrigation of farmland is a public use for which the right of eminent domain will lie. McTaggart v. Mont. Power Co., 184 M 329, 602 P2d 992, 36 St. Rep. 2079 (1979).

*"All Existing Rights":* The right to acquire water rights is a valuable right, and its value often depends on its priority; hence, to deprive plaintiff of his priority by dismissal because petition was filed under former law is to deprive him of an existing and valuable water right. Gen. Agriculture Corp. v. Moore, 166 M 510, 534 P2d 859 (1975).

*Beneficial Impoundment:* Counterclaim against petition of irrigation district for additional appropriation of water was properly denied where evidence was uncontradicted that water was going to waste and that impoundment would be beneficial. Sunset Irrigation District v. Ailport, 166 M 11, 531 P2d 1349 (1974).

*Private Beneficial Use a Public Use:* Because Art. III, sec. 15, Mont. Const., declares a private beneficial use of water to be a public use, individuals who have put water to a beneficial use should not have their rights arbitrarily diluted, under claim of sovereign rights or otherwise. Paradise Rainbow v. Fish & Game Comm'n, 148 M 412, 421 P2d 717 (1966).

**Law Review Articles**

Constitutional Teeth: Sharpening Montana's Clean and Healthful Environment Provision, Kansman, 81 Mont. L. Rev. 247 (2020).

The Adjudication of Montana's Waters—A Blueprint for Improving the Judicial Structure, MacIntyre, 49 Mont. L. Rev. 211 (1988).

Water Law: Recognition of a Public Water Right, 28 Mont. L. Rev. 249 (1967).

The Water Use Act, Wicks, 43 Pub. Land & Resources L. Rev. 243 (2020).

An Analysis of the Potential Conflict Between the Prior Appropriation and Public Trust Doctrines in Montana, Josephson, 8 Pub. Land L. Rev. 81 (1987).

## 85-2-102. Definitions.

**Compiler's Comments**

*2019 Amendment:* Chapter 59 in definition of appropriate near beginning inserted "or "appropriation""; inserted definitions of appropriation right, nonconsumptive use, and water right; and made minor changes in style. Amendment effective October 1, 2019.

*2017 Amendment:* Chapter 69 in definition of change in appropriation right inserted (b) regarding change in water use related to method of irrigation; and made minor changes in style. Amendment effective October 1, 2017.

*2013 Amendments — Composite Section:* Chapter 235 in definition of commission substituted "fish and wildlife commission" for "fish, wildlife, and parks commission". Amendment effective July 1, 2013.

Chapter 335 inserted definition of national forest system lands; and made minor changes in style. Amendment effective October 1, 2013.

Chapter 409 substituted current definition of developed spring for former definition that read: ""Developed spring" means any artificial opening or excavation in the ground, however made, including any physical alteration at the point of discharge regardless of whether it results in any increase in the yield of ground water, from which ground water is sought or can be obtained or through which it flows under natural pressures or is artificially withdrawn." Amendment effective October 1, 2013.

Chapter 421 inserted definition of stream depletion zone; and made minor changes in style. Amendment effective October 1, 2013.

*Saving Clause:* Section 40, Ch. 235, L. 2013, was a saving clause.

*2011 Amendment:* Chapter 29 in definition of appropriate in (f) after "mitigation" deleted "as provided in 85-2-360 and 85-2-362"; and in definition of beneficial use in (e) after "mitigation" deleted "as provided in 85-2-360 and 85-2-362". Amendment effective October 1, 2011.

*2009 Amendment:* Chapter 251 in definition of correct and complete at end after "required information" inserted "for the department to begin evaluating the information". Amendment effective July 1, 2009.

*Applicability:* Section 9, Ch. 251, L. 2009, provided: "[This act] applies to applications received by the department after [the effective date of this act]." Effective July 1, 2009.

*2007 Amendments — Composite Section:* Chapter 213 in definition of appropriate inserted (d) defining the term in the case of the United States department of agriculture, forest service; and made minor changes in style. Amendment effective April 17, 2007.

Chapter 391 inserted definitions of aquifer recharge, aquifer storage and recovery project, mitigation, and municipality; in definition of appropriate inserted (f) concerning aquifer recharge or mitigation and inserted (g) concerning aquifer storage and recovery project; in definition of beneficial use inserted (e) concerning aquifer recharge or mitigation and inserted (f) concerning aquifer storage and recovery project; and made minor changes in style. Amendment effective May 3, 2007.

Chapter 448 in definition of appropriate in (c) near middle substituted "change an appropriation right to instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource" for "lease water"; and in definition of beneficial use in (c) near middle after "parks" inserted "through a change in an appropriation right for instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource" and after "pursuant to" deleted "a lease authorized under". Amendment effective May 8, 2007.

*Preamble:* The preamble attached to Ch. 391, L. 2007, provided: "WHEREAS, it is the policy of this state to encourage the wise use of the state's water resources by making them available for appropriation and to provide wise utilization, development, and conservation of the water of the state for the maximum benefit of its people with the least possible degradation of the state's natural aquatic ecosystems; and

WHEREAS, there has been confusion regarding ground water issues in closed basins and the Department of Natural Resources and Conservation needs guidance from the Legislature on how to proceed; and

WHEREAS, the basin closure laws were passed to protect senior appropriators while the state water adjudication is ongoing; and

WHEREAS, ground water development in closed basins should be able to proceed as long as the applicant collects the necessary scientific information to determine if there will be an adverse effect on a prior appropriator and takes the necessary actions to mitigate or prevent any adverse effects on a prior appropriator; and

WHEREAS, it is critical that the Legislature develop state water policies in a way that protects the prior appropriation doctrine while at the same time protecting the quality of Montana's water and the ability to appropriate water consistent with section 85-1-101, MCA, and Article IX, section 3, of the Montana Constitution; and

WHEREAS, augmentation is statutorily authorized for the Clark Fork River Basin only; and

WHEREAS, the Department of Natural Resources and Conservation has developed administrative rules and applied augmentation through these administrative rules to all basins even though not specifically statutorily authorized; and

WHEREAS, administrative rules and rulemaking must comply with section 2-4-305, MCA, and may not engraft material not contemplated by the Legislature; and

WHEREAS, this bill provides definitions and a new procedure for mitigation and aquifer recharge."

*Severability:* Section 29, Ch. 391, L. 2007, was a severability clause.

*Applicability:* Section 31, Ch. 391, L. 2007, provided: "[This act] applies to applications for an appropriation right in a closed basin filed on or after [the effective date of this act]." Effective May 3, 2007.

*Termination Provision Repealed:* Section 8(2), Ch. 448, L. 2007, repealed sec. 11, Ch. 658, L. 1989, sec. 4, Ch. 740, L. 1991, and secs. 5 and 6, Ch. 123, L. 1999, which terminated the amendments to this section June 30, 2009. Effective May 8, 2007.

*2005 Amendments — Composite Section:* (Temporary version) Chapter 70 in definition of appropriate in (a) at end inserted "for a beneficial use" and inserted (d) regarding instream flow to benefit fishery resource; in definition of beneficial use inserted (d) regarding instream flow to benefit fishery resource; and made minor changes in style. Amendment effective March 24, 2005.

(Version effective July 1, 2009) In definition of appropriate in (a) at end inserted "for a beneficial use"; and made minor changes in style.

(Temporary version) Chapter 85 in definition of appropriate in (a) at end after "water" inserted "for a beneficial use" and in (d) substituted "to maintain or enhance streamflows to benefit the fishery resource in accordance with 85-2-408" for "in the Upper Clark Fork River basin, to maintain and enhance streamflows to benefit the fishery resource in accordance with 85-2-439"; in definition of beneficial use in (d) substituted "a use of water through a change in appropriation right or lease for instream flow to benefit the fishery resource in accordance with 85-2-408" for "a use of water to maintain and enhance streamflows to benefit the fishery resource in the Upper Clark Fork River basin as part of the Upper Clark Fork River basin instream flow pilot program authorized under 85-2-439"; and made minor changes in style. Amendment effective March 24, 2005.

(Version effective July 1, 2009) In definition of appropriate in (a) at end after "water" inserted "for a beneficial use" and inserted (c) including maintenance or enhancement of streamflows for fisheries; in definition of beneficial use inserted (c) including use of water through a change in appropriation right or lease for instream flow for fisheries; and made minor changes in style.

Style changes were slightly different in the chapters. In each case, the codifier chose appropriate text.

*Saving Clause:* Section 15, Ch. 70, L. 2005, was a saving clause.

*Termination Provision Repealed:* Section 9, Ch. 85, L. 2005, repealed sec. 14, Ch. 487, L. 1995, which terminated amendments to this section June 30, 2005. Effective March 24, 2005.

*2001 Amendment:* Chapter 78 inserted definition of developed spring; and made minor changes in style. Amendment effective March 20, 2001.

*Extension of Termination Date:* Sections 5 through 7, Ch. 123, L. 1999, amended sec. 11, Ch. 658, L. 1989, and secs. 4 and 7, Ch. 740, L. 1991, by extending the termination date imposed by Ch. 658, L. 1989, and Ch. 740, L. 1991, to June 30, 2009. Effective March 19, 1999. Section 14, Ch. 487, L. 1995, provided a termination date of June 30, 2005, for one version of this section; however, the 1995 termination date was not extended by Ch. 123, L. 1999.

*1997 Amendment:* (All three versions) Chapter 497 in definition of existing right inserted "or "existing water right"" and inserted second sentence concerning water rights reserved under federal law and water rights created under state law; inserted definition of state water reservation; in definition of watercourse, near end, substituted "constructed" for "manmade"; and made minor changes in style. Amendment effective May 1, 1997.

*Saving Clause:* Section 22, Ch. 497, L. 1997, was a saving clause.

*Severability:* Section 23, Ch. 497, L. 1997, was a severability clause.

*1995 Amendments:* Chapter 418 deleted definition of Board that read: ""Board" means the board of natural resources and conservation provided for in 2-15-3302"; and made minor changes in style. Amendment effective July 1, 1995.

(Temporary version) Chapter 487 in definition of appropriate inserted (d) to include the maintenance and enhancement of streamflows in the Upper Clark Fork basin; in definition of beneficial use inserted (d) to include the maintenance and enhancement of streamflows in the upper Clark Fork basin; and made minor changes in style. Amendment effective April 14, 1995, and terminates June 30, 2005.

(Version effective July 1, 1999) In definition of appropriate inserted (c) to include the maintenance and enhancement of streamflows in the Upper Clark Fork basin; in definition of beneficial use inserted (c) to include the maintenance and enhancement of streamflows in the Upper Clark Fork basin; and made minor changes in style. Amendment effective July 1, 1999, and terminates June 30, 2005.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*Severability:* Section 11, Ch. 487, L. 1995, was a severability clause.

*Applicability:* Section 12, Ch. 487, L. 1995, provided: "[This act] applies to all applications for changes in appropriation rights, permits, and water reservations received by the department of natural resources and conservation after [the effective date of this act]." Effective April 14, 1995.

*1993 Amendments:* Chapter 370 inserted definitions of correct and complete and substantial credible information; and made minor changes in style. Amendment effective April 16, 1993.

Chapter 629 inserted definition of late claim. Amendment effective July 1, 1993.

*Preamble:* The preamble attached to Ch. 629, L. 1993, provided: "WHEREAS, Article IX, section 3, of the Montana Constitution provides that all existing rights to the use of any waters for any useful or beneficial purpose are recognized and confirmed; and

WHEREAS, Article IX, section 3, of the Montana Constitution requires the Legislature to provide for the administration, control, and regulation of water rights and to establish a system of centralized records for such rights; and

WHEREAS, the Legislature established a procedure for the general adjudication of existing rights to the use of water and provided in section 85-2-226, MCA, that the failure to file a claim of existing right on or before the deadline established under section 85-2-221, MCA, would establish a conclusive abandonment of the right; and

WHEREAS, the Montana Supreme Court, in In the Matter of the Adjudication of the Water Rights Within the Yellowstone River, 253 Mont. 167, 832 P.2d 1210 (1992), has determined that the failure to file a statement of claim to an existing right to the use of water on or before April 30, 1982, resulted in the forfeiture of that right; and

WHEREAS, it has come to the attention of the Legislature that the forfeiture of water rights for failure to timely file a claim has in some instances caused hardship, and the Legislature accordingly desires to provide water rights claimants with one more opportunity to file a water rights claim in the general adjudication; and

WHEREAS, in so doing, the Legislature recognizes that the adjudication process will not be completed for many years but that a substantial amount of progress has already occurred in the adjudication, specifically in the area of water rights compacts with Indian tribes and the federal government and in decrees and stipulations involving individual claimants, and thus the Legislature believes that it is necessary to ensure that parties who have been recognized as having filed claims on or before April 30, 1982, and holders of federal reserved water rights are not adversely affected by the inclusion of new parties in the adjudication by subjecting the right to file those claims in remission to certain terms and conditions; and

WHEREAS, the Legislature wishes to provide protection for timely filed claimants from incurring additional costs or from being adversely affected by justifiable reliance on the presumption of abandonment; and

WHEREAS, the Legislature wishes to provide a conclusive adjudication of existing water rights; and

WHEREAS, the Legislature recognizes that according a privilege to file additional statements of claim presents a potential for abuse by those who may attempt to refile previously adjudicated claims, and the Legislature thus believes that the courts should deal harshly with any abuses by such measures as, without limitation, the imposition of sanctions under [former] Rule 11, Montana Rules of Civil Procedure [now superseded]; and

WHEREAS, the Legislature determines that the deadline for filing water right claims as provided in this bill appropriately balances the interests at stake in the adjudication.

THEREFORE, the Legislature finds it is appropriate to make the following amendments to sections 85-2-102, 85-2-211 [now repealed], 85-2-213, 85-2-221, 85-2-225, 85-2-226, 85-2-234, 85-2-237, and 85-2-306, MCA, in order to provide for the acceptance of late claims to the use of water under the conditions set forth in this bill. Additionally, the Legislature directs the Water Policy Committee, in coordination with the Department of Justice, the Department of Natural Resources and Conservation, and the Reserved Water Rights Compact Commission, to conduct an interim study regarding certain late claim issues."

*Severability:* Section 11, Ch. 370, L. 1993, was a severability clause.

*Retroactive Applicability:* Section 12, Ch. 370, L. 1993, provided: "[Sections 1 through 8] apply retroactively, within the meaning of 1-2-109, to all applications and objections pending on [the effective date of this act] [effective April 16, 1993] that are subject to the provisions of Title 85, chapter 2."

*Saving Clause:* Section 11, Ch. 629, L. 1993, provided: "[This act] does not affect proceedings that were begun before [passage and approval of this act] [approved May 11, 1993] in which relief for damages have been sought based upon the diversion, impoundment, or withdrawal of water without a water right established under state law."

*Severability — Partial Nonseverability:* Section 12, Ch. 629, L. 1993, provided: "(1) If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

(2) It is the intent of the legislature that each part of [this act] is essentially dependent upon [section 4], which amends 85-2-221, and that if one part of [section 4], except subsection (3)(f)(ii), is held unconstitutional or invalid, all other parts of [this act] are invalid."

*1991 Amendments — Name Change:* Section 2, Ch. 28, L. 1991, directed the Code Commissioner to change the name of the Fish and Game Commission to the Fish, Wildlife, and Parks Commission wherever the name appears in the MCA. Accordingly, the name was changed in this section as directed.

Chapter 308 inserted definition of salvage.

Chapter 543 inserted definition of watercourse.

Chapter 805 in definition of ground water, after "water", substituted "that is beneath the ground surface" for "beneath the land surface or beneath the bed of a stream, lake, reservoir, or other body of surface water, and which is not part of that surface water". Amendment effective July 1, 1991.

*1991 Statement of Intent:* The statement of intent attached to Ch. 308, L. 1991, provided: "A statement of intent is required for this bill in order to provide guidance to the department of natural resources and conservation concerning the adoption of rules to allow the appropriation, use, and change of use of salvaged water. The legislature directs the department of natural resources and conservation to adopt rules that promote the conservation and efficient use of water by implementing the provisions of this bill."

*Saving Clause:* Section 5, Ch. 308, L. 1991, was a saving clause.

*1989 Amendment:* In definition of appropriate inserted (c) regarding water leasing; in definition of beneficial use inserted (c) regarding water use pursuant to lease; inserted definition of Commission; and made minor changes in phraseology and form. Amendment effective May 11, 1989, and terminates June 30, 1993.

*1985 Amendment:* Inserted (2)(b) expanding the definition of beneficial use to include water leasing; inserted definition of change in appropriation right; and deleted former (12) that read: ""Slurry" means a mixture of water and insoluble material."

**Case Notes**

## DECISIONS UNDER CURRENT LAW

*City's Updated Growth Plan Not Protected Interest With Respect to Application for Change of Water Use:* The city of Bozeman appealed the decision of a Department of Natural Resources and Conservation hearing examiner granting an application to change the place of use of a water use permit issued to a private water and wastewater developer. The city argued that its adoption of an updated water facility plan as part of its adopted growth policy required the developer's change application to be denied under 85-2-402(2)(a) as adversely affecting the city's planned use. On appeal, the Supreme Court disagreed. A "permit", "certificate", or "state water reservation" is required to trigger the type of adverse use of planned or existing use of water rights that would warrant denial of a change application. A growth policy or water facility plan is not a permit, certificate, or state water reservation and thus does not create the type of protectable interest contemplated by 85-2-402. Bozeman v. Dept. of Natural Resources and Conservation, 2020 MT 214, 401 Mont. 135, 471 P.3d 46.

*Original Decree Did Not Specify Where Water Right Could Be Used — Rights Appurtenant to All Irrigated Lands in Ranch Before Split — Right Determined by Historic Acres Irrigated:* The claimants owned adjoining ranches, which were once owned as a single ranch in the Blackfoot River Basin. In 1909, when the ranch was under common ownership, the District Court issued a decree declaring the water rights of users of Nevada Creek and its tributaries. Among the rights that the District Court decreed to the ranch were four water rights for irrigation from Nevada Creek. In 1912, the ranch was split and sold. No deed transfer for the properties in the ensuing years reserved specific water rights as appurtenances to the land. Both predecessors of the claimants filed water rights claims. The Water Court largely adopted the Water Master's conclusion that proportionally split the flow rates of each decreed right between the claimants based on the historic number of acres irrigated on each property using the formula provided in Spaeth v. Emmett, 142 Mont. 231, 383 P.2d 812 (1963). The Supreme Court affirmed, reasoning that because the original District Court decree itself did not specify parcels within the ranch where the water right could be used, the rights were appurtenant to all of the irrigated lands on the ranch. In re Quigley, 2017 MT 278, 389 Mont. 283, 405 P.3d 627.

*Water Court Properly Applied Clear Error Standard to Water Master's Findings of Fact — Need Firm Conviction of Mistake to Overrule:* The Water Court did not err in applying the clear error standard to the Water Master's findings of fact on a "decree exceeded" issue remark. The Supreme Court reasoned that it is a necessary outcome that at least one party will be apportioned less water than it previously claimed when the Water Court adjudicates a "decree exceeded" issue remark. Additionally, the Supreme Court was not left with a firm conviction that the Water Master committed a mistake in resolving the issue remark when it apportioned the parties less water than they originally claimed. The Water Master did not clearly err in its factual findings and properly applied the formula from Spaeth v. Emmett, 142 Mont. 231, 383 P.2d 812 (1963), to divide the water right given the evidence before it. In re Quigley, 2017 MT 278, 389 Mont. 283, 405 P.3d 627.

*Crow Compact Upheld — Compact Held Reasonable — Public Property and Water Rights Reasonable Under Compact — Public Comment Satisfied Due Process:* Individual objectors to the Crow Water Compact appealed to the Supreme Court following the Water Court's determination that the Compact was valid. This action was subsequent to In re Crow Water Compact, 2015 MT 217, 380 Mont 168, 354 P.3d 1217. The objectors, who were not parties to the Compact but who owned land and water rights near the reservation, argued that the Water Court did not apply the proper legal standard, that they sustained injury because the Compact was unreasonable, and that their due process rights were violated during the Compact negotiation process. The Supreme Court disagreed with the objectors, holding that the Water Court correctly applied the correct standard articulated in Crow I, that the Compact was reasonable and had reasonable protection of state water and property rights, that the objectors' argument of future potential problems was beyond the scope of its review, that reservation of water for public recreation, wildlife, and aquatic life was for the benefit of the public, and that the record demonstrated sufficient opportunities for public comment during the Compact approval process. In re Crow Water Compact, 2015 MT 353, 382 Mont. 46, 364 P.3d 584.

*Water Court — Demonstrated by Uncontradicted Evidence That Predecessors Constructed Diversion — Construction of Reservoir Not Until 1930s:* In a water adjudication action involving multiple reservoirs, claimants, and diversion points along the Teton River, the Water Court found that the canal's predecessors never developed the water diversion point referenced in the 1890

Notice. Additionally, the Water Court found that one reservoir was properly administered under the 1890 Notice. On appeal, the Supreme Court reversed, holding that substantial uncontradicted evidence established that a diversion point was developed as contemplated in the 1890 Notice and that there was not a good faith effort to establish one of the reservoirs until the mid-1930s. The case was remanded to establish a new priority date. Teton Co-op Canal Co. v. Teton Co-op Reservoir Co., 2015 MT 344, 382 Mont. 1, 365 P.3d 442. See also In re Teton Co-op Reservoir Co., 2018 MT 66, 391 Mont. 66, 414 P.3d 1249.

*Promulgation of Definition of "Place of Storage" Rendering Declaratory Judgment Moot:* Based on complaints from other water users, the Department of Natural Resources and Conservation (DNRC) determined that plaintiff had created a place of storage for water on plaintiff's property without DNRC permission and demanded that plaintiff cease its storage activities and seek an application to change its water rights pursuant to ARM 36.12.1901 (now repealed), which requires filing of an application to change a water right when an applicant desires to change the place of storage of a water right. Plaintiff sought a declaratory judgment on grounds that because DNRC rules did not define "place of storage", the DNRC was attempting to enforce an ostensible rule that was not lawfully promulgated and was therefore unenforceable. The District Court dismissed plaintiff's claim with prejudice, and plaintiff appealed. However, prior to the decision of the appeal in this case, the DNRC properly promulgated a rule defining "place of storage" that included plaintiff's irrigation pumping pit, so plaintiff's claim that the DNRC relied on an improperly promulgated rule to disallow plaintiff's continued use of the irrigation pumping pit without permission lost any practical purpose for the parties and was moot and incapable of repetition. The Supreme Court therefore declined to address the merits of plaintiff's claim and affirmed the District Court's dismissal of plaintiff's claim because the District Court reached the proper conclusion, albeit for a different reason. Serena Vista, LLC v. Dept. of Natural Resources and Conservation, 2008 MT 65, 342 M 73, 179 P3d 510 (2008).

*Post-1973 Evidence Unpersuasive as to Adjudication of Existing Water Right:* The purpose of statewide water rights adjudication is to adjudicate those rights as they existed on July 1, 1973, the effective date of the Montana Water Use Act. Therefore, the Water Court did not err in refusing to consider evidence pertaining to a water right claimant's actions taken after 1973 as showing a lack of intent to abandon the water right. In re Adjudication of Clark Fork River Drainage, 254 M 11, 833 P2d 1120, 49 St. Rep. 591 (1992).

*"Beneficial Use":* No matter how a water right is expressed in the decrees of the Water Court, that expression of amount is not the final determining factor. Beneficial use is the basis, the measure, and the limit of all rights to the use of water. McDonald v. St., 43 St. Rep. 576 (1986), rehearing denied, 220 M 519, 722 P2d 598, 43 St. Rep. 1397 (1986).

*"Water" — Diffuse Surface Water:* In light of the common-law rules pertaining to appropriation of diffuse surface water and the 1977 amendment of the definition of "water" so as to include diffuse surface water, it was reasonable for the appellant to believe that diffuse surface water was not subject to the provisions of the Water Use Act in 1975. State ex rel. Wilson v. Dept. of Natural Resources and Conservation, 199 M 189, 648 P2d 766, 39 St. Rep. 1294 (1982).

## DECISIONS UNDER FORMER LAW

*Storage of Water Beneficial Use — BLM Held Stock Watering Rights for Use by Grazing Permittees — Multiple Appropriators Can Claim Water Rights from Same Source:* The Water Court did not err in concluding that the United States Bureau of Land Management (BLM) held stock watering rights under Montana law in reservoirs constructed on federal land for the use of grazing permittees. The Supreme Court recognized that storage of water as a beneficial use is expressly provided by the Montana Constitution and that the BLM was entitled to proceed under Montana law to appropriate water in its reservoirs for use by grazing permittees and others. It has long been the common law and then statutory law in Montana that multiple appropriators can claim water rights from the same source and that the first in time has the best right. While overappropriation creates its own issues, it does not mean that the person or entity that made the first use on a water source acquired the right to exclude any other person or entity from claiming water from the same source. A fundamental precept of Montana water law is that multiple claims can exist on a single source of water. U.S. v. Barthelemess Ranch Corp., 2016 MT 348, 386 Mont. 121, 386 P.3d 952.

*Existing Right to Appropriate Distinguished From Valid Appropriation:* When a corporation posted and filed notices of appropriation as required by section 89-810, R.C.M. 1947 (now repealed), it acquired an "existing right" to appropriate water. However, this "existing right" was not synonymous with a valid appropriation and would not ripen into such an appropriation until the remaining requirements under section 89-811, R.C.M. 1947 (now repealed), were met. Dept. of Natural Resources and Conservation v. Intake Water Co., 171 M 416, 558 P2d 1110 (1976).

*Slough — Natural Watercourse:* A slough naturally followed a channel which was cut down in gravel and rock, and was fed by natural springs, seepage, surface drainage and wastewater from a canal. Such a slough constituted a natural watercourse and was subject to appropriation. Meine v. Ferris, 126 M 210, 247 P2d 195 (1952).

*Diffused Surface Water Defined — Not Subject to Appropriation:* The essential characteristics of diffused surface waters are that their flows are short-lived and that the waters are spread over the ground and not concentrated or confined in flows of legal watercourses or bodies of water conforming to the definition of lakes or ponds. Diffused surface waters in a gulch on land above where a natural channel has developed are not subject to appropriation. Doney v. Beatty, 124 M 41, 220 P2d 77 (1950).

*"Watercourse" Defined:*

A "watercourse", within the meaning of the water right laws, from which an appropriation for purposes of irrigation may be made, may consist of a well-defined channel into which water from a slough fed by irrigation of adjoining lands through seepage or through a ditch constructed by the owners of such lands for draining purposes finds its way, and which water through years of so flowing has acquired a permanent character as the natural drainage of the particular watershed. W. Side Ditch Co. v. Bennett, 106 M 422, 78 P2d 78 (1938). (See 1991 amendment.)

Where waters flowing in a channel with regularity from year to year were made to do so through the instrumentality of man and have through years of so flowing acquired a permanent character as the natural drainage of the watershed or where they come from springs formed from seepage or percolation or surface water collecting in a canyon or from wells accidentally developed while drilling for oil, etc., they constitute a watercourse. Popham v. Holloron, 84 M 442, 275 P 1099 (1929), distinguished in McGowan v. U.S., 206 F. Supp. 439 (D.C. Mont. 1962). (See 1991 amendment.)

*Beneficial Use — Swimming Pool or Fishpond:* Diversion of water to maintain a swimming pool or fishpond may have been for a beneficial use and hence the basis of a valid appropriation. Osnes Livestock Co. v. Warren, 103 M 284, 62 P2d 206 (1936).

*Appropriation on Private Land:* An appropriation of water is not confined to waters flowing in streams upon public land but may be made from a stream flowing through privately owned land by invoking the aid of eminent domain proceedings, if necessary. Mettler v. Ames Realty Co., 61 M 152, 201 P 702 (1921).

*Beneficial Use — Immediate Use Unnecessary:* While the appropriation must be for some useful or beneficial purposes, the use to which the water is to be applied need not be immediate but may be prospective or contemplated. Bailey v. Tintinger, 45 M 154, 122 P 575 (1912); Smith v. Duff, 39 M 382, 102 P 984 (1909); Miles v. Butte Elec. & Power Co., 32 M 56, 79 P 549 (1905); Toohey v. Campbell, 24 M 13, 60 P 396 (1900).

*Beneficial Use — Intent of Claimant:* This section requires that, at the time of taking the initial steps, the claimant must have an intention to apply the water to a useful or beneficial purpose. Bailey v. Tintinger, 45 M 154, 122 P 575 (1912); Smith v. Duff, 39 M 382, 102 P 984 (1909); Miles v. Butte Elec. & Power Co., 32 M 56, 79 P 549 (1905); Toohey v. Campbell, 24 M 13, 60 P 396 (1900); Power v. Switzer, 21 M 523, 55 P 32 (1898).

*Beneficial Use — Irrigation:* Where a successor in interest of an appropriator of water greatly increased the amount of grass for pasture by irrigation, such use of the water was a useful and beneficial one within the meaning of the statute. Sayre v. Johnson, 33 M 15, 81 P 389 (1905).

## 85-2-103. Measurement of water.

### Case Notes

*Water Court Not Required to Assign Separate Volume Limits — Water Right Place or Purpose of Use May Be Changed:* The Water Court did not err when it chose not to assign separate volume limits for each of four sets of combined irrigation and stock water rights. A water right cannot be enlarged beyond the original beneficial use by the original appropriator to the injury of others. However, place or purpose of use may be changed, subject to the complaints of another user. The purpose of the Water Use Act (Title 85, ch. 2) and adjudication process is to determine with finality the extent of all water rights in the state as of July 1, 1973. Any changes made to a right prior to the Water Use Act followed the no-injury rule, and any changes made after would require following the statutory procedures under the Water Use Act. The record did not indicate, nor did the parties argue, that another user was injured by a change to any of the named water rights' purposes or places of use prior to the Water Use Act. In re Eldorado Coop Canal Co., 2016 MT 94, 383 Mont. 205, 369 P.3d 1034.

*Water Master's Flow Rate Findings Supported by Substantial Evidence — No Clear Error in Adopting Findings:* The Water Court did not err when it limited the flow rate of a water right to 300 miner's inches instead of 225 miner's inches. Any competing water user's claim to the 75 inches of the right was addressed and resolved by the Water Master, who determined that no other party made claim to the portion of the right on a statement of claim. Furthermore, the claimant claimed the full 300 inches on its statement of claim, which the Water Court correctly stated is entitled to prima facie proof. The Water Court plainly analyzed the Master's factual findings to determine whether substantial evidence supported the findings, and found no clear error. In re Eldorado Coop Canal Co., 2016 MT 94, 383 Mont. 205, 369 P.3d 1034.

*New Trial to Lift Injunction on Water Use Properly Denied:* As a result of defendant's negligent operation of an irrigation ditch and the risk associated with high volume flow in the ditch, the District Court enjoined defendant from a flow of more than 400 miner's inches through the ditch until defendant could prove that the ditch could safely transport more. Defendant sought a new trial to lift the injunction on grounds that new evidence stemming from the successful operation of the ditch since the trial could not have been presented earlier. The motion for a new trial was denied, and on appeal, the Supreme Court affirmed. Although the evidence was new, the fact remained that varying flows when combined with other variables could still produce damaging results, so the evidence was insufficient to warrant a new trial. Graveley Simmental Ranch Co. v. Quigley, 2003 MT 34, 314 M 226, 65 P3d 225 (2003).

*Water Right Limited to Carrying Capacity of Irrigation Ditch:* Through the years, Quigley was granted three water rights for irrigation from Ophir Creek for 25, 100, and 800 miner's inches, for a total or 925 inches. However, Quigley's own 1928 survey and a 1930 District Court decision established that the carrying capacity of the irrigation ditch was 800 miner's inches, and that amount was confirmed by the District Court in the present case. Quigley appealed, claiming the right to transport the full 925 inches through the ditch at one time. The Supreme Court disagreed. Because it is elementary that a ditch cannot carry more water than its smallest dimensions allow, it was held that although Quigley had the right to divert 925 miner's inches, that right was subject to the ditch description stating that the ditch had a carrying capacity of 800 miner's inches. Since 1930, the description was unchallenged and relied on by Quigley to his benefit, and under res judicata, Quigley could not now complain of its inaccuracy. Graveley Simmental Ranch Co. v. Quigley, 2003 MT 34, 314 M 226, 65 P3d 225 (2003). See also Quigley v. McIntosh, 88 M 103, 290 P 266 (1930), and Quigley v. McIntosh, 110 M 495, 103 P2d 1067 (1940).

*"Beneficial Use":* No matter how a water right is expressed in the decrees of the Water Court, that expression of amount is not the final determining factor. Beneficial use is the basis, the measure, and the limit of all rights to the use of water. McDonald v. St., 43 St. Rep. 576 (1986), rehearing denied, 220 M 519, 722 P2d 598, 43 St. Rep. 1397 (1986).

*Expression of Water Rights in Volume Rather than Flow Rate — Not Unconstitutional:* Even though almost every irrigation water right prior to the 1973 water use law was expressed in flow rate, the requirement of 85-2-234(5)(b) that the final decree state "the amount of water, rate, and volume, included in the right" is not unconstitutional under Article IX, sec. 3(1) of the Montana Constitution. The amount, rate, and volume are at all times subject to the requirement of beneficial use. McDonald v. St., 43 St. Rep. 576 (1986), rehearing denied, 220 M 519, 722 P2d 598, 43 St. Rep. 1397 (1986).

*Supreme Court Original Jurisdiction Over Declaratory Action Concerning Statewide Water Adjudication:* The Supreme Court had power to determine an action for declaratory judgment involving the constitutionality of the requirement in 85-2-234 that final water decrees state "the amount of water, rate, and volume, included in the right". The issue affects all rights in the statewide adjudication process. Determination of the issue by the Supreme Court: (1) will provide guidance to the water court; (2) is in the interests of judicial economy; and (3) would serve the public policy of the state by expediting the determination of existing water rights. McDonald v. St., 43 St. Rep. 576 (1986), rehearing denied, 220 M 519, 722 P2d 598, 43 St. Rep. 1397 (1986).

*Measurement of Water in Reservoir:* Devices for measuring the water in a storage reservoir should be such that at a glance anyone may tell the exact number of acre-feet therein at any time, thus obviating the necessity of calling in engineers or others to measure it. The details of operation, presenting a practical or engineering problem rather than a judicial one, should properly be left to the parties interested; and if the court's intervention or assistance is required in that regard, a motion for modification of the decree should suffice. Fed. Land Bank v. Morris, 112 M 445, 116 P2d 1007 (1941).

*One Miner's Inch Per Acre — Not Rule of Thumb:* The trial court awarded a 3-acre-foot water right to be used over a 4-month irrigation season. This was the equivalent of one-half miner's inch continuous flow. Although the courts of this state have generally observed the rule of thumb of 1 miner's inch per acre, there is no law in Montana to this effect. The better rule is that the requirements of the lands in a particular locality for adaptable crops should fix the amount of a water right. Fed. Land Bank v. Morris, 112 M 445, 116 P2d 1007 (1941).

*Water Right Decrees:* For many years the courts in water right decrees have followed the custom of expressing water rights in terms of flow per unit of time without stating during how many hours or days the water could be taken or defining the volume of water which could be used. This may not be taken as an adjudication that appropriations were of an absolutely uninterrupted flow, thereby removing the established limitation of the appropriator's right to water actually taken and beneficially applied. Nor should this fact be interpreted as a right to expand appropriations to the detriment of subsequent appropriators. Quigley v. McIntosh, 110 M 495, 103 P2d 1067 (1940).

*Measurement of Water for Irrigation:* In the absence of a statute regulating the amount of water reasonably necessary for irrigation, the rule has generally been observed by the court to allow 1 inch an acre in fixing the amount required for economical use unless the evidence discloses that a greater or less amount is required. Further, the system of irrigation in common use in the locality, if reasonable and proper under existing conditions, is to be taken as the standard. However, an appropriator cannot be compelled to divert the water according to the most scientific method known. Worden v. Alexander, 108 M 208, 90 P2d 160 (1939).

### 85-2-105. Water policy interim committee duties.

**Compiler's Comments**

*2021 Amendment:* See 2021 Session Law for amendment made by sec. 118, Ch. 261, L. 2021. Amendment effective April 20, 2021.

*2015 Amendment:* Chapter 122 in (1) substituted "water policy committee established in 5-5-231" for "environmental quality council"; in (2) and (3) substituted "water policy committee" for "environmental quality council"; deleted former (4) that read: "(4) The legislative services division shall provide staff assistance to the environmental quality council to carry out its water policy duties"; and made minor changes in style. Amendment effective March 25, 2015.

*2009 Amendment:* Chapter 285 in (2) at end of introductory clause after "council" substituted "may" for "shall". Amendment effective July 1, 2009.

*1999 Amendment:* Chapter 275 inserted (2)(c) requiring environmental quality council to assist with interagency coordination related to Montana's water resources; and made minor changes in style. Amendment effective October 1, 1999.

*Preamble:* The preamble attached to Ch. 275, L. 1999, provided: "WHEREAS, Montana's river and stream corridors and associated riparian areas play a critical role in supporting beneficial uses of water, agricultural production, fish and wildlife values, recreation opportunities, and related economic and aesthetic benefits; and

WHEREAS, Montana's river and stream corridors are experiencing tremendous pressure from increased use and development; and

WHEREAS, owners of land along Montana's rivers and streams, water users, and recreationists recognize the importance of maintaining and conserving these corridors and would increase their efforts to do so if they had information on relevant and affordable voluntary best management practices (BMPs); and

WHEREAS, although there are a variety of efforts at the federal, state, local, and watershed levels to address river and stream corridor issues, there is a continuing need to pool scarce resources, increase effectiveness through improved coordination of policies, data, and implementation, and provide a greater opportunity for innovative solutions such as voluntary BMPs; and

WHEREAS, Montana is fortunate to have a successful BMP and streamside management policy model that was developed by Montana's forestry community, with the assistance of the Environmental Quality Council, that can serve as an example for other river and streamside land uses; and

WHEREAS, the Montana Legislature's bipartisan Environmental Quality Council has a 28-year history of helping Montanans constructively solve complex and divisive natural resource issues and has the capability and the unique perspective to facilitate the compilation and dissemination of BMP information for river and streamside land uses and to assist with interagency coordination."

*Streamside Corridor and Riparian Management:* Section 2, Ch. 275, L. 1999, provided: "Streamside corridor and riparian management — coordination and dissemination of best management practice information. Consistent with its authorities set forth in Titles 75 and 85, the environmental quality council, in cooperation with affected and interested stakeholders, shall:

(1) review and summarize state, federal, and local policies and programs related to streamside corridor and riparian management in Montana and identify overlapping or conflicting goals or implementation mechanisms;

(2) coordinate with existing groups to evaluate existing streamside and riparian best management practices and existing educational and informational programs regarding the dissemination of information regarding voluntary BMPs, to ensure coordination in water quality protection efforts and consistency with 75-5-702 and 75-5-703; and

(3) coordinate with others to develop cost-effective mechanisms to compile and disseminate the conclusions from activities conducted pursuant to subsections (1) and (2) and in doing so, maximize the likely implementation of the practices."

*1997 Amendment:* Chapter 45 in (3)(d), at end, substituted "water information system maintained by the natural resource information system under 90-15-305" for "water resources data management system maintained by the department under 85-2-112".

*1995 Amendments:* Chapter 418 in (2)(b), after "department", deleted "of natural resources and conservation"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 545 in (1) deleted former first four sentences that read: "There is a permanent water policy committee of the legislature. The committee consists of eight members. The senate committee on committees and the speaker of the house of representatives shall each appoint four members on a bipartisan basis. The committee shall elect its chairman and vice-chairman"; at beginning of first sentence of (1), in (2), in introductory clause, and in (3), in introductory clause, substituted "environmental quality council" for "committee"; substituted (4) regarding staff assistance for former language that read: "The environmental quality council shall provide staff assistance to the committee. The committee may contract with experts and consultants, in addition to receiving assistance from the environmental quality council, in carrying out its duties under this section"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1995 Transition:* Section 81, Ch. 545, L. 1995, provided: "(1) The members of the legislative council, as provided in 5-11-101, the members of the legislative finance committee, as provided in 5-12-202, the members of the legislative audit committee, as provided in 5-13-202, and the members of the environmental quality council, as provided in 5-16-101, must be appointed as soon as possible following [the effective date of this section] [effective April 27, 1995].

(2) To implement the changes provided in [this act], the office of the legislative council, the office of budget and program planning, and the department of administration shall establish all necessary authorizations during the accounting preparation process known as the "turnaround" process, beginning in April or May 1995, to administer the several appropriations made by any means to programs of the legislative branch agencies consolidated under [sections 3 and 4] [5-2-503 and 5-2-504] for fiscal year 1996 or 1997 or the biennium ending June 30, 1997, as appropriations to a single legislative agency while maintaining the specific identification, legislative intent, and purpose for which the appropriations were made. During this transition, the executive director may authenticate documents as required to accomplish the purposes of [this act]. Appropriate changes on the statewide budgeting and accounting system and the payroll, personnel, and position control system must also be made and authorized as required to accomplish the purposes of [this act].

(3) Personnel and property of the environmental quality council are transferred to the legislative services division effective July 1, 1995."

*1985 Amendment:* In (2)(a) near middle, after "environmental quality council", inserted "of the state library"; and in (2)(b) near beginning, substituted "state library" for "department of administration", and near end substituted "library's" for "department's".

*1993 Amendment:* Chapter 478 in (3)(b) substituted "renewable resource grant and loan program" for "water development program". Amendment effective July 1, 1993.

*Late Claim Interim Study — Water Policy Committee:* Section 10, Ch. 629, L. 1993, provided: "(1) The water policy committee, in coordination with the department of justice, the department of natural resources and conservation, and the reserved water rights compact commission, shall conduct an interim study analyzing the need for and desirability and impacts of allowing the remission of forfeited water rights in addition to the remissions authorized under the provisions of [this act] [Ch. 629, L. 1993]. The study must analyze the impacts of additional forfeiture remission on:

(a) the general stream adjudication process, including but not limited to the issues of adequacy and Montana's and the federal government's concurrent water rights adjudication jurisdiction;

(b) the federal government and Indian tribes regarding existing and future negotiated water rights compacts, including but not limited to the issues of equal protection;

(c) timely claimants' water use;

(d) timely claimants' legal rights, including but not limited to constitutional requirements regarding the taking of property;

(e) the potential reduction in agricultural production resulting from not granting additional forfeiture remissions and the associated social and economic impacts;

(f) the issue of fairness to both late and timely claimants;

(g) the potential increased costs to the state and to late and timely claimants;

(h) potential losses in revenue to the state resulting from the state's failure to file claims to existing water rights on or before April 30, 1982;

(i) implications involving the state's trust responsibilities;

(j) potential litigation against the state by private parties; and

(k) impacts on municipal and county governments resulting from late claims.

(2) The study must include an analysis of the potential for identifying individuals or classes of individuals whose additional forfeiture remission could be authorized in a manner that would have an acceptable impact on those issues identified under subsection (1). The classes of late claimants include but are not limited to previously decreed water rights holders and classes established according to filing date.

(3) The study must be completed in consultation with other relevant state and federal agencies, relevant groups and organizations, and other interested and affected citizens.

(4) The water policy committee shall report the results of the study to the 54th legislature by October 1, 1994. The report must include any legislative or other policy options recommended by the water policy committee."

*1991 Amendment:* In (3)(e) substituted "as provided in 5-11-210" for "not less than once every biennium". Amendment effective March 20, 1991.

*Study of Dam Safety and Water Reservation Laws — 1991:* Section 7, Ch. 659, L. 1991, provided for a study of dam safety and water reservation laws and regulations by the Water Policy Committee, with the cooperation of the Department of Natural Resources and Conservation.

*Preamble:* The preamble to Ch. 573, L. 1985, provided: "WHEREAS, the Select Committee on Water Marketing was commissioned by the 1983 Legislature to undertake a study of the advantages and disadvantages of water marketing; and

WHEREAS, the Select Committee in completing its study determined that Montana needs to address broader questions of water policy in order to secure Montana's interests in allocation and management of state waters; and

WHEREAS, the Select Committee has presented a comprehensive package of recommendations that must be considered as a whole; and

WHEREAS, these recommendations serve to revise Montana's water policy in order to maximize Montana's authority over management of state waters and other natural resources and to conserve water for existing and future beneficial uses by Montanans.

THEREFORE, the Legislature of the State of Montana finds that this legislation and other recommendations of the Select Committee on Water Marketing constitute an appropriate revision of state water policy necessary to secure Montana's interests for present and future benefit to Montanans."

## 85-2-111. Department powers.

### Compiler's Comments

*2015 Amendment:* Chapter 294 inserted (2) concerning Flathead reservation water management board; and made minor changes in style. Amendment effective April 24, 2015.

## 85-2-112. Department duties.

### Compiler's Comments

*1997 Amendment:* Chapter 45 deleted former (4) that read: "(4) in cooperation with other state agencies, institutions, colleges, and universities, establish and maintain a centralized and efficient water resources data management system sufficient to make available and readily accessible, in a usable format, to state agencies and other interested persons, information on the state's water resources, out-of-state water resources that affect the state, existing and potential uses, and existing and potential demand. All other state agencies, institutions, and colleges and universities shall cooperate with the department in the development and maintenance of this system"; and made minor changes in style.

*1995 Amendment:* Chapter 418 in (1), after "adopted", deleted "by the board". Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1985 Amendment:* Inserted (4) requiring the Department to establish and maintain a centralized water resources data management system.

*1983 Amendment:* Deleted "declarations" before "claims" twice in (2) and once in (3); in (5) after "filing" deleted "declarations with the department or"; and inserted (6) requiring the Department to adopt rules necessary to reject, modify, or condition permit applications in highly appropriated basins or subbasins.

*Statement of Intent:* The statement of intent attached to SB 370 (Ch. 448, L. 1983) provided: "A statement of intent is required for this bill because it delegates rulemaking authority to the Department of Natural Resources and Conservation in sections 1 and 17.

The intent is to provide the Department with the authority to adopt rules necessary to reject, modify, or condition water use permit applications in highly appropriated basins or subbasins. A rule may only be adopted under this section upon a petition signed by a certain percentage of water users in the source of supply or by direction of the Legislature. The petition must allege certain facts showing the need for the adoption of a rule. The Department must act on the petition within 60 days by: denying the petition and providing reasons to the petitioners; informing the petitioners that additional study of the allegations is necessary before denying or proceeding with the petition; or initiating the rulemaking proceeding. The rulemaking procedure must follow the notice requirements of the Montana Administrative Procedure Act, and in addition the Department must publish notice of the rulemaking hearing once a week for three successive weeks in a newspaper of general circulation in which the source is located and also serve an individual copy of the notice on any known water right holder in the source of supply according to the Department's records.

This bill also delegates rulemaking authority to the Board of Natural Resources and Conservation [functions now transferred to Department of Natural Resources and Conservation] in section 2.

The intent is to provide the Board with the authority to adopt, through rules, fees to be paid by applicants, petitioners, and others for services provided. Fees could be adopted for: rulemaking hearings to reject, modify, or condition water use permit applications in highly appropriated basins or subbasins; administrative hearings conducted by the Department to settle objections to permit or change applications; costs incurred during the field investigation of a complaint against a permittee and related revocation proceedings; and for costs incurred in the field verification of issued and completed permits and change approvals."

*1981 Amendment:* Added "subject to the powers and duties of the supreme court under 3-7-204" to (1).

**Collateral References**

Data Quality in the Montana Water Rights Information System, Performance Audit, Mont. Leg. Audit Div. (November 2022), https://leg.mt.gov/content/Publications/Audit/Report/21P-01.pdf.

## 85-2-113. Department powers and duties.

**Compiler's Comments**

*2017 Amendment:* Chapter 264 in (3) inserted "including for emergency fire training and emergency fire-related operations"; and made minor changes in style. Amendment effective October 1, 2017.

*Limit on Rulemaking Authority:* Section 3, Ch. 256, L. 2011, provided: "(1) Except as provided in subsection (2), the department of natural resources and conservation may not adopt rules to implement the provisions of 85-2-306(3) for ground water wells that are exempt from permitting until October 1, 2012.

(2) The department may adopt rules to implement amendments to 85-2-306(3) that were passed and approved by the 62nd legislature for:

(a) appropriations by a local governmental fire agency organized under Title 7, chapter 33, provided that the appropriation is used only for emergency fire protection; or

(b) nonconsumptive appropriations for geothermal heating or cooling exchange applications." Effective April 21, 2011, and terminates June 30, 2013.

*2005 Amendment:* Chapter 161 in (2)(b) at end substituted "85-2-306" for "85-2-306(1)". Amendment effective April 7, 2005.

*1995 Amendment:* Chapter 418 in (1), (2), (2)(b), (3), (4)(a), in two places, and (4)(b) substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1991 Amendments:* Chapter 543 inserted (4) concerning controls on chronically dewatered watercourse.

Chapter 805 at end of (2)(b) substituted "the limitation contained in 85-2-306(1)" for "100 gallons a minute". Amendment effective July 1, 1991.

*1991 Statement of Intent:* The statement of intent attached to Ch. 543, L. 1991, provided: "A statement of intent is required to provide guidance to the board of natural resources and conservation [functions now transferred to department of natural resources and conservation] in adopting rules to implement the provisions of [this act]. The legislature understands that many Montana watercourses or portions of watercourses suffer chronic dewatering. The legislature further understands that this dewatering severely impairs important beneficial uses of those watercourses, including but not limited to fisheries and agricultural, industrial, municipal, and recreational uses. It is the intent of the legislature, where reasonable and practical, to identify those watercourses or portions of watercourses where chronic dewatering significantly impairs these beneficial uses. It is also the intent of the legislature to require measuring devices on diversions in chronically dewatered watercourses or portions of watercourses to ensure that appropriators withdraw only the amounts they are entitled to withdraw under valid appropriative rights and water use permits."

*1985 Statement of Intent — Section Numbering:* The statement of intent attached to Ch. 573, L. 1985, provided: "A statement of intent is needed for House Bill 680 [Ch. 573, L. 1985] because section 21 [section 22] extends the authority of the board [functions now transferred to department of natural resources and conservation] and the department of natural resources and conservation to adopt rules relating to the provisions of the bill. Such extension of authority would include the authority to adopt rules relating to the implementation of water reservations on the Missouri River basin under section 15 [section 16, 85-2-331] and relating to the leasing of water under section 12 [section 13, 85-2-141].

In their implementation of this bill, the long-range goal of the board and the department must be to conserve and protect the water resources of Montana for the use of all Montanans. Since agricultural uses of water constitute the largest uses by far, and a healthy economy of the state depends upon agriculture, the agricultural uses of water in Montana must be particularly conserved and protected.

In developing rules implementing this bill, and in entering into lease agreements with potential water users under section 12 [section 13, 85-2-141], it is the intent of the legislature that the department establish leasing rates which are commercially reasonable and take into account the financial abilities of a particular sector of the economy to lease water at various rates. Accordingly, it is contemplated that leasing rates for agricultural uses of water will be considerably lower than rates for industrial uses, as an example.

It is also the intent of the legislature that water be made available through the leasing program at minimal cost to potential users who may wish to benefit from a water use project of a third party. An example would be an irrigation district or a municipality in Montana that may desire to tap into a pipeline conveying water out of state. Provision for such incidental beneficial uses is authorized under section 12(8) [section 13(8), 85-2-141(8)] of the bill.

In entering into a lease of water, the department shall include a provision in the lease that other existing or planned uses of water in Montana will be fully protected during a low-water year. All of the criteria listed in 85-2-311 must be applied and considered by the department before it decides to enter into a lease of water.

In the implementation of water reservations in the Missouri River basin, it is the intent of the legislature that applicants for agricultural reservations be given equal treatment and opportunity to reserve water as that afforded applicants for instream uses. To the extent possible, equal treatment and opportunity includes the provision of financial resources and technical assistance to such applicants.

If an application for a slurry pipeline is received by the department of natural resources and conservation under the Montana Major Facility Siting Act, it is the intent of the legislature that the department and board of natural resources and conservation [functions now transferred to department of natural resources and conservation] shall consider and document the potential adverse economic impacts, if any, on railroads and railroad employment as required by 75-20-301(3) and 75-20-503 [now repealed]. The board shall also, to the extent feasible, require mitigation of these adverse impacts."

In the course of its passage through the Legislature, Ch. 573, L. 1985, was amended and consequently certain sections were renumbered. The statement of intent attached to the bill was not amended to reflect the renumbering. For clarity, the annotator has inserted in brackets, following each section number reference, the proper section number. If a section was codified, the annotator has also included the Montana Code Annotated number assigned to that section.

*1983 Amendment:* Substituted (1), authorizing Board of Natural Resources and Conservation to prescribe public service fees or charges, for the former text, which read: "The board may prescribe fees or service charges for any public service rendered by the department under this chapter, including fees for the filing of applications or for the issuance of permits and certificates. There shall be no fees for the filing of declarations or for any action taken by the department at the request of the water judge or for the issuance of certificates of existing rights."; in (2)(b) after "maximum" substituted "appropriation" for "yield".

## 85-2-114. Judicial enforcement.

### Compiler's Comments

*2019 Amendment:* Chapter 266 inserted (9) regarding the availability of relief. Amendment effective May 2, 2019.

*2015 Amendment:* Chapter 294 inserted (8) concerning applicability of section. Amendment effective April 24, 2015.

*2009 Amendment:* Chapter 103 in (1) near middle after "it may" deleted "after reasonable attempts have failed to obtain voluntary compliance as provided in subsection (4)"; in (4) at beginning after "county attorney" substituted "or the attorney general may bring suit to enjoin the waste, unlawful use, interference, or violation" for "may prosecute under 85-2-122(1)", after "under" substituted "85-2-122(1)" for "85-2-122(2)", and deleted former second sentence that read: "The attorney general and a county attorney are subject to the voluntary compliance provisions of subsection (4)"; inserted (5) allowing a county attorney to request assistance from the attorney general; inserted (6) requiring priority for protection of the water right of a prior appropriator; in (7) at beginning of first sentence inserted "After considering the provisions of subsection (6)" and after "department" substituted "may" for "shall"; and made minor changes in style. Amendment effective April 1, 2009.

*2001 Amendment:* Chapter 457 in (3) inserted second sentence concerning independent county attorney action and third sentence concerning voluntary compliance provisions of subsection (4); in (4) at end substituted "must extend over a period of at least 7 days and may not exceed 30 working days" for "may not exceed 3 working days"; and made minor changes in style. Amendment effective April 30, 2001.

*1991 Amendment:* In (1), after "use the water", inserted "or violating a provision of this chapter, it may, after reasonable attempts have failed to obtain voluntary compliance as provided in subsection (4)"; inserted (1)(c) providing for injunctions; at beginning of (2) inserted "Upon the issuance of an order or injunction"; at end of (3) inserted "or violation"; inserted (4) concerning voluntary compliance; and made minor changes in style. Amendment effective April 27, 1991.

### Case Notes

*No Private Right of Action to Enforce:* A corporation that owns a water right in a creek sued for injunctive relief in District Court, alleging that a municipality that owns a water right in the same creek was making unpermitted use in violation of the Montana Water Use Act. The District Court held that the Legislature did not create a private right of action for enforcement. The Supreme Court affirmed, explaining the essential difference between protecting an established water right under 85-2-406, which allows users to petition in District Court for supervised distribution and for resolution to controversies between appropriators, and enforcing the Act under 85-2-114. The Supreme Court found that no private right of action is implied in the Act and that such a right would undermine the legislative intent. Lyman Creek, LLC v. Bozeman, 2019 MT 243, 397 Mont. 365, 450 P.3d 872. (Annotator's note: This case was filed prior to the enactment of Ch. 266, L. 2019, which pertained to a private right of action to injunctive or other relief.)

*No Private Right of Action to Enforce Civil Penalties Under Water Use Act:* Defendant water and wastewater system operator was granted a provisional permit to pump ground water to service various businesses and residences in a water district, conditioned upon final state approval. However, defendant began pumping ground water before final approval was granted, and plaintiffs sought to have the District Court impose civil penalties against defendant for violations of the Montana Water Use Act. The District Court declined plaintiffs' request, and plaintiffs appealed. The Supreme Court noted that this section provides for judicial enforcement of the Act through actions initiated by the Department of Natural Resources and Conservation, the Attorney General, or a County Attorney. However, the Montana Water Use Act does not create a private right of action for enforcement of its civil penalty provisions. The District Court was affirmed. Faust v. Util. Solutions, LLC, 2007 MT 326, 340 M 183, 173 P3d 1183 (2007). (Annotator's note: Ch. 266, L. 2019, pertained to a private right of action to injunctive or other relief.)

**Law Review Articles**

Once-Released Irrigation Waters: Liability and Litigation, 36 Mont. L. Rev. 14 (1975).

## 85-2-117. Water right records for filing with local clerk and recorder.

**Compiler's Comments**

*2005 Amendment:* Chapter 70 near end substituted "water right ownership update forms" for "water right transfer certificates". Amendment effective March 24, 2005.

*Saving Clause:* Section 15, Ch. 70, L. 2005, was a saving clause.

*1991 Statement of Intent:* The statement of intent attached to Ch. 805, L. 1991, provided: "A statement of intent is required for this bill in order to provide a guideline on the payment of fees. Rulemaking authority is granted to the board of natural resources and conservation [functions now transferred to department of natural resources and conservation] to establish a fee schedule for payment of fees to be paid to the department for its costs incurred in providing water rights record information to a clerk and recorder. It is the intent of the legislature that the rules establish a reasonable fee schedule that approximates the department's actual and necessary costs. A published fee schedule will enable a clerk and recorder to know the cost prior to seeking the information from the department."

*Effective Date:* Section 15, Ch. 805, L. 1991, provided that this section is effective July 1, 1991.

## 85-2-121. Administrative proceedings.

**Case Notes**

*Water Rights — Ancient Documents Hearsay Exception:* Claimants sharing a diversion point filed statements of claim for existing rights based on notices of appropriation filed between 1895 and 1913. The Chief Water Judge found that the flume historically limited the quantity of water that had been put to beneficial use. This finding was partly based on historical documentation prepared in anticipation of potential litigation. The Supreme Court held that the ancient document exception applied and that it had not created a per se rule to exclude all documents prepared in anticipation of litigation. Skelton Ranch, Inc. v. Pondera County Canal & Reservoir Co., 2014 MT 167, 375 Mont. 327, 328 P.3d 644.

## 85-2-122. Penalties.

**Compiler's Comments**

*2009 Amendment:* Chapter 103 deleted former (1) that read: "(1) A person who violates or refuses or neglects to comply with the provisions of this chapter, any order of the department, or any rule of the department is guilty of a misdemeanor"; inserted (3)(b) requiring the deposit of certain fines in the water right enforcement account; and made minor changes in style. Amendment effective April 1, 2009.

*2001 Amendments — Composite Section:* Chapter 381 at beginning of (2) inserted exception clause; and made minor changes in style. Amendment effective April 27, 2001.

Chapter 457 in (3)(a) at beginning inserted exception clause; inserted (3)(b) concerning fine collected by independent action; and made minor changes in style. Amendment effective April 30, 2001.

*1995 Amendment:* Chapter 418 in (1) and (2) substituted "department" for "board". Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1991 Amendment:* Inserted (2) providing a civil penalty; and inserted (3) providing for deposit of fines. Amendment effective April 27, 1991.

*1985 Amendment:* Substituted "the provisions of this chapter" for "85-2-301, 85-2-402(1), and 85-2-403(3)".

**Case Notes**

*No Private Right of Action to Enforce Civil Penalties Under Water Use Act:* Defendant water and wastewater system operator was granted a provisional permit to pump ground water to service various businesses and residences in a water district, conditioned upon final state approval. However, defendant began pumping ground water before final approval was granted, and plaintiffs sought to have the District Court impose civil penalties against defendant for violations of the Montana Water Use Act. The District Court declined plaintiffs' request, and plaintiffs appealed. The Supreme Court noted that 85-2-114 provides for judicial enforcement of the Act through actions initiated by the Department of Natural Resources and Conservation, the Attorney General, or a County Attorney. However, the Montana Water Use Act does not create a private right of action for enforcement of its civil penalty provisions. The District Court was affirmed. Faust v. Util. Solutions, LLC, 2007 MT 326, 340 M 183, 173 P3d 1183 (2007).

**85-2-123. Deposit of fees and penalties.**

**Compiler's Comments**

*2001 Amendment:* Chapter 457 at beginning in exception clause inserted "85-2-122 and". Amendment effective April 30, 2001.

*1999 Amendment:* Chapter 389 near beginning after "85-2-124" deleted "and 85-2-241"; and made minor changes in style. Amendment effective July 1, 1999.

*1991 Amendment:* At beginning of second sentence inserted exception clause. Amendment effective April 27, 1991.

*1987 Amendment:* Near beginning of second sentence, after "court", inserted "other than a justice's court".

*1985 Amendment:* Near beginning of section, after "85-2-124", inserted "and 85-2-241".

*1983 Amendment:* Changed depositing of fees and penalties from state general fund to water right appropriation account established in 85-2-318.

**85-2-124. Costs and fees for environmental impact statements.**

**Compiler's Comments**

*2005 Amendment:* Chapter 337 in (1) near end of first sentence after "applicant" inserted "shall follow the process and" and after "department" substituted reference to costs and fees under Title 75, chapter 1, parts 1 and 2, for "the fee prescribed in this section", deleted former second sentence that read: "The department shall notify the applicant in writing within 90 days of receipt of a correct and complete application or a combination of applications if it determines that an environmental impact statement and fee is required", deleted first two sentences of former (2) that read: "(2) Upon notification by the department under subsection (1), the applicant shall pay a fee based upon the estimated cost of constructing, repairing, or changing the appropriation and diversion facilities as provided in this section. The maximum fee that must be paid to the department may not exceed the fees set forth in the following declining scale: 2% of the estimated cost up to $1 million; plus 1% of the estimated cost over $1 million and up to $20 million; plus 1/2 of 1% of the estimated cost over $20 million and up to $100 million; plus 1/4 of 1% of the estimated cost over $100 million and up to $300 million; plus 1/8 of 1% of the estimated cost over $300 million", at beginning of second sentence substituted "The payment of costs and fees for the environmental impact statement" for "The fee", and deleted last sentence of former (2) that read: "Any amounts paid by the applicant but not actually expended by the department must be refunded to the applicant"; deleted former (3) and (4) that read: "(3) The department and the applicant may determine by agreement the estimated cost of any facility for purposes of computing the amount of the fee to be paid to the department by the applicant. The department may contract with an applicant for:

(a) the development of information by the applicant or a third party on behalf of the department and the applicant concerning the environmental impact of any proposed activity under an application;

(b) the division of responsibility between the department and an applicant for supervision over, control of, and payment for the development of information by the applicant or a third party on behalf of the department and the applicant under any contract;
(c) the use or nonuse of a fee or any part of a fee paid to the department by an applicant.
(4) Any payments made to the department or any third party by an applicant under any contract must be credited against any fee that the applicant is required to pay under this section. The department and the applicant may agree on additional credits against the fee for environmental work performed by the applicant at the applicant's own expense"; at beginning of (2) substituted "Costs or fees" for "A fee"; deleted former (6) that read: "(6) This section applies to all applications, pending or filed, for which the department has not commenced writing an environmental impact statement. This section does not apply to any application if the fee for the application would not exceed $2,500"; near beginning of (3) substituted "costs or fees" for "fee"; and made minor changes in style. Amendment effective April 21, 2005.

*Applicability:* Section 22, Ch. 337, L. 2005, provided: "[This act] applies to environmental impact statements on which the agency responsible for preparation commenced preparation after December 31, 2004."

*2003 Amendment:* Chapter 217 in (5) near middle after "certificate of" substituted "compliance" for "environmental compatibility or public need"; in (6) in first sentence near middle after "has not" deleted "as of April 9, 1975"; and made minor changes in style. Amendment effective April 3, 2003.

*Saving Clause:* Section 19, Ch. 217, L. 2003, was a saving clause.

*Severability:* Section 20, Ch. 217, L. 2003, was a severability clause.

*1985 Amendment:* In (1) near end of first sentence reduced the threshold for the applicability of this section from 10,000 acre-feet or 15 cubic feet per second to 4,000 acre-feet and 5.5 cubic feet per second.

*1983 Amendments:* Chapter 277 substituted reference in (2) to state special revenue fund for reference to earmarked revenue fund.

Chapter 448, near end of (1), increased time period department has to notify applicant of requirement for environmental impact statement from 30 to 90 days.

### 85-2-125. Recovery of costs and attorney fees by prevailing party.

**Compiler's Comments**

*2011 Amendment:* Chapter 360 in (1) near middle inserted "or a change in appropriation right" and substituted "may award" for "shall award". Amendment effective May 9, 2011.

*Applicability:* Section 3, Ch. 360, L. 2011, provided: "[This act] applies to an application for a permit or a change in an appropriation right filed on or after [the effective date of this act]." Effective May 9, 2011.

*2007 Amendment:* Chapter 45 deleted former (1) that read: "(1) In the Upper Clark Fork River basin, as defined in 85-2-335, the prevailing party in a hearing under 85-2-309 on an application for a permit or change approval may bring an action in district court for costs and attorney fees. The court shall award the prevailing party reasonable costs and attorney fees"; deleted former (2)(a) that read: "(a) If a final decision of the department on an application for a change approval in the Upper Clark Fork River basin is appealed to a district court, the district court shall award the prevailing party reasonable costs and attorney fees"; in (1) near end after "reasonable" inserted "costs and"; and made minor changes in style. Amendment effective March 27, 2007.

*Saving Clause:* Section 2, Ch. 45, L. 2007, was a saving clause.

*2005 Amendment:* Chapter 100 in (2)(a) near end after "reasonable" inserted "costs and"; inserted (3) awarding costs and attorney fees to party obtaining injunctive relief and defining enforce a water right; and made minor changes in style. Amendment effective March 24, 2005.

*Termination Provision Repealed:* Section 9, Ch. 85, L. 2005, repealed sec. 14, Ch. 487, L. 1995, which terminated amendments to this section June 30, 2005. Effective March 24, 2005.

*Saving Clause:* Section 2, Ch. 100, L. 2005, was a saving clause.

*1995 Amendment:* Chapter 487 in temporary version inserted (1) regarding recovery of fees in hearings and decisions involving the Upper Clark Fork basin. Amendment effective April 14, 1995, and terminates June 30, 2005.

*Severability:* Section 11, Ch. 487, L. 1995, was a severability clause.

*Applicability:* Section 12, Ch. 487, L. 1995, provided: "[This act] applies to all applications for changes in appropriation rights, permits, and water reservations received by the department of natural resources and conservation after [the effective date of this act]." Effective April 14, 1995.

**Case Notes**

*District Court Erred in Denying Motion for Attorney Fees Made by Prevailing Party of Objectors.* Flathead Lakers Inc. v. Dept. of Natural Resources and Conservation, 2023 MT 85, 412 Mont. 225, 530 P.3d 769.

*No Injunction for Ground Water Pumping Violation When Water Use Permit Granted — Request for Attorney Fees Moot:* Defendant water and wastewater system operator was granted a provisional permit to pump ground water to service various businesses and residences in a water district, conditioned upon final state approval. However, defendant began pumping ground water before final approval was granted, and plaintiffs sought an injunction to stop the pumping and sought attorney fees in connection with the request for injunctive relief. Defendant moved for summary dismissal on grounds that plaintiffs did not have standing to enforce the Montana Water Use Act. The District Court agreed and dismissed plaintiffs' complaint, and plaintiffs appealed. About 2 weeks before the appeal was filed, the state granted final approval of defendant's permit. The Supreme Court held that issuance of the final permit rendered moot plaintiffs' request for injunctive relief and for attorney fees as well, including attorney fees under the private attorney general doctrine. The District Court was affirmed. Faust v. Util. Solutions, LLC, 2007 MT 326, 340 M 183, 173 P3d 1183 (2007).

*Previous Judgment Conclusive:* After the Supreme Court reversed the District Court order and reinstated the DNRC order, appellants petitioned the District Court for an award of attorney fees in their favor, contending that they, rather than the Monfortons, were the "prevailing party" under 85-2-125 since Monfortons' claim for attorney fees was denied in Mont. Power Co. v. Carey, 211 M 91, 685 P2d 336, 41 St. Rep. 1233 (1984). The Supreme Court affirmed the District Court's denial of appellants' petition, holding that the question regarding attorney fees had been fully considered, determined, and adjudged in the earlier appeal. With that action, every issue, including the question of award of attorney fees, was determined, and that judgment is conclusive. Mont. Power Co. v. Carey, 216 M 275, 700 P2d 989, 42 St. Rep. 803 (1985).

## 85-2-132. Change of watercourse name — public notice.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

## 85-2-134. Change of watercourse name — judgment to be filed with county clerk.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

## 85-2-141. Water leasing program.

**Compiler's Comments**

*2007 Amendment:* Chapter 416 inserted (2)(c) authorizing the department to contract with the United States to acquire water rights for water held in federal reservoirs; in (3)(b) at beginning after "Fort Peck" inserted "Tiber, Canyon Ferry, Hungry Horse, Koocanusa, or Yellowtail", before "between" substituted "a contract" for "an agreement", and after "water" deleted "and the sharing of revenue with the state"; deleted former (3)(c) that read: "(c) Tiber, Canyon Ferry, Hungry Horse, or Yellowtail reservoir if and as long as there is an agreement between the department and the federal government concerning the acquisition of water and sharing of revenue with the state from one or more of these reservoirs"; in (3)(c)(ii) near middle before "between" substituted "a contract" for "an agreement" and at end after "water" deleted "and the sharing of revenue with the state"; deleted former (4) that read: "(4) Water may be leased for any beneficial use. The amount of water that can be leased under this program for all beneficial uses may not exceed 50,000 acre-feet"; inserted (4) providing that the state may lease up to 1 million acre-feet of water from certain reservoirs, but the total leased may not exceed 1 million acre-feet, and that the state may lease up to 50,000 acre-feet from the reservoirs for beneficial use outside the state; in (8) in first sentence near beginning before "agreement" inserted "lease"; and made minor changes in style. Amendment effective May 3, 2007.

*1995 Amendment:* Chapter 418 in (1) deleted second sentence that read: "Water leases issued under this program must be approved by the board"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*Preamble and Applicability:* The preamble to Ch. 573, L. 1985, provided: "WHEREAS, the Select Committee on Water Marketing was commissioned by the 1983 Legislature to undertake a study of the advantages and disadvantages of water marketing; and

WHEREAS, the Select Committee in completing its study determined that Montana needs to address broader questions of water policy in order to secure Montana's interests in allocation and management of state waters; and

WHEREAS, the Select Committee has presented a comprehensive package of recommendations that must be considered as a whole; and

WHEREAS, these recommendations serve to revise Montana's water policy in order to maximize Montana's authority over management of state waters and other natural resources and to conserve water for existing and future beneficial uses by Montanans.

THEREFORE, the Legislature of the State of Montana finds that this legislation and other recommendations of the Select Committee on Water Marketing constitute an appropriate revision of state water policy necessary to secure Montana's interests for present and future benefit to Montanans."

Section 27, Ch. 573, L. 1985, provided: "This act applies to all permit applications, change in appropriation right applications, water sales and lease applications, and reservation applications filed and pending with the department on July 1, 1985, but upon which a hearing under Title 85, chapter 2, has not yet commenced."

**Law Review Articles**

Water Use Efficiency: The Value of Water in the West, Getches, 8 Pub. Land L. Rev. 1 (1987).

Commerce Clause Scrutiny of Montana's Water Export Statutes, Eaton, 7 Pub. Land L. Rev. 97 (1986).

### 85-2-145. Removal of natural obstruction to exercise water right — consent or court ruling required

**Compiler's Comments**

*Preamble:* The preamble attached to Ch. 408, L. 2013, provided: "WHEREAS, inflexible notions of private property rights in the context of real-life situations hamper the common-sense approach that competing uses of property between two interested owners should be accommodated when possible."

*Effective Date:* Section 3, Ch. 408, L. 2013, provided that this section is effective on passage and approval. Approved May 6, 2013.

### 85-2-150. Chronically dewatered watercourse — identification.

**Compiler's Comments**

*1991 Statement of Intent:* The statement of intent attached to Ch. 543, L. 1991, provided: "A statement of intent is required to provide guidance to the board of natural resources and conservation [functions now transferred to department of natural resources and conservation] in adopting rules to implement the provisions of [this act]. The legislature understands that many Montana watercourses or portions of watercourses suffer chronic dewatering. The legislature further understands that this dewatering severely impairs important beneficial uses of those watercourses, including but not limited to fisheries and agricultural, industrial, municipal, and recreational uses. It is the intent of the legislature, where reasonable and practical, to identify those watercourses or portions of watercourses where chronic dewatering significantly impairs these beneficial uses. It is also the intent of the legislature to require measuring devices on diversions in chronically dewatered watercourses or portions of watercourses to ensure that appropriators withdraw only the amounts they are entitled to withdraw under valid appropriative rights and water use permits."

## Part 2
## Adjudication of Water Rights

**Part Compiler's Comments**

*Collection of Outstanding Water Adjudication Fees — Appeals:* Section 8, Ch. 319, L. 2007, provided: "[This act] does not affect the department's ability to address appeals filed pursuant to former 85-2-276 or the collection of fees from a water right owner who did not pay the water adjudication fee provided for in former 85-2-276 as of [the effective date of this act] [effective July 1, 2007]. The department of natural resources and conservation shall turn over any debt to the department of revenue for collection pursuant to Title 17, chapter 4. If efforts to collect the debt are not successful, the department of revenue may file a lien against the water right in the county where the water is put to beneficial use after notifying each entity enumerated on the water right."

*Rules of Procedure:* The rules of procedure for the Water Courts for the state of Montana are set forth in full under 85-2-231.

*Pre-1973 Law Applicable to "Existing Rights":* The Montana Water Use Act, Ch. 452, L. 1973, preserves "existing rights", and thus future determinations and adjudications will require reference to sections repealed by the 1973 law. The text of repealed sections 89-121 through 89-123, 89-803, 89-804, 89-808, 89-809, 89-811, 89-814 through 89-816, 89-835 through 89-838, 89-840, 89-841, 89-844, 89-845, 89-850, 89-852, 89-857 through 89-864, 89-2913(a), and 89-2919 through 89-2924 may be found in the bound R.C.M. Volume 6, part 1. The text of repealed sections 89-801, 89-801.1, 89-801.2, 89-802, 89-807, 89-810 through 89-813, 89-829, 89-831, 89-832, 89-834, 89-839, 89-842, 89-847 through 89-849, 89-851, 89-853, 89-854, 89-2912, 89-2913, and 89-2925 of the R.C.M. 1947, which sections pertain specifically to appropriation and adjudication of water rights, is set out below. Immediately following this material are casenotes pertaining to many of the repealed sections.

89-801. What waters may be appropriated. (1) The right to the use of the unappropriated water of any river, stream, ravine, coulee, spring, lake, or other natural source of supply may be acquired by appropriation, and an appropriator may impound flood, seepage, and waste waters in a reservoir and thereby appropriate the same.

(2) But the unappropriated waters of the streams and portions of streams hereafter named shall be subject to appropriation by the fish and game commission [now fish, wildlife, and parks commission] of the state of Montana in such amounts only as may be necessary to maintain stream flows necessary for the preservation of fish and wildlife habitat. Such uses shall have a priority of right over other uses until the district court in which lies the major portions of such stream or streams shall determine that such waters are needed for a use determined by said court to be more beneficial to the public. The unappropriated water of other streams and rivers not named herein may be set aside in the future for appropriation by the fish and game commission [now fish, wildlife, and parks commission] upon consideration and recommendation of the water resources board, fish and game commission [now fish, wildlife, and parks commission], state soil conservation committee, the state board of health and approval of the legislature.

(a) Big Spring creek in Fergus county from its mouth in T17N, R16E, Sec. 26 to the state fish hatchery in T14W, R19E, Sec. 5.

(b) Blackfoot river in Missoula and Powell counties from its mouth in T13N, R18W, Sec. 21 to the mouth of its North Fork in T14N, R12W, Sec. 9.

(c) Flathead river in Flathead county from its mouth in T27N, R20W, Sec. 34 to the Canadian border in T37N, R22W, Sec. 4 & 5, including the section commonly known as the North Fork of the Flathead river.

(d) Gallatin river in Gallatin county from its mouth in T2N, R2E, Sec. 9 to the junction of its East Fork in T2N, R3E, Sec. 27.

(e) Gallatin river in Gallatin county (commonly called the West Gallatin) from the Beck & Border ditch intake in T2S, R4E, Sec. 14 to where it leaves the Yellowstone Park boundary in T9S, R5E, Sec. 18.

(f) Madison river in Madison and Gallatin counties from its mouth in T2N, R2E, Sec. 17 to Hebgen dam in T11S, R3E, Sec. 23.

(g) Missouri river in Lewis and Clark, Broadwater and Cascade counties from its junction with the Smith river in T19N, R2E, Sec. 9 to Toston dam in T4N, R3E, Sec. 7.

(h) Rock creek in Granite and Missoula counties from its mouth in T11N, R17W, Sec. 12 to the junction of its East and West Forks in T6N, R15W, Sec. 31.

(i) Smith river in Cascade and Meagher counties from the mouth of Hound creek in T17N, R3E, Sec. 20 to the Fort Logan bridge in T11N, R5E, Sec. 31.

(j) Yellowstone river in Stillwater, Sweetgrass and Park counties from the North-South Carbon-Stillwater county lines in T3S, R21E, Sec. 10 to where it leaves the Yellowstone Park boundary in NT9S, R8E, Sec. 23.

(k) Middle Fork Flathead river in Flathead county from its mouth in T31N, R19W, Sec. 7 to the mouth of Cox creek in T27N, R12W, (a nonsectioned township).

(l) South Fork Flathead river in Flathead and Powell counties from its mouth at Hungry Horse reservoir in T26W, R16W, Sec. (unknown), to its source at the junction of Danaher and Youngs creeks in T20W, R13W, Sec. 36.

History: Ap. p. Sec. 1, p. 130, L. 1885; re-en. Sec. 1250, 5th Div. Comp. Stat. 1887; amd. Sec. 1880, Civ. C. 1895; en. Sec. 1, p. 152, L. 1901; re-en. Sec. 4840, Rev. C. 1907; amd. Sec. 1, Ch. 228, L. 1921; re-en. Sec. 7093, R.C.M. 1921; amd. Sec. 1, Ch. 345, L. 1969. Cal. Civ. C. Sec. 1410.

89-801.1. Established rights of use unaffected. Nothing herein contained shall in any way affect or diminish any rights to the use of the waters of such streams or portions of streams heretofore established nor any legal or statutory rights given in connection with such established uses.

History: En. Sec. 2, Ch. 345, L. 1969.

89-801.2. Notice of appropriation. The appropriation hereby authorized shall be made by filing a written notice of appropriation in the office of the county clerk and recorder of each county through which flows the river on which the appropriation is made, and by filing a copy of such notice with the director of the Montana water resources board. The notice shall state the quantity of water claimed, measured as provided in Title 89, R.C.M. 1947, the purpose for which it is claimed, the name of the appropriator, and the date of appropriation.

History: En. Sec. 3, Ch. 345, L. 1969.

89-802. Appropriation must be for a useful purpose — abandonment. The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest abandons and ceases to use the water for such purpose, the right ceases; but questions of abandonment shall be questions of fact, and shall be determined as other questions of fact.

History: En. Sec. 2, p. 131, L. 1885; re-en. Sec. 1251, 5th Div. Comp. Stat. 1887; re-en. Sec. 1881, Civ. C. 1895; re-en. Sec. 4841, Rev. C. 1907; re-en. Sec. 7094, R.C.M. 1921. Cal. Civ. C. Sec. 1411.

89-807. First in time, first in right. As between appropriators the one first in time is first in right.

History: En. Sec. 5, p. 131, L. 1885; re-en. Sec. 1254, 5th Div. Comp. Stat. 1887; re-en. Sec. 1885, Civ. C. 1895; re-en. Sec. 4845, Rev. C. 1907; re-en. Sec. 7098, R.C.M. 1921. Cal. Civ. C. Sec. 1414.

89-810. Notice of appropriation. Any person hereafter desiring to appropriate the waters of a river, or stream, ravine, coulee, spring, lake, or other natural source of supply concerning which there has not been an adjudication of the right to use the waters, or some part thereof, must post a notice in writing in a conspicuous place at the point of intended diversion, stating therein:

1. The quantity of water claimed, measured as hereinafter provided;
2. The purpose for which it is claimed and place of intended use;
3. The means of diversion, with size of flume, ditch, pipe, or aqueduct, by which he intends to divert it;
4. The date of appropriation;
5. The name of the appropriator.

Within twenty days after the date of appropriation the appropriator shall file with the county clerk of the county in which such appropriation is made a notice of appropriation, which, in addition to the facts required to be stated in the posted notice, as hereinbefore prescribed, shall contain the name of the stream from which the diversion is made, if such stream have a name, and if it have not, such a description of the stream as will identify it, and an accurate description of the point of diversion of such stream, with reference to some natural object or permanent monument. The notice shall be verified by the affidavit of the appropriator or someone in his behalf, which affidavit must state that the matters and facts contained in the notice are true.

History: En. Sec. 6, p. 131, L. 1885; re-en. Sec. 1255, 5th Div. Comp. Stat. 1887; re-en. Sec. 1886, Civ. C. 1895; re-en. Sec. 4847, Rev. C. 1907; amd. Sec. 3, Ch. 228, L. 1921; re-en. Sec. 7100, R.C.M. 1921. Cal. Civ. C. Sec. 1415.

89-811. Diligence in appropriating. Within forty days after posting such notice, the appropriator must proceed to prosecute the excavation or construction of the work by which the water appropriated is to be diverted, and must prosecute the same with reasonable diligence to completion. If the ditch or flume, when constructed, is inadequate to convey the amount of water claimed in the notice aforesaid, the excess claimed above the capacity of the ditch or flume shall be subject to appropriation by any other person, in accordance with the provisions of this chapter.

History: En. Sec. 7, p. 132, L. 1885; re-en. Sec. 1256, 5th Div. Comp. Stat. 1887; re-en. Sec. 1887, Civ. C. 1895; re-en. Sec. 4848, Rev. C. 1907; re-en. Sec. 7101, R.C.M. 1921. Cal. Civ. C. Sec. 1416.

89-812. Effect of failure. A failure to comply with the provisions of this chapter deprives the appropriator of the right to the use of water as against a subsequent claimant who complies therewith, but by complying with the provisions of this chapter the right to the use of the water shall relate back to the date of posting the notice.

History: En. Sec. 8, p. 132, L. 1885; re-en. Sec. 1257, 5th Div. Comp. Stat. 1887; re-en. Sec. 1888, Civ. C. 1895; re-en. Sec. 4849, Rev. C. 1907; re-en. Sec. 7102, R.C.M. 1921. Cal. Civ. C. Sec. 1419.

89-813. Record of declaration. Persons who have heretofore acquired rights to the use of water shall, within six (6) months after the publication of this chapter, file in the office of the county clerk of the county in which the water right is situated, a declaration in writing, except notice be already given of record as required by this chapter, or a declaration in writing be already filed as required by this section, containing the same facts as required in the notice provided for record in section 89-810 of this chapter, and verified as required in said last-mentioned section, in cases of notice of appropriation of water; provided, that a failure to comply with the requirements of this section shall in nowise work a forfeiture of such heretofore acquired rights, or prevent any such claimant from establishing such rights in the courts. From and after July 1, 1967, the county clerk and recorder shall forward to the water resources board a copy of any instrument of water appropriation or instrument transferring any water appropriation which is filed as provided in this section.

History: En. Sec. 9, p. 132, L. 1885; re-en. Sec. 1258, 5th Div. Comp. Stat. 1887; re-en. Sec. 1889, Civ. C. 1895; re-en. Sec. 4850, Rev. C. 1907; re-en. Sec. 7103, R.C.M. 1921; amd. Sec. 6, Ch. 158, L. 1967.

89-829. Procedure for appropriating waters of adjudicated streams. (1) Any person hereafter desiring to appropriate the waters of a river, or stream, ravine, coulee, spring, lake, or other natural source of supply concerning which there has been an adjudication of rights between appropriators or claimants, as contemplated in section 89-839, shall:

(a) employ a competent engineer to make a survey of the ditch, or aqueduct, whereby the water is to be conveyed from the source of supply, or the dam or other work whereby the water is to be impounded, or both; or

(b) cause to be prepared an aerial photograph with a drawing thereon showing the course of the proposed ditch or aqueduct, or the location of the proposed dam or other work, or both, together with a description of the course of said ditch or the location of said dam attached thereto; and the appropriators shall file with the clerk of the court in the county in which the water is appropriated a petition giving the amount of water sought to be appropriated, a description by name or otherwise of the watercourse or body from which he intends to appropriate the water, and a general description of the ditch or aqueduct, stating its size, length, and capacity, showing the proposed means of appropriation and use of the water, and also the place of use thereof. If the means of appropriation be a reservoir by which the water is to be impounded, the petition shall state the location and size thereof, together with the contemplated manner of its construction and the means of conveying the water to the place of contemplated use, and the contemplated use.

(2) There shall be filed with the petition a map or aerial photograph as hereinbefore provided showing the point of, and means of diversion, and the course of the ditch or aqueduct to its terminus, and if a reservoir, the contour line thereof, the height and width of the dam, the point and means of discharge therefrom, and the spillway. If the appropriator shall intend to mingle the waters appropriated from one stream with another, or shall intend to deposit the waters impounded in a reservoir into a stream, he shall so state.

(3) The appropriator shall declare in his petition that the water rights sought by him shall be subject to, and that in the use thereof he shall be bound by the terms of any decree theretofore rendered by a court of competent jurisdiction adjudicating the waters of such river, stream, ravine, coulee, spring, lake, or other natural source of supply, or, any body of water to which the same may be tributary, provided that water stored in a reservoir pursuant to an appropriation hereunder which is subsequent to an adjudication of waters in a flowing stream when so released from storage shall not be considered as a part of the natural flow of said adjudicated stream.

(4) The appropriator shall, as near as may be, give the names of all appropriators or claimants who have, or appear to have, rights in the source of supply, from which the appropriation is sought, and whose rights may be in anywise affected by the appropriation, and in the petition the petitioner shall be named as plaintiff, and all other parties as defendants.

History: En. Sec. 4, Ch. 228, L. 1921; re-en. Sec. 7119, R.C.M. 1921; amd. Sec. 1, Ch. 179, L. 1957.

89-831. Appearance — default — decree. If any defendant shall not appear within twenty days after the service of summons upon him, it shall be deemed by the court that he has no objection to the court granting the appropriation sought by the plaintiff, and the defendant so failing to appear shall be deemed in default. Any defendant may appear by motion, demurrer, or answer, as in civil action. The procedure in civil actions shall be followed in all proceedings under the terms of this act; provided, that when the pleadings are settled the court shall summarily proceed to try and determine the case. Evidence may be offered by the parties as in civil actions. At the conclusion of the trial, the court may enter an interlocutory or permanent decree allowing the appropriation sought, either in whole or in part, subject to all prior rights as adjudicated, and subject to the terms of all prior decrees, or may make any other order deemed proper in the premises. If no objections are filed the court shall enter such decree as the facts warrant.

History: En. Sec. 6, Ch. 228, L. 1921; re-en. Sec. 7121, R.C.M. 1921.

89-832. Decree subject to prior adjudicated rights. If the defendants, or any of them, do not appear, their adjudicated rights which are prior in time to plaintiff's right shall in nowise be affected by the court's order. The court shall in every case, if an appropriation be awarded plaintiff, provide that the same shall be subject to all adjudicated rights which are prior in time to plaintiff's rights, and the plaintiff shall be bound by the terms of all prior decrees with respect to water rights in the proper order of his priority as if he had been a party to the decree originally.

History: En. Sec. 7, Ch. 228, L. 1921; re-en. Sec. 7122, R.C.M. 1921; amd. Sec. 1, Ch. 38, L. 1927.

89-834. Decree to govern conditions of performance of work. The court may provide by interlocutory decree awarding the appropriation, the condition under which the ditch, aqueduct, dam, or other work, necessary to the complete appropriation, shall be done and the time within which the same shall be completed until the conditions imposed are complied with. Upon a full compliance with the terms prescribed by the court, it shall enter its order and decree establishing the appropriation and fixing the date thereof, which, if the appropriator shall have been diligent in complying with the court order, shall be the date of the filing of the petition. The court may fix a later date if the facts warrant.

History: En. Sec. 9, Ch. 228, L. 1921; re-en. Sec. 7124, R.C.M. 1921.

89-839. Effect of decree upon subsequent appropriations. Whenever there shall have been an adjudication of the rights between appropriators or claimants to any stream or any other water supply in this state, in any district court of the state, or the United States court, in an action prosecuted in good faith between such appropriators or claimants to determine their respective rights to the use of such waters, and which decree is based upon evidence introduced, and not upon stipulations or admissions of the parties, such adjudication and decree, or certified copies thereof, shall, as against all persons appropriating or diverting any of the waters of the said stream or other water supply, after the date of such decree, in an action relating to such waters, be prima facie evidence of the facts therein found, determined, and decreed, respecting the rights of parties to said action to the use of the waters of said stream or other water supply.

History: En. Sec. 1, Ch. 95, L. 1905; re-en. Sec. 4867, Rev. C. 1907; re-en. Sec. 7128, R.C.M. 1921.

89-842. Appropriations pending litigation subject to decree. At such time as there may be legal proceedings instituted by the owner or owners of any water right or water rights in any stream, spring, creek, canyon, river, or ravine, before any court of competent jurisdiction, all subsequent appropriations made in any such streams, creeks, springs, canyons, rivers, or ravines will be subject to such suit as may be instituted and shall not date prior to the date of the beginning of said suit, and will be subject to the rulings and decisions thereunder.

History: En. Sec. 3, Ch. 185, L. 1907; re-en. Sec. 4870, Rev. C. 1907; re-en. Sec. 7131, R.C.M. 1921.

89-847. Declaration of policy as to adjudication of waters of the state. It is hereby declared to be the policy of this state and necessary for the welfare of the state and its citizens, that the waters of this state and especially interstate streams arising out of the state be investigated and adjudicated as soon as possible in order to protect the rights of water users in this state and negotiate interstate compacts in relation thereto, and that the state water conservation board make investigations to secure necessary information and initiate and carry on actions therefor.

History: En. Sec. 1, Ch. 185, L. 1939; amd. Sec. 6, Ch. 280, L. 1965.

89-848. Water conservation board may bring action to adjudicate waters. The state water conservation board is hereby authorized to bring action to adjudicate the waters of any stream or of any stream and its tributaries in any county traversed by said stream.

History: En. Sec. 2, Ch. 185, L. 1939; amd. Sec. 7, Ch. 280, L. 1965.

89-849. Appointment of referee to take testimony. In said actions the state water conservation board, or in any action pending for the adjudication of a water right, any party thereto, may make application to the court for the appointment of some competent person or persons to act as a referee or referees in said cause and to take testimony therein, and the court may appoint a referee or referees who shall proceed as herein set forth. In said order of reference the court may submit to said referee or referees any or all issues of fact in said cause.

History: En. Sec. 3, Ch. 185, L. 1939; amd. Sec. 8, Ch. 280, L. 1965.

89-851. Duties of water conservation board — scope of examination of streams — surveys, reports, maps and plats may be introduced as evidence. The state water conservation board shall either before or after the bringing of such action do all things, make all surveys, and perform all services required by said board in the securing of all necessary information and making same available to persons who may be interested therein including the courts of this state. The state water conservation board or some qualified employee may proceed to make an examination of any stream or streams as required by said board and the works diverting therefrom, said examination to include the measurement of the discharge of said stream and of the carrying capacity of the various ditches and canals, and examination of the irrigated lands and an approximate measurement of the lands irrigated from the various ditches and canals, and to take such other steps and gather such other data and information as may be essential to the proper understanding of the relative rights of the parties interested, which said observation and measurement shall be reduced to writing and made a matter of record, and it shall be the duty of the state water conservation board to make or cause to be made such maps or plats thereof as deemed necessary or shall be required. Any or all such surveys, reports, maps and plats may be furnished to the judge of said court or the referee or referees mentioned herein and may be introduced as evidence in such proceedings; provided that the costs and expenses incurred in carrying out the provisions of this section shall be paid by the state water conservation board.

History: En. Sec. 5, Ch. 185, L. 1939; amd. Sec. 9, Ch. 280, L. 1965.

89-853. Report of referee — recognition of decreed water rights. The report of the said referee or referees shall contain findings of fact upon the issues submitted but shall not contain conclusions of law. All evidence before said referee shall be transcribed and submitted to the court with the findings of such referees. In proceedings described herein, all vested and decreed water rights shall be herein recognized.

History: En. Sec. 7, Ch. 185, L. 1939.

89-854. District court procedure. After the conclusion of the taking of such testimony the said referee or referees shall file their findings of fact with the clerk of the district court wherein said action is pending which findings of fact shall remain on file and subject to investigation by parties interested therein. The clerk of court shall notify the parties or their attorneys by mail upon the filing of such findings of fact by the referee or referees. The parties shall have thirty days from the mailing of such notices during which time any party to said action may file in said court objections or exceptions to any such findings of fact. As to any findings to which no exceptions are filed, same may be adopted by the court as findings of said court. As to any findings to which objections are filed, the court shall consider such proposed findings together with the evidence in relation thereto and may adopt, reject, or modify such findings. The court may upon request or of its own motion make additional findings in said cause. All conclusions of law shall be determined by the court in the same manner as conclusions of law are determined by the court in any action to be tried before the court.

History: En. Sec. 8, Ch. 185, L. 1939.

89-2912. Rights to use. Rights to surface water where the date of appropriation precedes January 1, 1962, shall take priority over all prior or subsequent ground water rights. The application of ground water to a beneficial use prior to January 1, 1962 is hereby recognized as a water right. Beneficial use shall be the extent and limit of the appropriative right. As to appropriations of ground water completed on and after January 1, 1962, any and all rights must be based upon the filing provisions hereinafter set forth, and as between all appropriators of surface or ground water on and after January 1, 1962, the first in time is first in right. The right to use ground water may be obtained without a well, as by subirrigation and other natural processes, and appropriations by such means are provided for under section 89-2913. Appropriative rights shall relate only to quantities of water for beneficial uses and not to water levels, means of use, or ease of withdrawal; and appropriative rights shall not apply to minimal household use as provided in section 89-2915.

History: En. Sec. 2, Ch. 237, L. 1961.

89-2913. Filing — notice of appropriation — notice of completion. (a) The administrator shall prepare and publish forms for the filing by appropriators with the county clerks. They shall be known as a "notice of appropriation" and a "notice of completion," respectively. The notice of appropriation shall require, and provide space for, answers to such questions as: (1) the name and address of the appropriator; (2) the beneficial use for which the appropriation is made, including a description of the lands to be benefited if for irrigation; (3) the rate of use in gallons per minute of ground water claimed; (4) the annual period (inclusive dates) of intended use; (5) the probable or intended date of first beneficial use; (6) the probable or intended date of commencement and completion of the well or wells; (7) the location, type, size and depth of the well or wells contemplated; (8) the probable or estimated depth of the water table or artesian aquifer; (9) the name, address and license number (if any) of the driller engaged; and (10) such other similar information as may be useful in carrying out the policy of this act.

The notice of completion shall require answers to the same sort of questions as required for the notice of appropriation, except that for the most part it shall inquire as to accomplished facts concerning the well or means of withdrawal, including information as to the static level of water in the casing or the shut-in pressure if the well flows naturally; the capacity of the well in gallons per minute by pumping or by natural flow; the approximate draw down or pumping level of the well; the approximate surface elevation at the well head; the casing record of the well; the drilling log showing the character and thickness of all formations penetrated; the depth to which the well is drilled; and similar information.

For the benefit of persons obtaining (or desiring to obtain) ground water without a well (as by subirrigation and other natural processes) a specially prepared "notice of completion" shall be provided, enabling such persons to describe the means of using ground water and to estimate the amount of water so used, and requiring such other similar information as shall be pertinent to this particular class of user. The administrator shall distribute said forms to the county clerks.

(b) On and after January 1, 1962, any person desiring to appropriate ground water may complete a notice of appropriation and file it with the county clerk of the county in which the appropriation is located.

(c) Upon the filing of a notice of appropriation, the county clerk shall transmit a copy thereof to the administrator, and to the Montana bureau of mines and geology, retaining the original on file locally.

(d) After filing a notice of appropriation, in order to acquire a right based thereon, the person must, within ninety (90) days, commence actual excavation and diligently prosecute construction of a well and, upon its completion, file a notice of completion with the county clerk of the county in which the appropriation is located. The county clerk shall handle and transmit such filed notices as in the case of a filed notice of appropriation.

(e) A failure to file a notice of appropriation deprives the appropriator of his right to relate his date of appropriation back, and results in the dating of his appropriation as of when he files a notice of completion. Until a notice of completion is filed with respect to any use of ground water instituted after January 1, 1962, no right to that use of water shall be recognized. However, in the case of uses instituted prior to January 1, 1962 and diligently prosecuted to completion on or after that date, the date of appropriation shall relate back to the date of commencement of construction, upon the filing of a notice of completion.

(f) Persons required to file well logs and other information under the laws governing the conservation of oil and gas and who do so in compliance therewith, shall be deemed to have complied with all of the filing requirements of this act in so far as it applies to such particular oil and gas wells, salt water disposal wells, and injection wells. The date of appropriation in such cases shall be the date that written notice of intention to drill is given to the oil and gas conservation commission of the state of Montana.

(g) It shall be the responsibility of the driller of each well to fill out the notice of completion for the appropriator, and the latter shall be responsible for its filing.

(h) Persons who had put ground water to a beneficial use, including subirrigation or other natural process, prior to January 1, 1962 had a four (4) year period after January 1, 1962 to file a "declaration of vested ground water rights" in the office of the county clerk of the county in which the claimed right was situated. The right to file a "declaration of vested ground water rights" expired on January 1, 1966; therefore, any person desiring to file on ground water put to beneficial use prior to January 1, 1962, but not filed on by December 31, 1965 may file a "notice of completion." The appropriator's right will commence on the date the notice is filed, except as hereinafter provided.

The county clerk shall transmit copies to the office of the administrator and the bureau of mines and geology. The administrator shall attend to filing copies in any other counties affected by the appropriation.

The "declaration of vested ground water rights" as provided for, to be filed on from January 1, 1962 to January 1, 1966 shall be taken and received in all courts of this state as prima facie evidence of the statements therein contained.

Failure to comply with this requirement shall in no wise work a forfeiture of such rights, or prevent any such claimant from establishing such rights in the courts, but he must maintain the burden of proving such unrecorded rights. Provided, however, that persons who have filed the water well log form, provided for in sections 1 and 2 of chapter 58, session laws of Montana, 1957, shall be deemed to have complied with the requirements of this section. These latter forms may be returned to the county clerks by the administrator for the purpose of correction or for the entry of material facts necessary to fully complete the filing.

History: En. Sec. 3, Ch. 237, L. 1961; amd. Sec. 1, Ch. 21, L. 1965; amd. Sec. 2, Ch. 307, L. 1971.

89-2925. Appropriation must be for a useful purpose — abandonment. The appropriation must be for some beneficial purpose and when the appropriator or his successor in interest abandons and ceases to use the water for such purpose, the right ceases; but questions of abandonment shall be questions of fact and shall be determined as other questions of fact.

History: En. Sec. 15, Ch. 237, L. 1961.

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## DECISIONS UNDER CURRENT LAW

*Perfected Rights of Appropriation Contemplating Future Use — When Water Right Not Appurtenant to Land, Specific Lands Not Required — Removal of Unnecessary Curtailment Remark — No Error:* The Water Court correctly concluded that the Bureau of Reclamation's intent and the extent of its appropriations were not limited to the irrigable acreage listed in a feasibility document or already under irrigation by shareholders at the time that the East Bench Unit Project was completed. Because the Bureau of Reclamation was entitled to file notice of an appropriation that contemplated its future uses and needs, which included the expansion of irrigable lands in the valley as articulated in planning documents, its perfected rights were not legally circumscribed by a feasibility document, and since the Water Court's findings of fact regarding maximum irrigated acreage for the East Bench Unit Project were supported by substantial evidence, they were not clearly erroneous. Further, the Water Court did not err by adding an information remark to a claim defining the place of use as the lands served by the Clark

Canyon Water Supply Company shareholders' underlying water rights rather than providing specific boundaries or maximum irrigated acreage. Because the Clark Canyon Reservoir storage water was appropriated with the intent to sell the water to others, the storage right was not strictly appurtenant to the property where the water is used. Therefore, a service area was the proper method for defining place of use in that context. Lastly, the Water Court did not err in removing a curtailment remark from the Clark Canyon Water Supply Company shareholders' private water rights because the curtailment remarks were not necessary to the proper enforcement of the Bureau of Reclamation's water rights claims and were factually inaccurate. In re E. Bench Irrigation District, 2021 MT 319, 406 Mont. 502, 501 P.3d 380.

*Water Right Appropriator in Particular Source — Generally Has Standing to Challenge Any Water Right Granted in That Source:* A downstream user with senior private water rights to a reservoir storage project that declined shares in the reservoir storage project had standing where claims involved the natural flow rights of the river as well as the storage and delivery of the reservoir's stored flood water. In re E. Bench Irrigation District, 2021 MT 319, 406 Mont. 502, 501 P.3d 380.

*Failure to Assert Senior Priority — Application of Doctrine of Laches Proper:* In a water rights dispute, the Water Court ruled that the doctrine of laches barred the objectors from asserting a senior priority water right because they had never previously asserted the right despite being on notice of the competing storage right for nearly 70 years. On appeal, the Supreme Court affirmed, holding that the claimant had come to rely on the objectors' acquiescence in allowing the claimant to store water and that it would be inequitable to enforce the newly asserted senior water right. In re Teton Co-op Reservoir Co., 2018 MT 66, 391 Mont. 66, 414 P.3d 1249.

*Failure to Show by Preponderance of Evidence That Claim Should Be Rejected:* In an appeal concerning water rights along the Teton River, the objectors disputed claims to divert water for irrigation and stock water that were based on activity beginning in 1874 by an early settler on the basis that the claimants could not point to precise facts and dates of activities of the early settler that established water rights. The claimants cross-appealed the Water Court's determination that recognized two separate irrigation rights, dating 1880 and 1887. The Supreme Court concluded that the objectors failed to overcome the statutory presumption in favor of the truth of the elements set forth in the statement of claim and failed to show by a preponderance of the evidence that the claims should be rejected. Evidence that the early settler was cropping a precise number of acres, along with the fact that crops will not grow in the area without irrigation, and evidence of historical accounts of the settler's stock water use supported the existence of the claims. In regard to the cross-appeal, the Supreme Court concluded that the Water Court misapprehended the evidence and that the evidence demonstrated a continuation of the irrigation effort, which the early settler began in 1880 and completed in 1887. Therefore, the claimants were entitled to a single irrigation right with a priority date of 1880. In re Danreuther Ranches, 2017 MT 241, 389 Mont. 15, 403 P.3d 332.

*Storage Right Added to Direct Flow Water Right — Entitled to Priority Dates of Existing Rights:* Storage may be added to a direct flow water right as long as the water user does not store water at a rate exceeding the volumetric flow rate allowed by its direct flow rate or store water at times outside of the diversion period allowed by the direct flow right. Therefore, although the claimant's reservoirs were not part of the original irrigation system, the reservoirs were entitled to the same priority dates as the original water rights because they did not expand the amount of water diverted or its period of diversion. Teton Co-op Reservoir Co. v. Farmers Co-op Canal Co., 2015 MT 208, 380 Mont. 146, 354 P.3d 579. See also Teton Co-op Canal Co. v. Teton Co-op Reservoir Co., 2018 MT 20, 390 Mont. 210, 412 P.3d 1, and In re Teton Co-op Reservoir Co., 2018 MT 66, 391 Mont. 66, 414 P.3d 1249.

*Water Rights — Abandonment Determined by Flume Capacity:* Claimants sharing a diversion point filed statements of claim for existing rights based on notices of appropriation filed between 1895 and 1913. The Chief Water Judge found that the flume historically limited the quantity of water that had been put to beneficial use and the claimants were limited to this amount. The Supreme Court held that abandonment of a water right requires both nonuse and intent to abandon, which may be inferred from the circumstances of each case. Based on the evidence, the claimed water in excess of the flume's historical capacity had been abandoned. Skelton Ranch, Inc. v. Pondera County Canal & Reservoir Co., 2014 MT 167, 375 Mont. 327, 328 P.3d 644.

*Retroactive Applicability of 79 Ranch — Presumption of Abandonment Rebutted:* The state appealed the Water Court's decision that the plaintiffs produced sufficient evidence to overcome the presumption that they abandoned their water right claim. The Supreme Court affirmed, concluding that the Water Court properly retroactively applied 79 Ranch, Inc. v. Pitsch, 204

Mont. 426, 666 P.2d 215 (1983), in analyzing the abandonment of a pre-1973 water right and that the claimants submitted sufficient evidence to overcome the presumption of abandonment. Heavirland v. St., 2013 MT 313, 372 Mont. 300, 311 P.3d 813.

*Public Recreation and Conservation Interests in Water Adjudication Proceedings—Department of Fish, Wildlife, and Parks Not Exclusive Representative:* After the Water Court issued a temporary preliminary decree for the Big Hole River Basin, the objector filed timely objections to the claims of several claimants and requested a hearing. The Water Court granted summary judgment to the claimants on the basis that the objector lacked standing to file objections to the claims. The Supreme Court reversed. The Water Court erred in holding that under 85-2-223, only the Department of Fish, Wildlife, and Parks may represent public recreation and conservation interests in water rights adjudications. Section 85-2-223 does not prohibit other entities from filing objections. No statutory or regulatory restrictions exist regarding who may file an objection to a water rights claim contained in a temporary preliminary decree. Mont. Trout Unlimited v. Beaverhead Water Co., 2011 MT 151, 361 Mont. 77, 255 P.3d 179.

*Water Rights Adjudication — Standing to Object to Preliminary Decree:* After the Water Court issued a temporary preliminary decree for the Big Hole River Basin, the objector filed timely objections to the claims of several claimants and requested a hearing. The Water Court granted summary judgment to the claimants on the basis that the objector lacked standing to file objections to the claims. Although the objector had sufficiently alleged environmental and recreational interests of its members that were distinct from those of the general public, the Water Court concluded such interests were not sufficient to demonstrate standing because the objector lacked ownership of a water right. The Supreme Court reversed. The Water Court erroneously applied the "good cause" requirement contained in 85-2-233 to require an ownership interest in a water right. When a party has met all common-law and statutory requirements for standing and has shown that its interest in the use of water has been affected by the decree, that party is entitled to object to a preliminary decree under 85-2-233. Mont. Trout Unlimited v. Beaverhead Water Co., 2011 MT 151, 361 Mont. 77, 255 P.3d 179.

*No Right of Hydroelectric Facility to Make Free Appropriation of Water on State-Owned Land:* A hydroelectric facility does not have the right to make free appropriation of water on and within state-owned land without paying compensation to the state. PPL Mont., LLC v. St., 2010 MT 64, 355 Mont. 402, 229 P.3d 421, distinguishing Smith v. Deniff, 24 Mont. 20, 60 P 398 (1900), U.S. v. Conrad Invest. Co., 156 F 123 (D.C. Mont. 1907), and Mattson v. Mont. Power Co., 2009 MT 286, 352 Mont. 212, 215 P.3d 675. See also Prentice v. McKay, 38 Mont. 114, 98 P 1081 (1909).

Following the Montana Supreme Court's decision, PPL appealed to the United States Supreme Court. The United States Supreme Court reversed the Montana court's ruling, holding that the Montana court had not properly considered the rivers in question on a segment-by-segment basis and had not determined whether they were navigable in fact at the time of statehood. The United States Supreme Court remanded the case for proceedings consistent with its opinion. PPL Montana, LLC v. Montana, 565 US 576, 132 S Ct 1215, 182 L Ed 2d 77 (2012).

*New Trial to Lift Injunction on Water Use Properly Denied:* As a result of defendant's negligent operation of an irrigation ditch and the risk associated with high volume flow in the ditch, the District Court enjoined defendant from a flow of more than 400 miner's inches through the ditch until defendant could prove that the ditch could safely transport more. Defendant sought a new trial to lift the injunction on grounds that new evidence stemming from the successful operation of the ditch since the trial could not have been presented earlier. The motion for a new trial was denied, and on appeal, the Supreme Court affirmed. Although the evidence was new, the fact remained that varying flows when combined with other variables could still produce damaging results, so the evidence was insufficient to warrant a new trial. Graveley Simmental Ranch Co. v. Quigley, 2003 MT 34, 314 M 226, 65 P3d 225 (2003).

*Water Right Limited to Carrying Capacity of Irrigation Ditch:* Through the years, Quigley was granted three water rights for irrigation from Ophir Creek for 25, 100, and 800 miner's inches, for a total or 925 inches. However, Quigley's own 1928 survey and a 1930 District Court decision established that the carrying capacity of the irrigation ditch was 800 miner's inches, and that amount was confirmed by the District Court in the present case. Quigley appealed, claiming the right to transport the full 925 inches through the ditch at one time. The Supreme Court disagreed. Because it is elementary that a ditch cannot carry more water than its smallest dimensions allow, it was held that although Quigley had the right to divert 925 miner's inches, that right was subject to the ditch description stating that the ditch had a carrying capacity of 800 miner's inches. Since 1930, the description was unchallenged and relied on by Quigley to his benefit, and under res judicata, Quigley could not now complain of its inaccuracy. Graveley

Simmental Ranch Co. v. Quigley, 2003 MT 34, 314 M 226, 65 P3d 225 (2003). See also Quigley v. McIntosh, 88 M 103, 290 P 266 (1930), and Quigley v. McIntosh, 110 M 495, 103 P2d 1067 (1940).

*No Right of Appeal Except From Final Judgment:* There is no right of appeal granted to a water right claimant under the state water rights adjudication process except from a final decree entered under 85-2-234. In re Adjudication of Sage Creek Water Rights, 234 M 243, 763 P2d 644, 45 St. Rep. 1876 (1988).

*State Water Court — Jurisdiction to Adjudicate Indian Reserved Water Rights:* In an original proceeding to determine jurisdiction over controversies involving federal water rights of the Water Court over Indian tribes and water flowing through state reservations, the Supreme Court held that Article I of the Montana Constitution does not bar state jurisdiction to adjudicate Indian reserved water rights. With the 1952 McCarran amendment, the U.S. Congress diminished the scope of absolute federal jurisdiction over controversies involving federal water rights by allowing state courts concurrent jurisdiction to adjudicate federal water rights. In Colo. River Water Conserv. District v. U.S., 424 US 800 (1976), the U.S. Supreme Court held that the McCarran amendment applied to Indian water rights. The state Legislature's enactment of the Water Use Act (Title 85, ch. 2) pursuant to Art. IX, sec. 3, Mont. Const., constitutes a valid and binding consent of the people of Montana to Congress' grant of state jurisdiction over Indian reserved water rights. State ex rel. Greely v. Confederated Salish & Kootenai Tribes, 219 M 76, 712 P2d 754, 42 St. Rep. 1856 (1985), followed in Blackfeet Indian Nation v. Hodel, 634 F. Supp. 646, 43 St. Rep. 863 (D.C. Mont. 1986).

*Water Use Act — Adjudication of Federal and Indian Reserved Water Rights:*

The Montana Water Use Act (Title 85, ch. 2) is adequate on its face to adjudicate federal reserved water rights. Although federal reserved rights differ from state appropriative rights in origin, determination of priority date, and quantification standards, the Water Use Act recognizes the distinction between federal reserved rights and state-created appropriative rights. As the Act permits each different class of water rights to be treated differently, the Act is adequate to allow for adjudication of federal reserved rights. State ex rel. Greely v. Confederated Salish & Kootenai Tribes, 219 M 76, 712 P2d 754, 42 St. Rep. 1856 (1985), followed in Blackfeet Indian Nation v. Hodel, 634 F. Supp. 646, 43 St. Rep. 863 (D.C. Mont. 1986).

The Montana Water Use Act (Title 85, ch. 2) is adequate on its face to adjudicate Indian reserved water rights. Although state appropriative water rights and Indian reserved water rights differ in origin and definition, the Water Use Act, as amended, permits the Water Court to treat Indian reserved water rights differently from state appropriative rights. The Water Use Act does not state explicitly that the Water Court shall apply federal law in adjudicating Indian reserved rights; however, state courts are required to follow federal law with regard to those water rights. State ex rel. Greely v. Confederated Salish & Kootenai Tribes, 219 M 76, 712 P2d 754, 42 St. Rep. 1856 (1985), followed in Blackfeet Indian Nation v. Hodel, 634 F. Supp. 646, 43 St. Rep. 863 (D.C. Mont. 1986).

*State Court Jurisdiction Over Federal and Indian Water Rights:* The McCarran Amendment, 43 U.S.C. § 666, granting state courts jurisdiction over the United States in litigation involving a comprehensive adjudication of water rights, removed "whatever limitations the enabling acts or federal policy may have originally placed on state court jurisdiction" over the adjudication of Indian water rights in actions brought by the United States on behalf of an Indian tribe as well as in actions brought by an Indian tribe itself. Assuming that the state adjudication procedure is adequate and complies with state law, dismissal of adjudication actions filed in federal District Court out of deference to state adjudication proceedings was proper. Ariz. v. San Carlos Apache Tribe, 463 US 545, 77 L Ed 2d 837, 103 S Ct 3201 (1983), reversing N. Cheyenne Tribe v. Adsit, 668 F2d 1080 (9th Cir. 1982); followed in Blackfeet Indian Nation v. Hodel, 634 F. Supp. 646, 43 St. Rep. 863 (D.C. Mont. 1986).

## DECISIONS UNDER FORMER SECTION 89-801, R.C.M. 1947 — WHAT WATERS MAY BE APPROPRIATED

*Water Rights by Prescription — Hostile Use Required:* Where the plaintiffs brought an action against the decedent's estate, claiming a prescriptive right to water diverted by the decedent's descendants, the District Court did not err in holding that the requirement of hostile use of the water would be applied to determine whether the water had been acquired by prescription. Without such a requirement, the holder of a water right could be deprived of that right without notice. In the case before the court, use of the water could not be said to be hostile unless the defendants were deprived of the water in question at a time when they actually had need of it. Language in the opinion in Cook v. Hudson, 110 M 263, 103 P2d 137 (1940), appearing to abrogate the requirement of hostile use, is expressly disapproved. Grimsley v. Estate of Spencer, 206 M 184, 670 P2d 85, 40 St. Rep. 1585 (1983).

*Waters of Tributary:* The waters of a tributary belong to the stream into which the tributary flows to the extent of prior appropriations. Granite Ditch Co. v. Anderson, 204 M 10, 662 P2d 1312, 40 St. Rep. 630 (1983).

*Valid Water Right Not Affected by Release of Surplus to Junior User:* Defendants' predecessor in interest began using water in the amount of 110 gallons a minute from Mahle Spring in 1917 for domestic, stock, and irrigation purposes. Mahle Spring flows into Ashley Creek. In 1958, defendants completed construction of a dam whose purpose was to stabilize their water supply only, not to increase the amount of water appropriated. In April 1973, defendants filed notice of completion of ground water appropriation without well, claiming 110 gallons a minute. In 1957, plaintiff's predecessor in interest began using water from Ashley Creek. At times, when Ashley Creek dried up, defendants agreed to release water from the dam. In 1978, plaintiff obtained a water use permit for Ashley Creek. Subsequently, defendants refused to release any water from the dam. Plaintiff filed an action to adjudicate the parties' water rights and to enjoin defendants from interfering with the flow of Ashley Creek. The Montana Supreme Court upheld the District Court's ruling that defendants are entitled to 110 gallons a minute with a priority date of 1917 and that plaintiff is entitled only to the excess over that. The court denied plaintiff's claim that defendants were estopped from asserting a superior claim, reasoning that the release of the water did not cause plaintiff's predecessor in interest to change her position for the worse because the defendants had already established a valid claim to the water and thus the release was either a mere gratuity or a release of surplus water. In the absence of evidence that defendant was not simply releasing surplus water, the court also denied plaintiff's claim of laches. Finally, the court denied plaintiff's claim that the release from the dam was evidence that defendants were not making beneficial use of all the water since the District Court findings indicated that the defendants' total claim was fully justified. Bagnell v. Lemery, 202 M 238, 657 P2d 608, 40 St. Rep. 58 (1983).

*Adverse Use — Expansion of Water Right:* Plaintiff had title by conveyance to 132/142 part of a water right, with defendant having the remaining part. Because the defendant insisted on and did use one-half of the water right against plaintiff's wishes for 15 years and because plaintiff stated he needed all the water during that time, the defendant established a claim to half of the water through adverse possession. Firestone v. Bradshaw, 157 M 181, 483 P2d 716 (1971).

*Adverse Use — Elements — Burden of Proof:* In order to acquire a water right by adverse use or by prescription (prior to 1953), the proof must show all the following elements: that the use has been continuous for 10 years, exclusive, open, under a claim of right, hostile, and an invasion of another's rights, which the latter had a chance to prevent. The burden of proving an adverse use rests upon the party alleging it. Smith v. Krutar, 153 M 325, 457 P2d 459 (1969); King v. Schultz, 141 M 94, 375 P2d 108 (1962); Havre Irrigation Co. v. Majerus, 132 M 410, 318 P2d 1076 (1957); Lamping v. Diehl, 126 M 193, 246 P2d 230 (1952); Irion v. Hyde, 107 M 84, 81 P2d 353 (1938).

*Adverse Use — Not Peaceable and Uninterrupted:* During the period of defendant's asserted adverse use, the plaintiff attempted to prevent defendant's use of water by destroying pipes and headgates placed on a ditch by the defendant. Therefore, the defendant's use was not peaceable or uninterrupted as required for a claim of adverse use. Smith v. Krutar, 153 M 325, 457 P2d 459 (1969).

*Adverse Use — Prerequisites:* There are three basic prerequisites for establishing adverse use: (1) that the claimant use water at a time when plaintiff needs it; (2) that the claimant use water in such a substantial manner as to notify plaintiff that he is being deprived of water to which he is entitled; and (3) that during all of that period, plaintiff could have maintained an action against him for so using the water. Smith v. Krutar, 153 M 325, 457 P2d 459 (1969); King v. Schultz, 141 M 94, 375 P2d 108 (1962); Havre Irrigation Co. v. Majerus, 132 M 410, 318 P2d 1076 (1957).

*Adverse Use — Prior Decree as Res Judicata:* Because the criteria for the doctrine of res judicata were met, a water right by adverse use could not be established based on a period prior to the entry of a water rights decree. Smith v. Krutar, 153 M 325, 457 P2d 459 (1969).

*Adverse Use — Diversion System as Evidence:* Evidence of a water line and diversion system on defendant's land to divert water on defendant's land to plaintiff's land amply supported a conclusion that plaintiff was the owner of a water right by reason of title by prescription. O'Connor v. Brodie, 153 M 129, 454 P2d 920 (1969).

*Appropriation on Private Land:*

Without the permission of the defendant, the plaintiff constructed a ditch over land of the defendant. The plaintiff's trespass did not give rise to a right to an easement over the defendant's land or to water from the spring. Jones v. Hanson, 133 M 115, 320 P2d 1007 (1958).

An appropriation of water is not confined to waters flowing in streams upon public land but may be made from a stream flowing through privately owned land by invoking the aid of eminent domain proceedings, if necessary. Mettler v. Ames Realty Co., 61 M 152, 201 P 702 (1921).

Sections 89-801 through 89-805, 89-807 through 89-828, and 89-839 through 89-844, R.C.M. 1947, do not and cannot authorize a person to go upon the private property of another for the purpose of making an appropriation, except by condemnation proceedings. Prentice v. McKay, 38 M 114, 98 P 1081 (1909), explained in Connolly v. Harrel, 102 M 295, 57 P2d 781 (1936).

The mere fact that water has its source on land owned by a plaintiff does not of itself give him the exclusive right therein so as to prevent others from acquiring rights to it under the laws of the state. Quinlan v. Calvert, 31 M 115, 77 P 428 (1904).

A trespasser on riparian land cannot lawfully exercise any right to water on such land or acquire any right therein by virtue of the provisions of this chapter. Smith v. Denniff, 24 M 20, 60 P 398 (1900), distinguished in Dept. of State Lands v. Pettibone, 216 M 361, 702 P2d 948, 42 St. Rep. 869 (1985).

*Adverse Use — Parties to the Action:* In order to acquire title to a water right by adverse possession, those claiming to be the legal owners of the water right must be made parties. Forrester v. Rock Island Oil Co., 133 M 333, 323 P2d 597 (1958).

*Limitation on Rights:* The rights of an appropriator of water are limited to the natural condition of the stream at the time the appropriation is made. Jones v. Hanson, 133 M 115, 320 P2d 1007 (1958).

*Adverse Use — Not Adverse:* The defendant used water from a stream during periods of spring runoff in years of above average rainfall, believed the water so used would percolate back into the stream, and used the water on isolated land, making discovery of irrigation difficult. Such use was insufficient to establish a water right by adverse possession because it lacked the most vital element, namely, adverse use. Havre Irrigation Co. v. Majerus, 132 M 410, 318 P2d 1076 (1957).

*Impounding Floodwater and Wastewater:* Where plaintiff had over the years constructed a series of dikes in order to spread water over his land that would flow down a dry gully after the melting of snow or a heavy rainfall, he had a prior right to the extent that his project was finished. He who first diverts the water to a beneficial use has the prior right thereto where the right is based upon the custom and practice of the early settlers and where there was no compliance with the statute. Midkiff v. Kincheloe, 127 M 324, 263 P2d 976 (1953). (See, however, the dissenting opinion in the case in which it was contended that the waters were floodwaters and wastewaters that the defendant had a right to impound in a stock reservoir, 127 M 324, 263 P2d 976 (1953).)

*Slough — Natural Watercourse:* A slough naturally followed a channel which was cut down in gravel and rock, and was fed by natural springs, seepage, surface drainage and wastewater from a canal. Such a slough constituted a natural watercourse and was subject to appropriation. Meine v. Ferris, 126 M 210, 247 P2d 195 (1952).

*Diffused Surface Water Defined — Not Subject to Appropriation:* The essential characteristics of diffused surface waters are that their flows are short-lived and that the waters are spread over the ground and not concentrated or confined in flows of legal watercourses or bodies of water conforming to the definition of lakes or ponds. Diffused surface waters in a gulch on land above where a natural channel has developed are not subject to appropriation. Doney v. Beatty, 124 M 41, 220 P2d 77 (1950).

*Ownership of Land Where Water Has Source:* Seepage water that has its rise along the bed of a stream and forms a natural accretion thereto belongs to that stream as part of its source of supply, and the ownership of land where water has its source does not necessarily give the exclusive right to use such water to the landowner so as to prevent others from acquiring rights therein. Woodward v. Perkins, 116 M 46, 147 P2d 1016 (1944), distinguished in Forrester v. Rock Island Oil & Ref. Co., 133 M 333, 323 P2d 597 (1958). See also Nelson v. Brooks, 2014 MT 120, 375 Mont. 86, 329 P.3d 558.

*Seepage and Wastewaters:*

Although seepage water that has its rise along the bed of a stream and forms a natural accretion thereto belongs to the stream as a part of its source of supply, the same as do feeder springs, and an appropriator of water on such stream has the right to all such tributary flow even as against the owner of the land, the conducting of water from upper reaches of a tributary to "potholes" and "reservoirs" and then capturing the seepage therefrom in ditches is insufficient proof of creating a new supply for an additional water right. Woodward v. Perkins, 116 M 46, 147 P2d 1016 (1944), distinguished in Forrester v. Rock Island Oil & Ref. Co., 133 M 333, 323 P2d 597 (1958).

Where water seeping from irrigated lands finds its way into a drain ditch and is collected there, it is subject to appropriation. Wills v. Morris, 100 M 514, 50 P2d 862 (1935), distinguished in McGowan v. U.S., 206 F. Supp. 439 (D.C. Mont. 1962).

While wastewaters are subject to appropriation, the owner of the land from which such water flows has the right to use his land as he pleases and may therefore change the flow to suit his purpose, provided the changes are not made maliciously or arbitrarily to the detriment of the appropriator in the enjoyment of his right. Newton v. Weiler, 87 M 164, 286 P 133 (1930).

Prior to the amendment of this section (Ch. 228, L. 1921), there was no statutory provision for the appropriation of flood, seepage, and wastewaters and therefore no right could be acquired as to such vagrant or fugitive waters as against the owner who sought to recapture them. But where such waters had passed beyond the control of the owner, they became abandoned personalty that could be taken up and used by the person first in the field. Popham v. Holloron, 84 M 442, 275 P 1099 (1929), distinguished in McGowan v. U.S., 206 F. Supp. 439 (D.C. Mont. 1962).

*Interference With Prior Rights — Burden:* Primary rights to the use of water in a stream are those of appropriators of its natural flow, and the burden is upon a subsequent storage claimant (in the instant case, defendant State Water Conservation Board, precursor to the Department of Natural Resources and Conservation) or upon one who uses a watercourse as part of his distribution system of developed or alien waters to affirmatively disprove interference with prior rights in a suit to enjoin such interference. Allendale Irrigation Co. v. St. Water Conservation Bd., 113 M 436, 127 P2d 227 (1942).

*Storage and Use of Floodwater or Wastewater:* Under Art. III, sec. 15, 1889 Mont. Const., the sites for reservoirs for collecting and storing water constitute a public use intended to conserve rather than waste water so that the arid lands of the state may be made productive. The appropriation of water in a reservoir to conserve water flowing in an otherwise dry coulee, only at heavy rains or spring runoff, entitles the owner to fill the reservoir to its full capacity to the extent of his appropriation, only once a year. The state laws that apply to acquisition of running water apply to storage and use of floodwater or wastewater—first in time, first in right. Fed. Land Bank v. Morris, 112 M 445, 116 P2d 1007 (1941).

*Adverse Use — Open and Notorious But Not Adverse:* Although the defendant used water rightfully subject to the plaintiff's prior right, he failed to tell anyone of his adverse claim or show possession so as to give the plaintiff notice of his adverse claim. Use may be open and notorious yet still not adverse. Cook v. Hudson, 110 M 263, 103 P2d 137 (1940), distinguished and overruled in Grimsley v. Estate of Spencer, 206 M 184, 670 P2d 85 (1983).

*Appropriation on Indian Lands:*

Defendant's contention that an appropriation of a water right was made on Indian lands prior to opening for settlement and therefore initiated by trespass and hence void could not be sustained because the provision of the Crow Indian treaty of 1868 that white men should be excluded from Indian lands is directory and not mandatory. Whites could be excluded if inimical to Indian welfare, it being discretionary with those charged with protecting Indian rights to take action against whites invading without the consent of the tribe. The Indian land became public domain subject to squatter's rights after ratification of agreement for settlement in 1891. Cook v. Hudson, 110 M 263, 103 P2d 137 (1940), distinguished and overruled on other grounds in Grimsley v. Estate of Spencer, 206 M 184, 670 P2d 85 (1983).

By the treaty of May 7, 1868, between the United States and the Crow Indians, establishing the Crow Indian Reservation, the federal government impliedly reserved to itself the waters thereon for irrigation and other purposes for use by the Indians, hence they were not subject to appropriation by others. The right to use water appurtenant to lands on an Indian reservation and held by Indians under trust patents is property of the United States, and state courts are without jurisdiction to enter a decree affecting such right, but when an Indian becomes seized of a fee simple title after removal of a trust patent, the conveyance of land transfers the right to use the water appurtenant to the land. Anderson v. Spear-Morgan Livestock Co., 107 M 18, 79 P2d 667 (1938).

*Water Right to Be Personal Property When Considered Independently of Land:* While a water right partakes of the nature of real estate, it is not land in any sense, and when considered alone for the purpose of taxation and independently of the land to which it is appurtenant, it is personal property. Brady Irrigation Co. v. Teton County, 107 M 330, 85 P2d 350 (1938); Verwolf v. Low Line Irrigation Co., 70 M 570, 227 P 68 (1924).

*Adverse Use — Permissive Use:* The claim of adverse use of a water right cannot be initiated until the owner of the superior right is deprived of the benefit of its use in such a substantial manner as to notify him that his rights are being invaded; mere use of the water during the statutory period alone is not sufficient, but it must appear that during such entire period an action could have been maintained against the claimant by the party against whom it is made. Permissive use negates the possibility of adverse use. Irion v. Hyde, 107 M 84, 81 P2d 353 (1938).

*Tributary of Stream:* Evidence in a water right suit that water flowed in a creek only in times of flood and that except at such times, the water therein never reached the point where it joined another creek, supported a finding that the former was not a tributary of the latter. Anderson v. Spear-Morgan Livestock Co., 107 M 18, 79 P2d 667 (1938).

*Right to Use Increased Supply:* Where one claims to have increased the flow of water in a stream and therefore claims he is entitled to use such increase, he must show that the increase was occasioned through his exertions and not through any accessions to the stream brought about through the process of nature, as by percolating or seepage waters that would have found their way to the stream in any event. W. Side Ditch Co. v. Bennett, 106 M 422, 78 P2d 78 (1938).

*"Watercourse" Defined:*

A "watercourse", within the meaning of the water right laws, from which an appropriation for purposes of irrigation may be made, may consist of a well-defined channel into which water from a slough fed by irrigation of adjoining lands through seepage or through a ditch constructed by the owners of such lands for draining purposes finds its way, and which through years of so flowing has acquired a permanent character as the natural drainage of the particular watershed. W. Side Ditch Co. v. Bennett, 106 M 422, 78 P2d 78 (1938).

Where waters flowing in a channel with regularity from year to year were made to do so through the instrumentality of man and have through years of so flowing acquired a permanent character as the natural drainage of the watershed, or where they come from springs formed from seepage or percolation, from surface water collecting in a canyon, or from wells accidentally developed while drilling for oil, etc., they constitute a watercourse. Popham v. Holloron, 84 M 442, 275 P 1099 (1929), distinguished in McGowan v. U.S., 206 F. Supp. 439 (D.C. Mont. 1962).

*Rules and Customs Prior to 1885:*

Prior to the adoption of the first water right statutes in 1885, appropriations of water were made pursuant to the rules and customs of the early California settlers, and under them the essential elements of an appropriation made in 1871 were a completed ditch and the application of the water through it to a beneficial use. Missoula Light & Water Co. v. Hughes, 106 M 355, 77 P2d 1041 (1938).

The essential features of an appropriation of water made prior to L. 1885, p. 130, were a completed ditch and the application of water to a beneficial use. Maynard v. Watkins, 55 M 54, 173 P 551 (1918).

*Appropriation Made on Public Domain by Settler:* A settler on lands that were a part of the public domain could make a valid appropriation of water thereon. Galahan v. Lewis, 105 M 294, 72 P2d 1018 (1937).

*Appropriator Not Owner of Water — Sale of Water:* An appropriator of water does not become the owner of the water but only of the right to use it. He may not sell the water to another to be used by the purchaser when not in use by the appropriator. Galahan v. Lewis, 105 M 294, 72 P2d 1018 (1937).

*Conveyance of Right as Appurtenance:* When land is conveyed, including the appurtenances, any water rights theretofore enjoyed are transferred. When the grantor later purports to convey the water right only, the latter deed does not constitute severance of the water right, as it adds nothing to the conveyance theretofore made. Osnes Livestock Co. v. Warren, 103 M 284, 62 P2d 206 (1936).

*Prescription — Adverse Use — Burden of Proof:* To establish acquisition of a water right by adverse use or prescription, the claimant has the burden of showing that his use of the water deprived the prior appropriator of water at times when the latter actually needed it. Osnes Livestock Co. v. Warren, 103 M 284, 62 P2d 206 (1936).

*Property Right — After Perfection:* Where a water right has once been fully perfected, i.e., where there was a diversion of the water and its application to a beneficial use, it becomes a property right of which the owner may be divested only in some legal manner. Osnes Livestock Co. v. Warren, 103 M 284, 62 P2d 206 (1936).

*Rights of Licensee:* Where one goes upon land of another with the latter's verbal consent for the purpose of making an appropriation of water, posts his notice of appropriation, diverts the water through the landowner's ditch, and applies it to a beneficial use on his own land, he becomes a licensee, not a trespasser, and revocation of a license to construct a ditch does not necessarily affect the licensee's right to the water carried by the ditch. Connolly v. Harrel, 102 M 295, 57 P2d 781 (1936).

*Water Rights and Ditches Separate Rights:* Water rights and ditch rights are separate and distinct property rights, i.e., one may own a water right without a ditch right or a ditch right without a water right. Connolly v. Harrel, 102 M 295, 57 P2d 781 (1936).

*Adverse Use — Irrigation Company's Distribution:* For more than 10 years before the commencement of an action an irrigation company asserted that the water right acquired by the plaintiff's deed was not superior to the water right acquired by a holder of the company's capital stock. Upon this theory the irrigation company made a pro rata distribution of available water to its shareholders and the plaintiff, the plaintiff accepting the water distribution with full knowledge of the irrigation company's position. The irrigation company's possession of the water was thereby open, notorious, continuous, exclusive, adverse, and hostile with respect to the plaintiff's claim of right. Verwolf v. Low Line Irrigation Co., 70 M 570, 227 P 68 (1924).

*Adverse Use — Payment of Taxes on Land Not Required:* One is not required to pay all the taxes for the period of prescription upon the land to which a water right is appurtenant in order to acquire title to a water right by adverse possession. Verwolf v. Low Line Irrigation Co., 70 M 570, 227 P 68 (1924).

*Source of Right:* An appropriator of water derives his right from the state and not from the national government, the use of waters flowing in natural streams in Montana being subject to state regulation and control. Mettler v. Ames Realty Co., 61 M 152, 201 P 702 (1921).

*Land Qualifications Unnecessary for Appropriation:* An appropriator of water need not be either an owner or in possession of land to make a valid appropriation for irrigation purposes. Bailey v. Tintinger, 45 M 154, 122 P 575 (1912); Smith v. Denniff, 24 M 20, 60 P 398 (1900), distinguished in Dept. of State Lands v. Pettibone, 216 M 361, 702 P2d 948, 42 St. Rep. 869 (1985); Toohey v. Campbell, 24 M 13, 60 P 396 (1900).

*Method of Procedure:* Sections 89-810 and 89-811, R.C.M. 1947 (now repealed), provide all the steps necessary to be taken by one seeking to make an appropriation of water, and one who proceeds under them, instead of under the rules and customs of the early settlers, has a completed appropriation when the work on his ditch or canal is finished and before the water is actually applied to its intended use. Bailey v. Tintinger, 45 M 154, 122 P 575 (1912).

*Public Service Corporation:* A public service corporation, organized for the purpose of constructing an irrigation system and selling or renting water to reclaim arid lands, has a completed appropriation of water when its distributing system is finished and when the corporation is ready to deliver water to users upon demand and offers to do so. Bailey v. Tintinger, 45 M 154, 122 P 575 (1912). See also Curry v. Pondera County Canal & Reservoir Co., 2016 MT 77, 383 Mont. 93, 370 P.3d 440.

*Statute to Apply Only to Public Lands:* Sections 89-801 through 89-805, 89-807 through 89-828, and 89-839 through 89-844, R.C.M. 1947 (in part since repealed and in part contained in Title 85, ch. 2), apply only to appropriations made on the public lands of the United States or of the state and to such as are made by individuals who have riparian rights, either as owners of riparian lands or through grants from such owners. Prentice v. McKay, 38 M 114, 98 P 1081 (1909). See Alaska Juneau Gold Min. Co. v. Ebner Gold Min. Co., 239 F 638 (9th Cir. 1917).

*Title Obtained by Appropriation:* Title cannot be acquired to the corpus of waters flowing in a stream but only to the use thereof. Norman v. Corbley, 32 M 195, 79 P 1059 (1905).

*Adverse Use — Contract to Use Water:* A controversy between a mill and a mining company over water in a creek was settled by a contract in which the mining company had a right to a specified amount plus a further amount that was over and above that necessary for the mill. The mill went out of business, and the mining company used all the water from the creek. Because the mining company had a right under the contract to the water not used by the mill, it could not be said that the mining company was acting adversely with respect to the mill's water right. Smith v. Hope, 18 M 432, 45 P 632 (1882).

## DECISIONS UNDER FORMER SECTION 89-802, R.C.M. 1947 — APPROPRIATION FOR USEFUL PURPOSE — ABANDONMENT

*Forty Years of Nonuse as Raising Rebuttable Presumption of Intent to Abandon:* In litigation to establish plaintiff's and defendant's respective priorities to water appropriated from Big Coulee Creek, the evidence showed that neither had used previously appropriated water for a period of at least 40 years. Thus, the District Court did not err in holding that under section 89-802, R.C.M. 1947 (now repealed), the appropriation rights of both parties had been abandoned for lack of use of the water. While abandonment of a water right is a question of fact, nonuse for a period of at least 40 years raises, in effect, a rebuttable presumption of abandonment. A claim that the predecessors of the parties could not afford to use the water by irrigating their land did not excuse the failure to use the water or rebut the presumption of abandonment since economics could excuse nearly every otherwise abandoned water right. 79 Ranch, Inc. v. Pitsch, 204 M 426, 666 P2d 215, 40 St. Rep. 981 (1983), followed in In re Adjudication of Clark Fork River Drainage, 254 M 11, 833 P2d 1120, 49 St. Rep. 591 (1992), in which nonuse for 23-plus years was sufficient to constitute a presumption of abandonment despite the fact that the water right was carried as an asset on the county's books during the period of nonuse, and In re Adjudication of Existing Rights to Use of All Water, Both Surface & Underground, Within Clark Fork River Drainage Above Blackfoot River, 274 M 340, 908 P2d 1353, 52 St. Rep. 1264 (1995), in which continuous nonuse of water for a mining claim for over 50 years raised a rebuttable presumption of abandonment, despite claimant's contention that the cyclical nature of the mining industry and its uncertain economics were reason enough to explain the long period of nonuse. See also Axtell v. M.S. Consulting, 1998 MT 64, 288 M 150, 955 P2d 1362, 55 St. Rep. 276 (1998), and Heavirland v. St., 2013 MT 313, 372 Mont. 300, 311 P.3d 813, in which the Supreme Court concluded that the 79 Ranch abandonment analysis applies retroactively.

*Abandonment by Nonuse:* Under section 89-802, R.C.M. 1947 (now repealed), 75 years of nonuse is sufficient to provide "clear evidence" of abandonment of the unused portion of a water right. Holmstrom Land Co., Inc. v. Newlan Creek Water District, 185 M 409, 605 P2d 1060, 36 St. Rep. 1403 (1979), rehearing denied, 185 M 409, 605 P2d 1060, 37 St. Rep. 295 (1980).

*Intent to Abandon — Nonuse of Ditch:* Mere nonuse of a ditch appurtenant to a water right is not sufficient to establish abandonment. There must be concurrent intent to abandon. Shammel v. Vogl, 144 M 354, 396 P2d 103 (1964), followed in Rieman v. Anderson, 282 M 139, 935 P2d 1122, 54 St. Rep. 286 (1997), and distinguished in Roland v. Davis, 2013 MT 148, 370 Mont. 327, 302 P.3d 91.

*Beneficial Use — Measurement of Water:*

For many years the courts in water right decrees have followed the custom of expressing water rights in terms of flow per unit of time without stating during how many hours or days the water could be taken or defining the volume of water which could be used. This may not be taken as an adjudication that appropriations were of an absolutely uninterrupted flow, thereby removing the established limitation of the appropriator's right to water actually taken and beneficially applied. Nor should this fact be interpreted as a right to expand appropriations to the detriment of subsequent appropriators. Quigley v. McIntosh, 110 M 495, 103 P2d 1067 (1940).

In the absence of a statute regulating the amount of water reasonably necessary for irrigation, the rule has generally been observed by the courts to allow 1 inch an acre in fixing the amount required for economical use, unless the evidence discloses that a greater or lesser amount is required. Further, the system of irrigation in common use in the locality, if reasonable and proper under existing conditions, is to be taken as the standard. But an appropriator cannot be compelled to divert the water according to the most scientific method known. Worden v. Alexander, 108 M 208, 90 P2d 160 (1939).

The rights of appropriators of water may not be measured entirely by what they claimed in their notices of appropriation but must be measured by their beneficial use thereof over reasonable periods. Consideration must be given to the extent and manner of their use, the character of the land upon which used, and the general necessities of the case, as well as whether streams were furnished by usual rains or snows, extraordinary rain or snowfall, or by springs or seepage. Irion v. Hyde, 107 M 84, 81 P2d 353 (1938), followed in 79 Ranch, Inc. v. Pitsch, 204 M 426, 666 P2d 215, 40 St. Rep. 981 (1983).

Neither the appropriator of water nor one to whom a right is decreed owns the corpus of any part of the flow of a stream. He is entitled only to the beneficial use of the amount of water called for by his appropriation or the decree when he has need therefor, provided his distributing system has a sufficient capacity to carry that amount; if incapable of carrying that amount, his right is measured by the capacity of his system of distribution regardless of his needs. Tucker v. Missoula Light & Ry., 77 M 91, 250 P 11 (1926).

*"Abandonment" Defined:* Before it may be said that the owner of a water right has abandoned it, there must be the necessary concurrence of act and intent to abandon. He must have relinquished it because he no longer desired to possess it. Irion v. Hyde, 107 M 84, 81 P2d 353 (1938).

*Beneficial Use — Swimming Pool or Fishpond:* Diversion of water to maintain a swimming pool or fishpond may have been for a beneficial use and hence the basis of a valid appropriation. Osnes Livestock Co. v. Warren, 103 M 284, 62 P2d 206 (1936).

*Abandonment — Essential Elements:* Abandonment of a water right is a voluntary act, and to constitute it there must be a concurrence of act and intent. Neither the relinquishment of possession or the intent not to resume it for a beneficial use is alone sufficient to bring about its abandonment. Osnes Livestock Co. v. Warren, 103 M 284, 62 P2d 206 (1936); Thomas v. Ball, 66 M 161, 213 P 597 (1923); Tucker v. Jones, 8 M 225, 19 P 571 (1888).

*Abandonment — Trespassers:* Plaintiff's predecessors in interest for 13 years used a water right acquired by a desert land entryman after the entry had been canceled and thus were trespassers upon the public domain. That fact did not deprive the plaintiff from resuming the use of the water upon acquiring possession, unaffected by any junior rights which came into being in the meantime, since there is no law enforcing abandonment of a vested water right as a penalty for exercising it as a trespasser. Osnes Livestock Co. v. Warren, 103 M 284, 62 P2d 206 (1936).

*Abandonment — Resumption:* Where use of water is abandoned and resumed, use vests from the date of resumption. Galiger v. McNulty, 80 M 339, 260 P 401 (1927); O'Shea v. Doty, 68 M 316, 218 P 658 (1923).

*Abandonment — Burden of Proof — Nonuse:* One who claims an abandonment of a water right has the burden of proving it by a preponderance of clear and definite evidence. Where the only evidence was nonuse for 7 years, whereupon its use was resumed by the owner and the water right later sold to another, the resumption and sale were evidence that abandonment was not intended. Thomas v. Ball, 66 M 161, 213 P 597 (1923).

*Beneficial Use — Irrigation:*

Respecting the use of water for purposes of irrigation, the ultimate question in every case is how much will supply the actual needs of the prior claimant under existing conditions. Conrow v. Huffine, 48 M 437, 138 P 1094 (1914).

Where a successor in interest of an appropriator of water greatly increased the amount of grass for pasture by irrigation, such use of the water was a useful and beneficial one within the meaning of this section. Sayre v. Johnson, 33 M 15, 81 P 389 (1905).

*Beneficial Use — Immediate Use Unnecessary:* While the appropriation must be for some useful or beneficial purposes, the use to which the water is to be applied need not be immediate but may be prospective or contemplated. Bailey v. Tintinger, 45 M 154, 122 P 575 (1912); Smith v. Duff, 39 M 382, 102 P 984 (1909); Miles v. Butte Elec. & Power Co., 32 M 56, 79 P 549 (1905); Toohey v. Campbell, 24 M 13, 60 P 396 (1900).

*Beneficial Use — Intent of Claimant:*

This section requires that, at the time of taking the initial steps, the claimant must have an intention to apply the water to a useful or beneficial purpose. Bailey v. Tintinger, 45 M 154, 122 P 575 (1912); Smith v. Duff, 39 M 382, 102 P 984 (1909); Miles v. Butte Elec. & Power Co., 32 M 56, 79 P 549 (1905); Toohey v. Campbell, 24 M 13, 60 P 396 (1900); Power v. Switzer, 21 M 523, 55 P 32 (1898).

As every appropriation must be made for a beneficial or useful purpose, it becomes the duty of the courts to try the question of the claimant's intent by his acts and the circumstances surrounding his possession of the water, its actual or contemplated use, and the purposes thereof. Smith v. Duff, 39 M 382, 102 P 984 (1909); Miles v. Butte Elec. & Power Co., 32 M 56, 79 P 549 (1905); Toohey v. Campbell, 24 M 13, 60 P 396 (1900). See also In re E. Bench Irrigation District, 2021 MT 319, 406 Mont. 502, 501 P.3d 380.

*Unused Excess Not Appropriated:* The diversion of water for domestic purposes in excess of what is required and allowing such excess to overflow lands without any intention of irrigating and without any intention of using such excess for any useful purpose does not constitute an appropriation of the excess. Power v. Switzer, 21 M 523, 55 P 32 (1898).

*Abandonment of Ditch — No Effect on Water Right:* An appropriation was made from a creek, turned into a ditch, and eventually used at placer mines. Years later the appropriator abandoned the ditch, returned the water to the creek, and recaptured it for irrigation use. The abandonment of the ditch was not an abandonment of the entire water right. Meagher v. Hardenbrook, 11 M 385, 28 P 451 (1891).

*Abandonment — Insufficient Supply:* Defendant's appropriation for placer mining was not abandoned by his failure to use the appropriation for 5 years, as there was not enough water to work the mines during those years. McCauley v. McKeig, 8 M 389, 21 P 22 (1889).

## DECISIONS UNDER FORMER SECTION 89-803, R.C.M. 1947 — CHANGE OF POINT OF DIVERSION — CHANGE OF USE

*Storage of Water Beneficial Use — BLM Held Stock Watering Rights for Use by Grazing Permittees — Multiple Appropriators Can Claim Water Rights from Same Source:* The Water

Court did not err in concluding that the United States Bureau of Land Management (BLM) held stock watering rights under Montana law in reservoirs constructed on federal land for the use of grazing permittees. The Supreme Court recognized that storage of water as a beneficial use is expressly provided by the Montana Constitution and that the BLM was entitled to proceed under Montana law to appropriate water in its reservoirs for use by grazing permittees and others. It has long been the common law and then statutory law in Montana that multiple appropriators can claim water rights from the same source and that the first in time has the best right. While overappropriation creates its own issues, it does not mean that the person or entity that made the first use on a water source acquired the right to exclude any other person or entity from claiming water from the same source. A fundamental precept of Montana water law is that multiple claims can exist on a single source of water. U.S. v. Barthelemess Ranch Corp., 2016 MT 348, 386 Mont. 121, 386 P.3d 952.

*Change in Place of Diversion — Water Exchange Prevented:* The defendants, upstream subsequent appropriators with respect to the plaintiff, diverted all the waters of a creek. Further downstream but still above the plaintiff, the defendants replenished the creek with water from a canal. The plaintiff could not change his diversion to a point upstream of the defendants because of the injury resulting to the defendants. Thompson v. Harvey, 164 M 133, 519 P2d 963 (1974).

*Change in Use — Appurtenant to Land:*

After purchasing an adjoining tract of land with an appurtenant water right, a farmer proceeded to irrigate all of his land with the newly purchased water right. This change in use resulted in the water right becoming appurtenant to all of the land. Spaeth v. Emmett, 142 M 231, 383 P2d 812 (1963).

Neither a change in the place of diversion of water nor a change in its use from mining to agriculture, or vice versa, affects its appropriation. Thomas v. Ball, 66 M 161, 213 P 597 (1923). See also Galiger v. McNulty, 80 M 339, 260 P 401 (1927); Whitcomb v. Murphy, 94 M 562, 23 P2d 980 (1933); Thrasher v. Mannix & Wilson, 95 M 273, 26 P2d 370 (1933); Loyning v. Rankin, 118 M 235, 165 P2d 1006 (1946).

Actual diversion of water and its beneficial use existing, prospective, or in contemplation constitute an appropriation, which is not affected by a change in the point of diversion or place of use. Wheat v. Cameron, 64 M 494, 210 P 761 (1922).

Under section 89-803, R.C.M. 1947 (now repealed), the location of a flume maintained over the land of another, as well as the use of the water flowing through it, may be changed, provided the change adds no new burdens to the servient estate or causes additional damage thereto. Pioneer Min. Co. v. Bannack Gold Min. Co., 60 M 254, 198 P 748 (1921).

*Burden of Proof of Injury:*

For a period of more than 50 years the defendant accumulated water rights and used them wherever and whenever needed to irrigate 34,000 acres of land. The burden was on the plaintiffs to show that they had been injured or prejudiced by such changing use. Forrester v. Rock Island Oil & Ref. Co., 133 M 333, 323 P2d 597 (1958).

The party who claims to have been injured by another's change in place of diversion of water right has the burden of alleging and proving the injury. Thrasher v. Mannix & Wilson, 95 M 273, 26 P2d 370 (1933); Lokowich v. Helena, 46 M 575, 129 P 1063 (1913); Hansen v. Larsen, 44 M 350, 120 P 229 (1911).

*Change in Place of Use — Decree Not Detailed:*

A water rights decree failed to describe the particular acreage to be irrigated and expressed the water rights in terms of flow per unit of time without stating during how many such units of time water could be taken. Adjudicated owners could not expand the use of water to additional lands or in length of time to the injury of subsequent appropriators. Quigley v. McIntosh, 110 M 495, 103 P2d 1067 (1940), followed in Cate v. Hargrave, 209 M 265, 680 P2d 952, 41 St. Rep. 697 (1984).

The conclusiveness of a judgment as res judicata in a water right suit between the same parties or their successors in interest in a prior action is not impaired by the alleged fact that in authorizing a change of place of use or point of diversion, the judgment violated the provisions of section 89-803, R.C.M. 1947 (now repealed). Brennan v. Jones, 101 M 550, 55 P2d 697 (1936).

*Extent of Use in Terms of Flow Per Unit of Time:* The fact that for many years the courts in water right decrees have followed the custom of expressing water rights in terms of flow per unit of time without stating during how many hours or days the water could be taken or defining the volume of water which could be used may not be taken as an adjudication that appropriations were of an absolutely uninterrupted flow, thereby removing the established limitation of the appropriator's right to water actually taken and beneficially applied, or to expand appropriations to the detriment of subsequent appropriators. Quigley v. McIntosh, 110 M 495, 103 P2d 1067 (1940).

*Change of Use — Sale:* Appropriations not originally made for the purpose of sale may have their use changed to that purpose if subsequent appropriators are not thereby injured. Sherlock v. Greaves, 106 M 206, 76 P2d 87 (1938).

*Change in Use — Outside of Watershed:* Pursuant to an earlier water rights decree, the defendant irrigated land outside the watershed of the source. When the defendant brought additional lands outside the watershed under irrigation with this water right, the plaintiffs could not claim they were injured by this change in use. Their lands were either within the watershed of the source or higher than the defendant's irrigated land and would not benefit from percolating waters from his land. Thrasher v. Mannix & Wilson, 95 M 273, 26 P2d 370 (1933).

*Change in Use — Sale of Water Not in Use:* An appropriator of a water right for placer mining purposes attempted to convey to another a right to use the waters when not being used for mining. Although an appropriator may change the use of his appropriation, he may not sell it in the interim when the water is not being used. Galiger v. McNulty, 80 M 339, 260 P 401 (1927); Creek v. Bozeman Water Works Co., 15 M 121, 38 P 459 (1894).

*Use of Any of Several Ditches:* Where an owner of a water right had several ditches for the irrigation of his lands, he had a right to use any of them at which he had a headgate so long as other users were not injured thereby. Tucker v. Missoula Light & Ry., 77 M 91, 250 P 11 (1926).

*Change in Place of Diversion or Use — Who May Complain:* Only a subsequent appropriator being injured may complain that a prior appropriator's change in place of diversion or use is affecting subsequent rights. Carlson v. Helena, 43 M 1, 114 P 110 (1911).

*Change in Place of Diversion and Use — Placer Mining:* The successors of an appropriation of water appropriated for placer mining purposes cannot so change its use as to deprive lower appropriators of their rights, already acquired, in the use of the water for irrigating purposes. Head v. Hale, 38 M 302, 100 P 222 (1909).

*Change in Place of Use — Deprivation of Subsequent Right:* After the defendant used his water right for placer mining purposes the water was turned into a gulch, whereupon the plaintiff appropriated it for irrigation purposes. The defendant then changed the place of use of his water right, resulting in the water no longer being returned to the gulch. Such change in use was unlawful as it absolutely deprived the plaintiff of his subsequent right. Gassert v. Noyes, 18 M 216, 44 P 959 (1896).

*Change in Use — Mining to Irrigation:* A water right was abandoned for mining purposes, the water returned to its original channel, and then recaptured by the original owner to be used for irrigation purposes. This change in use was lawful. Meagher v. Hardenbrook, 11 M 385, 28 P 451 (1891).

### DECISIONS UNDER FORMER SECTION 89-804, R.C.M. 1947 — CHANNELING APPROPRIATED WATER TO ANOTHER STREAM — RECLAIMING WATER

*Canal Water Turned Into Slough — Amount That May Be Reclaimed:* The defendant permitted waters from a canal and spring to run in a slough and then used the slough as a waterway. The defendant could reclaim from the slough only that amount of water equal to what he put in. Meine v. Ferris, 126 M 210, 247 P2d 195 (1952).

*Seepage Water Potholed and Recaptured:* Since seepage water which has its rise along the bed of a stream and forms a natural accretion thereto belongs to the stream as a part of its source of supply, the same as do feeder springs, and an appropriator of water on such stream has the right to all such tributary flow even as against the owner of the land, the conducting of water from upper reaches of a tributary to "potholes" and "reservoirs" and then capturing the seepage therefrom in ditches is insufficient proof of creating a new supply for an additional water right. Woodward v. Perkins, 116 M 46, 147 P2d 1016 (1944), distinguished in Forrester v. Rock Island Oil & Ref. Co., 133 M 333, 323 P2d 597 (1958).

*Percolation From Irrigation on Adjacent Lands:* While under section 89-804, R.C.M. 1947 (now repealed), one may employ the natural channel of a stream for the conveyance of water which he has developed and reclaim it if the rights of prior appropriators are not thereby diminished in quantity or deteriorated in quality, the rule has no application where an increase in the flow of the stream results solely by percolation from irrigation on adjacent lands. West Side Ditch Co. v. Bennett, 106 M 422, 78 P2d 78 (1938); State ex rel. Mungas v. District Court, 102 M 533, 59 P2d 71 (1936); Rock Creek Ditch & Flume Co. v. Miller, 93 M 248, 17 P2d 1074, 89 ALR 200 (1933); Beaverhead Canal Co. v. Dillon Elec. Power & Light Co., 34 M 135, 85 P 880 (1906).

*Deterioration in Quality Prohibited:* While section 89-804, R.C.M. 1947 (now repealed), authorizes an appropriator to turn water into the channel of a stream other than the one from which he appropriates, he may do so only if the waters in the stream the channel of which he thus uses are not deteriorated in quality to the detriment of a prior appropriator thereof. Missoula Pub. Serv. Co. v. Bitter Root Irrigation District, 80 M 64, 257 P 1038 (1927).

*Developed Water Supply — Burden of Proof as to Amount:* One who claims to have developed a water supply has the burden of proving the amount developed, especially when it is mingled with a water supply to which another is entitled. Spaulding v. Stone, 46 M 483, 129 P 327 (1912); Smith v. Duff, 39 M 382, 102 P 984 (1909).

*Drainage Ditch — Interception of Stream's Source:* In order to catch seepage water from irrigated land, the defendant constructed a drainage ditch that paralleled and intersected a stream. Because the ditch intercepted seepage water that was a source of supply for the stream, the defendant did not develop a new water supply to which he was entitled. Spaulding v. Stone, 46 M 483, 129 P 327 (1912).

### DECISIONS UNDER FORMER SECTION 89-807, R.C.M. 1947 — FIRST IN TIME, FIRST IN RIGHT

*Priority of Senior Main Stem Water Rights Over Junior Tributary Water Rights:* Appellant owns water rights in Clear Creek dating to 1910. Petitioners have water rights in Rock Creek dating to 1896. Clear Creek is a tributary of Rock Creek. In 1970, appellant obtained a court order directing the Rock Creek Water Commissioner to "carry out" the Clear Creek water rights of appellant. Following the District Court order, the Water Commissioner honored in full the requests of appellant for water without regard to any priority in the relationship of the creeks' water rights. As a result, at times of water shortage, senior Rock Creek decreed waters are cut off. In 1977, petitioners filed this action to rescind the 1970 order and to direct the Water Commissioner to subject the Clear Creek water rights to the priorities of Rock Creek water rights. The District Court ruled that the 1970 court order, applied by the Water Commissioner to fulfill junior appropriations ahead of prior decreed rights, was improper. The Supreme Court affirmed the District Court's order and further stated that the order did not violate due process. The Supreme Court reasoned that the only rights affected by the District Court order were the rights of the parties before the court. Granite Ditch Co. v. Anderson, 204 M 10, 662 P2d 1312, 40 St. Rep. 630 (1983).

*Prior Rights:* Where plaintiff had over the years constructed a series of dikes in order to spread over his land the water which would flow down a dry gully after the melting of snow or a heavy rainfall, he had a prior right to the extent that his project was finished. He who first diverts the water to a beneficial use has the prior right thereto where the right is based upon the custom and practice of the early settlers and where there was no compliance with the statutes. Midkiff v. Kincheloe, 127 M 324, 263 P2d 976 (1953). (See, however, the dissenting opinion in the case in which it was contended that the waters were floodwaters and wastewaters which the defendant had a right to impound in a stock reservoir, 127 M 324, 263 P2d 976 (1953).)

*Temporary Suspension of Prior Right:* When the one holding the prior right does not need the water, such prior right is temporarily suspended and the next right in the order of priority may use the water until such time as the prior appropriator's needs justify his demanding that the junior appropriator give way to his superior claim. Cook v. Hudson, 110 M 263, 103 P2d 137 (1940), distinguished and overruled on other grounds in Grimsley v. Estate of Spencer, 206 M 184, 670 P2d 85 (1983).

*Contractual Relation or Privity:* The doctrine that where the possessor of a water right claims the right as of the date on which it was initiated by another person, he must show some contractual relation or privity between himself and such other person was not modified to the extent of holding that the possessor of the land may be presumed to be the owner of the right by the decision in Wills v. Morris, 100 M 514, 50 P2d 862 (1935). Osnes Livestock Co. v. Warren, 103 M 284, 62 P2d 206 (1936).

*Abandonment — Resumption:* Where use of water is abandoned and resumed, use vests from the date of resumption. Galiger v. McNulty, 80 M 339, 260 P 401 (1927); O'Shea v. Doty, 68 M 316, 218 P 658 (1923).

*Priority of Appropriation:* Priority of appropriation of water confers superiority of right, without reference to the character of the use, whether natural or artificial. Mettler v. Ames Realty Co., 61 M 152, 201 P 702 (1921); Meine v. Ferris, 126 M 210, 247 P2d 195 (1952).

## DECISIONS UNDER FORMER SECTION 89-808, R.C.M. 1947 — APPROPRIATION BY UNITED STATES

*Method of Procedure:* The United States must proceed, in making appropriations of water from nonnavigable streams of this state, as a corporation or individual. Bailey v. Tintinger, 45 M 154, 122 P 575 (1912). See U.S. v. Burley, 172 F 615 (9th Cir. 1909); Burley v. U.S., 179 F 1 (9th Cir. 1910). See also Mettler v. Ames Realty Co., 61 M 152, 201 P 702 (1921).

## DECISIONS UNDER FORMER SECTION 89-810, R.C.M. 1947 — NOTICE OF APPROPRIATION

*Insufficient Notice of Appropriation Not Prima Facie Evidence:*

Deeds do not qualify as notices of appropriation under section 89-810, R.C.M. 1947 (now repealed). Even if deeds were to be considered as notices, the deeds in question are fatally defective and inadmissible as evidence of an appropriation because they were executed with unsworn acknowledgments, rather than with verified affidavits as required by section 89-810. The Supreme Court reaffirmed that it has strictly construed the provisions of section 89-814, R.C.M. 1947 (now repealed), and that any nonconformance with section 89-810 renders the notice of appropriation inadmissible as evidence. Olsen v. McQueary, 212 M 173, 687 P2d 712, 41 St. Rep. 1669 (1984).

In enacting section 89-814, R.C.M. 1947 (now repealed), the Legislature established a reward for those parties who comply with section 89-810, R.C.M. 1947 (now repealed), by considering a notice of appropriation as prima facie evidence of a claimed water right. However, the former section is to be construed strictly. If the notice does not comply with section 89-810 it is of no evidentiary value. Holmstrom Land Co., Inc. v. Newlan Creek Water District, 185 M 409, 605 P2d 1060, 36 St. Rep. 1403 (1979), rehearing denied, 185 M 409, 605 P2d 1060, 37 St. Rep. 295 (1980). See also Shammel v. Vogl, 144 M 354, 396 P2d 103 (1964); Galahan v. Lewis, 105 M 294, 72 P2d 1018 (1937); Peck v. Simon, 101 M 12, 52 P2d 164 (1935).

*Extent of Right Measured by Beneficial Use:* The rights of the parties are not to be measured entirely by what they claimed in their appropriation notices. They are to be measured by their beneficial use over a reasonable period of time. Holmstrom Land Co., Inc. v. Newlan Creek Water District, 185 M 409, 605 P2d 1060, 36 St. Rep. 1403 (1979), rehearing denied, 185 M 409, 605 P2d 1060, 37 St. Rep. 295 (1980); Irion v. Hyde 107 M 84, 81 P2d 353 (1938).

*Defective Notice of Appropriation:* Where a notice of appropriation was dated 1886, referred to acts taking place in 1886, and was recorded in 1886, but the notary's certificate was dated 1885, it is obvious from the instrument itself that the date in the notary's certificate was a clerical error, and the notice may be received as prima facie evidence of a right dating from 1886. Shammel v. Vogl, 144 M 354, 396 P2d 103 (1964).

*Rebuttal of Prima Facie Evidence:* A notice of appropriation meeting the requirements of section 89-810, R.C.M. 1947 (now repealed), and filed in 1886 was admissible in evidence and entitled to be treated as prima facie evidence under section 89-814, R.C.M. 1947 (now repealed), but was not sufficient in itself to establish a water right from that date when its efficacy was destroyed by the claimant's own statement that he first used the water in 1961. Shammel v. Vogl, 144 M 354, 396 P2d 103 (1964).

*Insufficient Notice:* When a water rights notice was made 16 years before the enactment of section 89-810, R.C.M. 1947 (now repealed), when the notice stated a point of diversion different from that claimed by the plaintiff and when it failed to state where or when the water was to be used, the notice was insufficient to establish a water right. Stearns v. Benedick, 126 M 272, 247 P2d 656 (1952).

*Date of Appropriation Where Statute Not Complied With:* When a ditch was not constructed within a reasonable time after the date of the notice of appropriation, the date of appropriation would not relate back to the date of the notice but would date from the time the water was actually used. Clausen v. Armington, 123 M 1, 212 P2d 440 (1949).

*Record of Notice — Prima Facie Evidence:* The record of notice of appropriation of water conforming to the provisions of section 89-810, R.C.M. 1947 (now repealed), and filed as provided therein is prima facie evidence of its contents. Anderson v. Spear-Morgan Livestock Co., 107 M 18, 79 P2d 667 (1938). See Vidal v. Kensler, 100 M 592, 51 P2d 235 (1935).

*Compliance With Statute Not Required for Valid Appropriation:* A valid appropriation of water may be acquired even where there has been no compliance with the statute regulating appropriations by record, if the water has actually been diverted and applied to a beneficial use. Compliance with section 89-810, R.C.M. 1947 (now repealed), is important only with regard to the doctrine of "relation back". Vidal v. Kensler, 100 M 592, 51 P2d 235 (1935). See also

Holmstrom Land Co., Inc. v. Newlan Creek Water District, 185 M 409, 605 P2d 1060, 37 St. Rep. 295 (1980); Clausen v. Armington, 123 M 1, 212 P2d 440 (1949); Murray v. Tingley, 20 M 260, 50 P 723 (1897).

*Fixing Date in Decree:* There is no valid objection to the fixing of an arbitrary date of appropriation in a decree unless another appropriator can show that his right precedes the date fixed, instead of being subsequent to it as shown by the decree. Vidal v. Kensler, 100 M 592, 51 P2d 235 (1935), followed in 79 Ranch, Inc. v. Pitsch, 204 M 426, 666 P2d 215, 40 St. Rep. 981 (1983).

*Lack of Recorded Notice — Oral Testimony:* To sustain a water right based on oral testimony, as against a recorded notice, the testimony should be clear, unambiguous, and convincing. Vidal v. Kensler, 100 M 592, 51 P2d 235 (1935).

*Date of Appropriation When Notice Defective:* Appropriators of water were denied the right to relate back the life of their appropriation to the date of posting their notice of appropriation because their recorded notice was rendered ineffective by a fatally defective verification. Since the evidence showed that they put water on their land for a beneficial purpose on or about a certain time, their right bore the date as of such time. Musselshell Valley Farming & Livestock Co. v. Cooley, 86 M 276, 283 P 213 (1929).

*Verification of Notice:*

A water right, when acquired by appropriation, amounts to a grant by the United States or the state, and the appropriator is in position of a grantee. The affidavit required by statute to be attached to a notice of appropriation serves the same purpose as and is of equal dignity with an acknowledgment. Where an appropriation was made by a firm composed of two brothers and the affidavit accompanying the notice of appropriation was verified by one of them, a grantee, as notary public, the verification was void and the notice was not entitled to record. Musselshell Valley Farming & Livestock Co. v. Cooley, 86 M 276, 283 P 213 (1929).

A notice of location of a water right is fatally defective unless it is verified in conformity with this section. Murray v. Tingley, 20 M 260, 50 P 723 (1897).

*Essentials to Complete Appropriation Under Old Rule Prior to Act of 1885:* The essential features of an appropriation of water made prior to L. 1885, p. 130, were a completed ditch and the application of water to a beneficial use. Maynard v. Watkins, 55 M 54, 173 P 551 (1918).

*Essentials to Complete Appropriation by Statutory Method:* To secure a completed appropriation of water under section 89-810, R.C.M. 1947 (now repealed), notice must be posted and filed as herein required; and under section 89-811, R.C.M. 1947 (now repealed), work must be commenced within 40 days after the notice is posted, and it must be prosecuted with reasonable diligence and be actually completed. Bailey v. Tintinger, 45 M 154, 122 P 575 (1912).

*Two Methods of Appropriating Water:* Since 1885, two distinct methods of appropriating water are prescribed: one, by complying with the rules and customs of the early settlers; the other, by complying with the terms of the statute. Bailey v. Tintinger, 45 M 154, 122 P 575 (1912).

*Delay in Recording Appropriation:* Where an appropriation of the waters of a stream for irrigating purposes was actually made by the plaintiff in the year 1880 and the water used continuously ever since but no record of the appropriation was made until 1891, such water right is superior to the one acquired and recorded by the defendant in 1889. Salazar v. Smart, 12 M 395, 30 P 676 (1892).

## DECISIONS UNDER FORMER SECTION 89-811, R.C.M. 1947 — DILIGENCE IN APPROPRIATING

*Lack of Reasonable Diligence Shown in Three-Year and Three-Month Delay in Diversion:* In litigation between the plaintiff and defendant to establish their relative rights to appropriated water, the evidence showed that the defendant's predecessor in interest filed a notice of appropriation for 30 cfs of water on May 30, 1973, but failed to divert the water to a sprinkler irrigation system until 3 years and 3 months later. The District Court did not err in holding that the defendant's predecessor failed to exercise reasonable diligence in diversion of the water. Under the rationale of Dept. of Natural Resources and Conservation v. Intake Water Co., 171 M 416, 558 P2d 1110 (1976), the defendant was required to show there had been an ongoing effort to divert the water. The lack of parts for the sprinkler system notwithstanding, the record showed no ongoing effort to proceed to completion of the sprinkler system and the diversion. 79 Ranch, Inc. v. Pitsch, 204 M 426, 666 P2d 215, 40 St. Rep. 981 (1983), followed in In re Adjudication of Musselshell River Rights, 255 M 43, 840 P2d 577, 49 St. Rep. 866 (1992).

*Diligence in Appropriating Following Notice of Appropriation Under Former Law:* The requirement found in section 89-811, R.C.M. 1947, repealed in 1973, that the claimant within 40 days "proceed to prosecute the excavation or construction . . . with reasonable diligence" is not confined to the commencement of actual onsite work, but it requires steady ongoing effort in good faith to prosecute the construction of the project. Diligence is a question of fact to be determined on a case-by-case basis. In this case, making surveys and geologic investigations, completing plans, entering into cooperative agreements, soil testing, core drilling, land and easement acquisition, obtaining financing, and entering into a contract for construction were sufficient. Holmstrom Land Co., Inc. v. Newlan Creek Water District, 185 M 409, 605 P2d 1060, 36 St. Rep. 1403 (1979), rehearing denied, 185 M 409, 605 P2d 1060, 37 St. Rep. 295 (1980). See also Dept. of Natural Resources and Conservation v. Intake Water Co., 171 M 416, 558 P2d 1110 (1976).

*Date of Appropriation Where Statute Is Not Complied With:* When a ditch was not constructed within a reasonable time after the date of notice of an appropriation, the date of appropriation would not relate back to the date of the notice but rather would date from the time the water was actually used. Clausen v. Armington, 123 M 1, 212 P2d 440 (1949).

*Completion of Appropriation:* The steps necessary to be taken to make a completed appropriation of water are: posting notice, filing it with the County Clerk, commencing construction of a ditch within 40 days after posting notice, prosecuting such work with reasonable diligence, and actual completion of the work of construction. Anderson v. Spear-Morgan Livestock Co., 107 M 18, 79 P2d 667 (1938).

*Completion of Ditch — Reasonable Diligence:* An appropriator of water filed a proper notice of appropriation on November 20, 1894, and shortly thereafter commenced construction of a ditch but had to suspend operations because of freezing weather. He did not work continuously on the ditch during the year 1895. Irrigation from the ditch began in the spring of 1896. In view of the length and size of the ditch, a finding that he did not proceed with reasonable diligence was unwarranted. Anderson v. Spear-Morgan Livestock Co., 107 M 18, 79 P2d 667 (1938).

### DECISIONS UNDER FORMER SECTION 89-812, R.C.M. 1947 — EFFECT OF FAILURE TO COMPLY WITH STATUTORY LAW

*Date of Appropriation Where Statute Is Not Complied With:*

When a ditch was not constructed within a reasonable time after the date of notice of an appropriation, the date of appropriation would not relate back to the date of the notice but rather would date from the time the water was actually used. Clausen v. Armington, 123 M 1, 212 P2d 440 (1949).

A prior appropriator may acquire a valid water right by a completed ditch, actual diversion of the water, and its application to a beneficial use without complying with the statute. This appropriation is good against everyone except an appropriator who complies with the appropriation statute before the first claimant has applied the water to a beneficial use. Vidal v. Kensler, 100 M 592, 51 P2d 235 (1935). See also Holmstrom Land Co., Inc. v. Newlan Creek Water District, 185 M 409, 605 P2d 1060, 37 St. Rep. 295 (1980); Clausen v. Armington, 123 M 1, 212 P2d 440 (1949); Bailey v. Tintinger, 45 M 154, 122 P 575 (1912); Murray v. Tingley, 20 M 260, 50 P 723 (1897).

Appropriators of water were denied the right to relate back the life of their appropriation to the date of posting their notice of appropriation because their recorded notice was rendered ineffective by a fatally defective verification. Since the evidence showed that they put water on their land for a beneficial purpose on or about a certain time, their right bore the date as of such time. Musselshell Valley Farming & Livestock Co. v. Cooley, 86 M 276, 283 P 213 (1929).

Of two claimants of water, neither of whom had complied with the statute, he who first completes his ditch and puts it to a beneficial use has the prior right, although he began to build his ditch after the ditch of the other claimant had been commenced. Murray v. Tingley, 20 M 260, 50 P 723 (1897).

*Delay in Recording Notice:* Notices of appropriation of water not recorded within the time provided in the saving clause found in the original recording act (L. 1885, p. 131), while prima facie evidence of the extent of the rights where the statute was complied with, are of no evidentiary value in proving the amount and date of an appropriation. Galahan v. Lewis, 105 M 294, 72 P2d 1018 (1937).

*Doctrine of "Relation Back":*

Before the doctrine of relation applies, a completed appropriation must have been effected. Bailey v. Tintinger, 45 M 154, 122 P 575 (1912).

One who complies with the statutes regulating the appropriation of water acquires a right which relates back to the date of the posting of his notice of location. Bailey v. Tintinger, 45 M 154, 122 P 575 (1912); Murray v. Tingley, 20 M 260, 50 P 723 (1897).

Under the doctrine of "relation back", as between two persons digging ditches at the same time and prosecuting work thereon with reasonable diligence to completion, the one who first began work had the prior right, even though the other had completed his first. Wright v. Cruse, 37 M 177, 95 P 370 (1908); but see Murray v. Tingley, 20 M 260, 50 P 723 (1897).

*Purpose of Act:* The purpose and object of the Legislature was merely to define the conditions upon which the appropriator of water could have the advantage of the doctrine of relation back. Bailey v. Tintinger, 45 M 154, 122 P 575 (1912); Murray v. Tingley, 20 M 260, 50 P 723 (1897).

*"Appropriator":* The word "appropriator" is not susceptible of any greater or narrower force than the word "claimant", as used in the California Civil Code relating to water rights. Therefore, no distinction can be drawn between the California Water Right Act and that of Montana. Murray v. Tingley, 20 M 260, 50 P 723 (1897).

### DECISIONS UNDER FORMER SECTION 89-813, R.C.M. 1947 — RECORD OF DECLARATION

*Delay in Recording Appropriation:* Where an appropriation of the waters of a stream for irrigating purposes was actually made by the plaintiff in the year 1880 and the water used continuously ever since but no record of the appropriation was made until 1891, plaintiff's water right is superior to one acquired and recorded by the defendant in 1889. Salazar v. Smart, 12 M 395, 30 P 676 (1892).

### DECISIONS UNDER FORMER SECTION 89-814, R.C.M. 1947 — RECORD PRIMA FACIE EVIDENCE

*Insufficient Notice of Appropriation Not Prima Facie Evidence:*

Deeds do not qualify as notices of appropriation under section 89-810, R.C.M. 1947 (now repealed). Even if deeds were to be considered as notices, the deeds in question are fatally defective and inadmissible as evidence of an appropriation because they were executed with unsworn acknowledgments, rather than with verified affidavits as required by section 89-810. The Supreme Court reaffirmed that it has strictly construed the provisions of section 89-814, R.C.M. 1947 (now repealed), and that any nonconformance with section 89-810 renders the notice of appropriation inadmissible as evidence. Olsen v. McQueary, 212 M 173, 687 P2d 712, 41 St. Rep. 1669 (1984).

In enacting section 89-814, R.C.M. 1947 (now repealed), the Legislature established a reward for those parties who comply with section 89-810, R.C.M. 1947 (now repealed), by considering a notice of appropriation as prima facie evidence of a claimed water right. However, 89-814 is to be construed strictly. If the notice does not comply with section 89-810, it is of no evidentiary value. Holmstrom Land Co., Inc. v. Newlan Creek Water District, 185 M 409, 605 P2d 1060, 36 St. Rep. 1403 (1979), rehearing denied, 185 M 409, 605 P2d 1060, 37 St. Rep. 295 (1980). See also Shammel v. Vogl, 144 M 354, 396 P2d 103 (1964); Galahan v. Lewis, 105 M 294, 72 P2d 1018 (1937); Peck v. Simon, 101 M 12, 52 P2d 164 (1935).

*Additional Burden of Proof Beyond Prima Facie Showing:* The defendant's introduction into evidence of three notices of appropriation established a prima facie case but did not completely discharge his burden of proof. The defendant still had the burden of showing that all water claimed had been put to a beneficial use within a reasonable period of time. Holmstrom Land Co., Inc. v. Newlan Creek Water District, 185 M 409, 605 P2d 1060, 36 St. Rep. 1403 (1979), rehearing denied, 185 M 409, 605 P2d 1060, 37 St. Rep. 295 (1980).

*Contents of Record:* The record of notice of appropriation of water conforming to the provisions of section 89-810, R.C.M. 1947 (now repealed), and filed as provided in that section, is prima facie evidence of its contents. Anderson v. Spear-Morgan Livestock Co., 107 M 18, 79 P2d 667 (1938); Wills v. Morris, 100 M 514, 50 P2d 862 (1935).

### DECISIONS UNDER FORMER SECTION 89-815, R.C.M. 1947 — RIGHTS SETTLED IN ONE ACTION

*Sufficiency of Decree:* A water rights decree entered by the District Court was not insufficient because it failed to specify the exact acreage to which the water rights were appurtenant, the seasonal and hourly limitations on the water rights, and the exact points of diversion. Designation of the owners of the water rights, their priority dates, the amount of the awards in miner's inches, and the source of the water was sufficient. Holmstrom Land Co., Inc. v. Newlan Creek Water District, 185 M 409, 605 P2d 1060, 36 St. Rep. 1403 (1979), rehearing denied, 185 M 409, 605 P2d 1060, 37 St. Rep. 295 (1980).

*Quieting Title:* An action under Montana law to determine relative rights and priorities of parties claiming interests in waters of a stream, while in personam, is in effect one to quiet title to real property. Sain v. Mont. Power Co., 84 F2d 126 (9th Cir. 1936).

*Appeal Lying From Part of Judgment:* Where two or more parties are awarded a water right under the terms of the decree, each of them recovers a judgment against the other or others; such a judgment is divisible into parts, and therefore an appeal lies from a part thereof. Wills v. Morris, 100 M 504, 50 P2d 858 (1935).

*Damages for Wrongful Diversion of Water:*

Where several parties have diverted water so as to injure the crops of another, they cannot be held jointly liable for the acts of each other nor can they be sued in one action for the entire damage, with or without an apportionment of the damage. Howell v. Bent, 48 M 268, 137 P 49 (1913).

Section 89-815, R.C.M. 1947 (now repealed), does not apply to an action at law for damages for the wrongful diversion of water, where there is no allegation in the complaint that would authorize the court to grant equitable relief and there is no evidence to show that the plaintiff is entitled to such relief. Miles v. Du Bey, 15 M 340, 39 P 313 (1895). See Howell v. Bent, 48 M 268, 137 P 49 (1913).

*Rights of Parties Defendant:*

The first provision of section 89-815, R.C.M. 1947 (now repealed), is permissive only. Thus, there was no presumption that the respective interests of joint owners in an undivided water right had been adjudicated among themselves in a suit in which their predecessors were codefendants, in the absence of a showing to that effect upon the face of the decree or the judgment roll. Bennett v. Quinlan, 47 M 247, 131 P 1067 (1913).

The Legislature, in enacting section 89-815, R.C.M. 1947 (now repealed), did not state that it intended to compel parties, made defendants to a water right suit pursuant to its provisions, to litigate their respective titles as between themselves. Further, it is doubtful that the Legislature has the power to coerce them to do so. Sloan v. Byers, 37 M 503, 97 P 855 (1908). See Bennett v. Quinlan, 47 M 247, 131 P 1067 (1913).

*Equitable Actions:* Section 89-815, R.C.M. 1947 (now repealed), contemplates equitable actions only, in which relative priorities and conflicting rights of all parties may be settled and where the damages claimed are a mere incident. Howell v. Bent, 48 M 268, 137 P 49 (1913); Miles v. Du Bey, 15 M 340, 39 P 313 (1895).

*Pleadings:*

The District Court may settle the relative priorities and rights of all the parties to a water right suit in one judgment only when pleadings have been framed so as to justify such settlement. Sloan v. Byers, 37 M 503, 97 P 855 (1908), distinguished and followed in Bennett v. Quinlan, 47 M 247, 131 P 1067 (1913).

The provision of section 89-815, R.C.M. 1947 (now repealed), is permissive and not mandatory. Sloan v. Byers, 37 M 503, 97 P 855 (1908), distinguished and followed in Bennett v. Quinlan, 47 M 247, 131 P 1067 (1913).

*All Parties Antagonists:* In an action to settle the relative priorities and rights of the parties to the use of the waters of a stream, every party to the suit is an antagonist of every other party. McNinch v. Crawford, 30 M 297, 76 P 698 (1904). See Sloan v. Byers, 37 M 503, 97 P 855 (1908); Bennett v. Quinlan, 47 M 247, 131 P 1067 (1913).

*Injunction:* Property owners having the right to divert the waters of a creek for irrigation purposes may join in a suit to restrain a third person from diminishing the volume of water to the use of which they are entitled. Beach v. Spokane Ranch & Water Co., 25 M 379, 65 P 111 (1901).

### DECISIONS UNDER FORMER SECTION 89-829, R.C.M. 1947 — PROCEDURE FOR APPROPRIATING WATERS OF ADJUDICATED STREAMS

*Exclusive Method:* The method prescribed by sections 89-829 through 89-838, R.C.M. 1947 (now repealed), for making an appropriation of the waters of an adjudicated stream is exclusive as to appropriations made after the passage of that act. Hanson v. So. Side Canal Users Assoc., 167 M 210, 537 P2d 325 (1975); Donich v. Johnson, 77 M 229, 250 P 963 (1926); Anaconda Nat'l Bank v. Johnson, 75 M 401, 244 P 141 (1926).

*Filing of Petition — "Existing Right":* On November 30, 1972, the plaintiff filed a petition to appropriate water from an adjudicated stream pursuant to section 89-829, R.C.M. 1947 (now repealed). This filing was the first step leading to "use" and was thereby preserved under Art. IX, sec. 3, 1972 Mont. Const., as an "existing right". Gen. Agriculture Corp. v. Moore, 166 M 510, 534 P2d 859 (1975).

*Diversion Into Fishpond Without Outlet Constituting Unauthorized New Appropriation:* After the appointment of a Water Commissioner, there never was more than enough water in an adjudicated stream to supply the needs of the parties under their adjudicated rights. Thus, a diversion of water from the stream by one of them into a fishpond that had no outlet constituted an attempted new appropriation under this section. In the absence of a decree establishing a new use, the diversion was unauthorized and therefore properly prohibited by an order of court in a proceeding under section 89-1015, R.C.M. 1947 (85-5-301). Quigley v. McIntosh, 110 M 495, 103 P2d 1067 (1940).

*Extent of Rights:*

When a water right is allowed under the provisions of section 89-829, R.C.M. 1947 (now repealed), and sections 89-830 through 89-838, R.C.M. 1947 (now repealed), it is governed by all the provisions of the decree by which the waters in the stream were adjudicated, just as if the new appropriator had been a party to that decree. The new appropriator has the right to use the waters in the order of his juniority and divert them as of the date of his appropriation when he does not interfere with the superior rights of others. Quigley v. McIntosh, 88 M 103, 290 P 266 (1930).

Where there is an appropriator of water from an adjudicated stream who is simply a junior appropriator who may use the water subject to the superior rights of others, the decree should contain provisions respecting the use of the water as between senior and junior appropriators consistent with those contained in the original decree. The decree should also contain restrictions, such as that the new appropriator should cease to divert water when the volume of water flowing in the stream is equal to or less than that of the prior decreed rights. Quigley v. McIntosh, 88 M 103, 290 P 266 (1930).

*Purpose:* One seeking to appropriate water from an adjudicated stream under section 89-829, R.C.M. 1947 (now repealed), and sections 89-830 through 89-838, R.C.M. 1947 (now repealed), may do so upon compliance with the conditions prescribed without regard to whether the water sought to be appropriated is a part of the normal flow or excess or surplus water, i.e., water flowing in the stream in addition to adjudicated waters. The purpose of the act is to provide security for those whose rights have theretofore been adjudicated and to compel the new appropriator to take his water right subject to the prior rights fixed, after litigation, by the decree of a competent court. Quigley v. McIntosh, 88 M 103, 290 P 266 (1930).

## DECISIONS UNDER FORMER SECTION 89-835, R.C.M. 1947 — ADJUDICATING RIGHTS OF PERSONS NOT PARTY TO DECREE

*"May" Not Mandatory:* The provision of section 89-835, R.C.M. 1947 (now repealed), declaring that a claimant may petition the District Court for an order making him a party to the decree and establishing his right thereunder, is not mandatory in the sense that if such party fails to take advantage of the permission granted, he will be barred from thereafter complaining. State ex rel. McKnight v. District Court, 111 M 520, 111 P2d 292 (1941).

*Trial Court Ignoring Predecessor's Claim:* In a water right suit plaintiff relied upon the decree entered in a former action involving the same right as res judicata, in which defendants' predecessor had appeared and answered making claim to a certain right. However, the trial court had failed to make disposition of the claim and apparently ignored it. Thus, defendants were not barred by the former decree from having their right adjudicated. Missoula Light & Water Co. v. Hughes, 106 M 355, 77 P2d 1041 (1938).

## DECISIONS UNDER FORMER SECTION 89-839, R.C.M. 1947 — EFFECT OF DECREE UPON SUBSEQUENT APPROPRIATIONS

*Stipulation of Parties:*

This section could not relate to water rights acquired prior to its passage and approval and does not attempt to make decrees binding upon subsequent appropriators but merely makes them "prima facie evidence of the facts therein found". It is applicable only to decrees in actions "prosecuted in good faith" and "based upon evidence introduced and not upon stipulations or admissions of the parties". State ex rel. McKnight v. District Court, 111 M 520, 111 P2d 292 (1941).

Under this section the court in water right suits is not bound by a stipulation of the parties as to the general character and quality of the soil of their respective lands or the amount of water required for their successful and economical irrigation. Allen v. Petrick, 69 M 373, 222 P 451 (1924).

*Decrees Showing Anticipation of Future Needs:* When the intention is made manifest, the court must take into consideration prospective or future needs in entering a water right decree, and mere description of lands does not justify the extended use of water in the absence of recitals in the pleadings and decree and proof in the record that appropriation is made in anticipation of future needs. In reviewing the acts of the Water Commissioner in distributing water, in a proceeding under section 89-1015, R.C.M. 1947 (85-5-301), reasonable diligence must be shown to have been exercised since entry of the decree in developing such needs. Quigley v. McIntosh, 110 M 495, 103 P2d 1067 (1940).

*Inapplicable in Contempt Proceeding to Enforce Original Decree:* A plaintiff instituted a contempt proceeding to enforce a 1914 water rights decree against a successor in interest of a party to the decree. As the contempt proceeding was not being brought against persons appropriating water subsequent to the decree, this section was inapplicable. Delmoe v. District Court, 100 M 131, 46 P2d 39 (1935).

### DECISIONS UNDER FORMER SECTION 89-840, R.C.M. 1947 — APPROPRIATIONS OF WATER SUBJECT TO PRIOR DECREES ADJUDICATING RIGHTS

*Appropriations From Adjudicated Streams:* This section, regulating the method by which appropriations of water from adjudicated streams could be made, was not exclusive, but sections 89-829 through 89-838, R.C.M. 1947 (now repealed), amendatory thereof, were exclusive. Donich v. Johnson, 77 M 229, 250 P 963 (1926).

### DECISIONS UNDER FORMER SECTION 89-844, R.C.M. 1947 — EFFECT OF DECREE

*Presumption of Correctness When Relied Upon:* Where, in a suit for damage to crops resulting from wrongful diversion of water, the judgment in a former suit between the same parties was relied on in aid of the plea of res judicata, the disputable presumption is that the proceedings in the previous suit were regular under section 93-1301-7, R.C.M. 1947 (26-1-602). Cocanougher v. Mont. Life Ins. Co., 103 M 536, 64 P2d 845 (1936).

**Part Law Review Articles**

A New Rule of Law for the Abandonment of Water Rights, Hightower, 45 Mont. L. Rev. 167 (1984).

**Part Collateral References**

Water Rights Adjudication, Performance Audit, Mont. Leg. Audit Div. (June 2010).

## 85-2-212. Order by supreme court.

**Compiler's Comments**

*Water Rights Order and Extension:* Pursuant to Montana Supreme Court Order No. 14833 (July 13, 1979), every person asserting a claim to an existing right for the use of water prior to July 1, 1973, was ordered to file a statement of claim for the right with the Department of Natural Resources and Conservation no later than January 1, 1982. Failure to file a claim will result in a conclusive presumption that the water right or claimed water right has been abandoned. See In re Water Rights Order, 36 St. Rep. 1228 (1979) (apparently not reported in Montana Reports). The filing deadline was extended to April 30, 1982, with the court stating that no more extensions would be granted. See Supreme Court Order 14833 (Dec. 7, 1981).

**Case Notes**

*Post-1973 Evidence Unpersuasive as to Adjudication of Existing Water Right:* The purpose of statewide water rights adjudication is to adjudicate those rights as they existed on July 1, 1973, the effective date of the Montana Water Use Act. Therefore, the Water Court did not err in refusing to consider evidence pertaining to a water right claimant's actions taken after 1973 as showing a lack of intent to abandon the water right. In re Adjudication of Clark Fork River Drainage, 254 M 11, 833 P2d 1120, 49 St. Rep. 591 (1992).

## 85-2-213. Notice of order.

**Compiler's Comments**

*1999 Amendment:* Chapter 389 deleted former (1)(c) that read: "(c) It shall provide a sufficient number of copies of the order to the county treasurers before October 15, 1979, 1980, 1981, and 1982, and the county treasurers shall enclose a copy of the order with each statement of property taxes mailed in 1979, 1980, 1981, and 1982. In the implementation of this subsection, the department shall provide reimbursement to each county treasurer for the reasonable additional costs incurred by the treasurer arising from the inclusion of the order required by this section. The department shall be reimbursed for such costs from the water right adjudication account created by 85-2-241"; deleted former (2) and (3) that read: "(2) (a) To ensure that all persons who failed to file a claim of existing right under 85-2-221(1) are provided notice of the opportunity to file a claim on or before July 1, 1996, as provided in 85-2-221(3), the department shall provide notice as follows:

(i) It shall, in October 1993, April and October 1994, April and October 1995, and April 1996, cause a notice of the right to file a claim in accordance with 85-2-221(3) to be published in all daily newspapers in the state and in at least one newspaper in each county in the state.

(ii) It shall, in October 1993, April and October 1994, April and October 1995, and April 1996, provide copies of the notice, in writing, to the press services with offices located in Helena.

(iii) It shall, by October 1993, provide copies of the notice to the United States attorney general and to all Indian tribes in Montana.

(iv) It shall cause copies of the notice to be posted in a conspicuous location in each county courthouse and department field office in the state and to be maintained in that location through July 1, 1996.

(v) It may also, in its discretion, provide notice in any other manner that will effectuate the purposes of 85-2-221(3).

(b) The water court shall include notice of 85-2-221(3) in all notices, decrees, or orders issued pursuant to 85-2-231 or 85-2-232 after July 1, 1993, until July 1, 1996.

(3) Notice given in accordance with subsection (2) must at a minimum indicate that any claim of existing right not filed with the department before April 30, 1982, may be filed by physically filing it with the department on or before July 1, 1996, or sending it by United States mail, postmarked on or before July 1, 1996. Additionally, the notice must indicate that under 85-2-226, a failure to file or mail the claim results in the forfeiture for all time of any existing rights to the use of water that are not claimed in accordance with the provisions of 85-2-221"; and made minor changes in style. Amendment effective July 1, 1999.

*1993 Amendment:* Chapter 629 inserted (2) and (3) regarding notice requirements applicable to additional filing period. Amendment effective July 1, 1993.

*Preamble:* The preamble attached to Ch. 629, L. 1993, provided: "WHEREAS, Article IX, section 3, of the Montana Constitution provides that all existing rights to the use of any waters for any useful or beneficial purpose are recognized and confirmed; and

WHEREAS, Article IX, section 3, of the Montana Constitution requires the Legislature to provide for the administration, control, and regulation of water rights and to establish a system of centralized records for such rights; and

WHEREAS, the Legislature established a procedure for the general adjudication of existing rights to the use of water and provided in section 85-2-226, MCA, that the failure to file a claim of existing right on or before the deadline established under section 85-2-221, MCA, would establish a conclusive abandonment of the right; and

WHEREAS, the Montana Supreme Court, in In the Matter of the Adjudication of the Water Rights Within the Yellowstone River, 253 Mont. 167, 832 P.2d 1210 (1992), has determined that the failure to file a statement of claim to an existing right to the use of water on or before April 30, 1982, resulted in the forfeiture of that right; and

WHEREAS, it has come to the attention of the Legislature that the forfeiture of water rights for failure to timely file a claim has in some instances caused hardship, and the Legislature accordingly desires to provide water rights claimants with one more opportunity to file a water rights claim in the general adjudication; and

WHEREAS, in so doing, the Legislature recognizes that the adjudication process will not be completed for many years but that a substantial amount of progress has already occurred in the adjudication, specifically in the area of water rights compacts with Indian tribes and the federal government and in decrees and stipulations involving individual claimants, and thus the Legislature believes that it is necessary to ensure that parties who have been recognized as having filed claims on or before April 30, 1982, and holders of federal reserved water rights are not adversely affected by the inclusion of new parties in the adjudication by subjecting the right to file those claims in remission to certain terms and conditions; and

WHEREAS, the Legislature wishes to provide protection for timely filed claimants from incurring additional costs or from being adversely affected by justifiable reliance on the presumption of abandonment; and

WHEREAS, the Legislature wishes to provide a conclusive adjudication of existing water rights; and

WHEREAS, the Legislature recognizes that according a privilege to file additional statements of claim presents a potential for abuse by those who may attempt to refile previously adjudicated claims, and the Legislature thus believes that the courts should deal harshly with any abuses by such measures as, without limitation, the imposition of sanctions under [former] Rule 11, Montana Rules of Civil Procedure [now superseded]; and

WHEREAS, the Legislature determines that the deadline for filing water right claims as provided in this bill appropriately balances the interests at stake in the adjudication.

THEREFORE, the Legislature finds it is appropriate to make the following amendments to sections 85-2-102, 85-2-211 [now repealed], 85-2-213, 85-2-221, 85-2-225, 85-2-226, 85-2-234, 85-2-237, and 85-2-306, MCA, in order to provide for the acceptance of late claims to the use of water under the conditions set forth in this bill. Additionally, the Legislature directs the Water Policy Committee, in coordination with the Department of Justice, the Department of Natural Resources and Conservation, and the Reserved Water Rights Compact Commission, to conduct an interim study regarding certain late claim issues."

*Saving Clause:* Section 11, Ch. 629, L. 1993, provided: "[This act] does not affect proceedings that were begun before [passage and approval of this act] [approved May 11, 1993] in which relief for damages have been sought based upon the diversion, impoundment, or withdrawal of water without a water right established under state law."

*Severability — Partial Nonseverability:* Section 12, Ch. 629, L. 1993, provided: "(1) If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

(2) It is the intent of the legislature that each part of [this act] is essentially dependent upon [section 4], which amends 85-2-221, and that if one part of [section 4], except subsection (3)(f)(ii), is held unconstitutional or invalid, all other parts of [this act] are invalid."

## 85-2-214. Commencement of action.

### Compiler's Comments

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### Case Notes

*Water Right Appropriator in Particular Source — Generally Has Standing to Challenge Any Water Right Granted in That Source:* A downstream user with senior private water rights to a reservoir storage project that declined shares in the reservoir storage project had standing where claims involved the natural flow rights of the river as well as the storage and delivery of the reservoir's stored flood water. In re E. Bench Irrigation District, 2021 MT 319, 406 Mont. 502, 501 P.3d 380.

## 85-2-215. Consolidation of matters.

### Case Notes

*"May" Not Mandatory:* The provision of section 89-835, R.C.M. 1947 (now repealed), declaring that a claimant may petition the District Court for an order making him a party to the decree and establishing his right thereunder, is not mandatory in the sense that if such party fails to take advantage of the permission granted, he will be barred thereafter from complaining. State ex rel. McKnight v. District Court, 111 M 520, 111 P2d 292 (1941).

*Trial Court Ignoring Predecessor's Claim:* The plaintiff relied, in a water right suit, upon the decree entered in a former action involving the same right as res judicata, in which defendants' predecessor had appeared and answered making claim to a certain right. However, the trial court had failed to make disposition of the claim and apparently had ignored it. Thus, defendants were not barred by the former decree from having their right adjudicated. Missoula Light & Water Co. v. Hughes, 106 M 355, 77 P2d 1041 (1938).

*Quieting Title:* Action under section 89-815, R.C.M. 1947 (now repealed), to determine relative rights and priorities of parties claiming interests in waters of a stream, while in personam, is in effect one to quiet title to real property. Sain v. Mont. Power Co., 84 F2d 126 (9th Cir. 1936).

*Appeal From Part of Judgment:* Under section 89-815, R.C.M. 1947 (now repealed), where two or more parties are awarded a water right under the terms of the decree, each of them recovers a judgment against the other or others; such a judgment is divisible into parts, and therefore an appeal lies from a part thereof. Wills v. Morris, 100 M 504, 50 P2d 858 (1935).

*Damages for Wrongful Diversion of Water:*

Under section 89-815, R.C.M. 1947 (now repealed), where several parties have diverted water so as to injure the crops of another, they cannot be held jointly liable for the acts of each other nor can they be sued in one action for the entire damage, with or without an apportionment of the damage. Howell v. Bent, 48 M 268, 137 P 49 (1913).

Section 89-815, R.C.M. 1947 (now repealed), did not apply to an action at law for damages for the wrongful diversion of water where there is no allegation in the complaint that would authorize the court to grant equitable relief and where there is no evidence to show that the plaintiff is entitled to such relief. Miles v. Du Bey, 15 M 340, 39 P 313 (1895). See Howell v. Bent, 48 M 268, 137 P 49 (1913).

*Equitable Actions:* Section 89-815, R.C.M. 1947 (now repealed), contemplates equitable actions only, in which relative priorities and conflicting rights of all parties may be settled and where the damages claimed are a mere incident. Howell v. Bent, 48 M 268, 137 P 49 (1913); Miles v. Du Bey, 15 M 340, 39 P 313 (1895).

*Rights of Parties Defendant:*

The first provision of section 89-815, R.C.M. 1947 (now repealed), is permissive only. Thus, there was no presumption that the respective interests of joint owners in an undivided water right had been adjudicated among themselves in a suit in which their predecessors were codefendants, in the absence of a showing to that effect upon the face of the decree or the judgment roll. Bennett v. Quinlan, 47 M 247, 131 P 1067 (1913).

The Legislature, in enacting section 89-815, R.C.M. 1947 (now repealed), did not state that it intended to compel parties, made defendants to a water right suit pursuant to its provisions, to litigate their respective titles as between themselves. Further, it is doubtful that the Legislature has the power to coerce them to do so. Sloan v. Byers, 37 M 503, 97 P 855 (1908), followed in Bennett v. Quinlan, 47 M 247, 131 P 1067 (1913).

*Pleadings:*

Under section 89-815, R.C.M. 1947 (now repealed), the District Court may settle the relative priorities and rights of all the parties to a water right suit in one judgment only when pleadings have been framed so as to justify such settlement. Sloan v. Byers, 37 M 503, 97 P 855 (1908), distinguished and followed in Bennett v. Quinlan, 47 M 247, 131 P 1067 (1913).

The provision of section 89-815, R.C.M. 1947 (now repealed), is permissive and not mandatory. Sloan v. Byers, 37 M 503, 97 P 855 (1908), distinguished and followed in Bennett v. Quinlan, 47 M 247, 131 P 1067 (1913).

*All Parties Antagonists:* Under section 89-815, R.C.M. 1947 (now repealed), every party in an action to settle the relative priorities and rights of the parties to the use of the waters of a stream is an antagonist to every other party. McNinch v. Crawford, 30 M 297, 76 P 698 (1904). See Sloan v. Byers, 37 M 503, 97 P 855 (1908); Bennett v. Quinlan, 47 M 247, 131 P 1067 (1913).

*Injunction:* Under section 89-815, R.C.M. 1947 (now repealed), property owners having the right to divert the waters of a creek for irrigation purposes may join in a suit to restrain a third person from diminishing the volume of water to the use of which they are entitled. Beach v. Spokane Ranch & Water Co., 25 M 379, 65 P 111 (1901).

## 85-2-217. Suspension of adjudication.

### Compiler's Comments

*2009 Amendment:* Chapter 5 in third and fourth sentences extended effective date of suspension and approval from July 1, 2009, to July 1, 2013. Amendment effective February 19, 2009.

*2003 Amendment:* Chapter 103 in third and fourth sentences extended period from July 1, 2005, until July 1, 2009. Amendment effective July 1, 2003.

*1997 Amendments:* Chapter 44 in third sentence, in two places, substituted "July 1, 2005" for "July 1, 1999"; and made minor changes in style. Amendment effective July 1, 1997.

Chapter 497 in second and sixth sentences, near middle, inserted "federal non-Indian and Indian"; and made minor changes in style. Amendment effective May 1, 1997.

*Saving Clause:* Section 22, Ch. 497, L. 1997, was a saving clause.

*Severability:* Section 23, Ch. 497, L. 1997, was a severability clause.

*1991 Amendment:* In two places substituted July 1, 1999, for July 1, 1993; and made minor change in style. Amendment effective May 17, 1991.

*1987 Amendment:* Extended suspension period by substituting "1993" for "1987" in two places.

*1985 Amendment:* Changed 1985 to 1987 in two places.

*Select Committee Bill:* Chapter 667, L. 1985, was introduced at the request of the Select Committee on Indian Affairs (now Law and Justice Interim Committee). See Committee report published December 1984 by the Montana Legislative Council.

*1981 Amendment:* Deleted "From the time of filing the petition required in 85-2-211 until July 1, 1982, and" from the beginning of the section; substituted "proceedings" for "actions" before "to generally adjudicate" in the first sentence; substituted "and federal reserved water rights of those tribes and federal agencies which are negotiating" for "from a source of water in question under this part" in the first sentence; deleted "unless an action is commenced or is pending by or on behalf of an Indian tribe to adjudicate water from that source other than as provided for in Title 85, chapter 2. In such case, the suspension is maintained only if the action is dismissed or if the parties to the action stipulate to the suspension during compact negotiations of all further proceedings in the action except the determination of jurisdictional issues and an order is so issued" after "are suspended" in the first sentence; added the last five sentences describing procedures to terminate suspension of state water rights adjudication proceedings if no compact on reserved water rights is approved by the state and tribes or federal agencies by July 1, 1985.

**Case Notes**

*Supreme Court Jurisdiction Over Water Court — Not Barred by Suspension Provision:* After the U.S. Supreme Court decision in Ariz. v. San Carlos Apache Tribe, 463 US 545, 77 L Ed 2d 837, 103 S Ct 3201 (1983), that the McCarran amendment, 43 U.S.C. § 666, removed "whatever limitations the enabling acts or federal policy may have originally placed on state court jurisdiction" over the adjudication of Indian water rights, the state requested that the Montana Supreme Court exercise its powers of supervisory control over the state Water Court concerning the adjudication of federal reserved water rights. In assuming jurisdiction, the Supreme Court ruled that the request for supervisory control is not barred by the suspension provisions of this section, as the present proceeding will not generally adjudicate any Indian reserved water rights or any federal reserved water rights. This proceeding will consider the following issues: (1) is the state Water Court prohibited from exercising jurisdiction over Indian reserved water rights based on the disclaimer clause of Art. I of the Montana Constitution or otherwise; (2) is the Montana Water Use Act, Title 85, ch. 2, adequate to adjudicate Indian reserved water rights; and (3) is the Montana Water Use Act adequate to adjudicate federal reserved water rights held, on its own behalf, by the United States or any of its agencies. State ex rel. Greely v. Water Court, 214 M 143, 691 P2d 833, 41 St. Rep. 2373 (1984).

*State Court Jurisdiction Over Federal and Indian Water Rights:* The McCarran amendment, 43 U.S.C. § 666, granting state courts jurisdiction over the United States in litigation involving a comprehensive adjudication of water rights, removed "whatever limitations the enabling acts or federal policy may have originally placed on state court jurisdiction" over the adjudication of Indian water rights in actions brought by the United States on behalf of an Indian tribe as well as in actions brought by an Indian tribe itself. Assuming that the state adjudication procedure is adequate and complies with state law, dismissal of adjudication actions filed in federal District Court out of deference to state adjudication proceedings was proper. Ariz. v. San Carlos Apache Tribe, 463 US 545, 77 L Ed 2d 837, 103 S Ct 3201 (1983), reversing N. Cheyenne Tribe v. Adsit, 668 F2d 1080 (9th Cir. 1982); followed in Blackfeet Indian Nation v. Hodel, 634 F. Supp. 646, 43 St. Rep. 863 (D.C. Mont. 1986).

## 85-2-218. Process and criteria for designating priority basins or subbasins.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

*1987 Statement of Intent:* The statement of intent attached to Ch. 651, L. 1987, provided: "A statement of intent is provided for this bill because the legislature desires to indicate to the Montana water courts and the department of natural resources and conservation the basins that should receive priority adjudication efforts.

The legislature finds and determines the basins described in I through IX below to be priority basins. The basins are selected according to the criteria in section 10 [85-2-218] of this bill and the priority provided for the Milk River basin in 85-2-321. They are listed by geographical areas because it is assumed priority basins are needed in each area to ensure efficient use of water court and department staff. The legislature recognizes that deviations from the order of priority provided may be necessary to ensure efficiency in the adjudication process, that the water judge may vary efforts from area to area based on available resources, and that additional priority basins may be added upon petition to and determination by the water judge.

I. Basins in the Billings area:
Yellowstone River from Bridger Creek to the Clark's Fork of the Yellowstone River (43QJ)
Yellowstone River above and including Bridger Creek (43B)

Sweet Grass Creek (43BV)
Stillwater River (43C)
Boulder River tributary of Yellowstone River (43BJ)
Clark's Fork of the Yellowstone River (43D)
Yellowstone River between the Clark's Fork of the Yellowstone River and the Bighorn River (43Q)
II. Basins in the Bozeman area:
Madison River (41F)
Gallatin River (41H)
Shields River (43A)
Ruby River (41C)
Beaverhead River (41B)
Red Rock River (41A)
Big Hole River (41D)
III. Basins in the Glasgow area:
Rock Creek tributary of the Milk River (40N)
Frenchman Creek (40L)
Milk River below Whitewater Creek including Porcupine Creek (40O)
Beaver Creek tributary of the Milk River (40M)
Whitewater Creek (40K)
Dry Creek (40D)
Missouri River between the Musselshell River and Fort Peck Dam (40E)
IV. Basins in the Havre area:
Sage Creek (40G)
Milk River between Fresno Reservoir and Whitewater Creek (40J)
Peoples Creek (40I)
Willow Creek (41N)
Teton River (41O)
Sun River (41K)
V. Basins in the Helena area:
Dearborn River (41U)
Clark Fork above the Blackfoot River (76G)
Boulder River tributary of the Jefferson River (41E)
Jefferson River (41G)
Missouri River above Holter Dam (41I)
VI. Basins in the Kalispell area:
Milk River above Fresno Reservoir (40F)
Big Sandy Creek (40H)
Yaak River (76B)
Fisher River (76C)
Kootenai River (76D)
Clark Fork below Flathead Lake (76N)
South Fork of the Flathead River (76J)
Middle Fork of the Flathead River (76I)
Swan River (76K)
Flathead River above Flathead Lake (76LJ)
VII. Basins in the Lewistown area:
Milk River between Fresno Reservoir and Whitewater Creek (40J)
Judith River (41S)
Musselshell River above Roundup (40A)
Musselshell River below Roundup (40C)
Flatwillow Creek including Box Elder Creek (40B)
VIII. Basins in the Miles City area:
Beaver Creek tributary of the Little Missouri River (39G)
Yellowstone River between the Tongue River and the Powder River (42K)
Little Missouri River above Little Beaver Creek (39F)
Rosebud Creek (42A)
Little Beaver Creek (39FJ)
Box Elder Creek (39E)
Yellowstone River below Powder River (42M)

IX. Basins in the Missoula area:
Rock Creek tributary of the Clark Fork River (76E)
Flint Creek (76GJ)
Clark Fork between the Blackfoot River and the Flathead River (76M)
Bitterroot River (76H)
Blackfoot River (76F)

The legislature intends by the amendment to 85-2-243 in section 8 of this bill that it be interpreted to restrict the department to utilize funds that have been appropriated for the adjudication program. The department's funding level in adjudicating water claims for the 1987-89 biennium is as specifically set forth in House Bill No. 2."

## 85-2-221. Filing of claim of existing water right — filing late claim.

**Compiler's Comments**

*2017 Amendment:* Chapter 338 in (1) after "an existing right, unless" substituted "provided for" for "exempted". Amendment effective May 7, 2017.

*Applicability:* Section 10, Ch. 338, L. 2017, provided: "[This act] applies to a statement of claim for an exempt right filed on or after [the effective date of this act]." Effective May 7, 2017.

*1993 Amendment:* Chapter 629 inserted (3) and (4) establishing a procedure for filing of late claims. Amendment effective July 1, 1993.

*Preamble:* The preamble attached to Ch. 629, L. 1993, provided: "WHEREAS, Article IX, section 3, of the Montana Constitution provides that all existing rights to the use of any waters for any useful or beneficial purpose are recognized and confirmed; and

WHEREAS, Article IX, section 3, of the Montana Constitution requires the Legislature to provide for the administration, control, and regulation of water rights and to establish a system of centralized records for such rights; and

WHEREAS, the Legislature established a procedure for the general adjudication of existing rights to the use of water and provided in section 85-2-226, MCA, that the failure to file a claim of existing right on or before the deadline established under section 85-2-221, MCA, would establish a conclusive abandonment of the right; and

WHEREAS, the Montana Supreme Court, in In the Matter of the Adjudication of the Water Rights Within the Yellowstone River, 253 Mont. 167, 832 P.2d 1210 (1992), has determined that the failure to file a statement of claim to an existing right to the use of water on or before April 30, 1982, resulted in the forfeiture of that right; and

WHEREAS, it has come to the attention of the Legislature that the forfeiture of water rights for failure to timely file a claim has in some instances caused hardship, and the Legislature accordingly desires to provide water rights claimants with one more opportunity to file a water rights claim in the general adjudication; and

WHEREAS, in so doing, the Legislature recognizes that the adjudication process will not be completed for many years but that a substantial amount of progress has already occurred in the adjudication, specifically in the area of water rights compacts with Indian tribes and the federal government and in decrees and stipulations involving individual claimants, and thus the Legislature believes that it is necessary to ensure that parties who have been recognized as having filed claims on or before April 30, 1982, and holders of federal reserved water rights are not adversely affected by the inclusion of new parties in the adjudication by subjecting the right to file those claims in remission to certain terms and conditions; and

WHEREAS, the Legislature wishes to provide protection for timely filed claimants from incurring additional costs or from being adversely affected by justifiable reliance on the presumption of abandonment; and

WHEREAS, the Legislature wishes to provide a conclusive adjudication of existing water rights; and

WHEREAS, the Legislature recognizes that according a privilege to file additional statements of claim presents a potential for abuse by those who may attempt to refile previously adjudicated claims, and the Legislature thus believes that the courts should deal harshly with any abuses by such measures as, without limitation, the imposition of sanctions under [former] Rule 11, Montana Rules of Civil Procedure [now superseded]; and

WHEREAS, the Legislature determines that the deadline for filing water right claims as provided in this bill appropriately balances the interests at stake in the adjudication.

THEREFORE, the Legislature finds it is appropriate to make the following amendments to sections 85-2-102, 85-2-211 [now repealed], 85-2-213, 85-2-221, 85-2-225, 85-2-226, 85-2-234, 85-2-237, and 85-2-306, MCA, in order to provide for the acceptance of late claims to the use of water under the conditions set forth in this bill. Additionally, the Legislature directs the Water Policy Committee, in coordination with the Department of Justice, the Department of Natural Resources and Conservation, and the Reserved Water Rights Compact Commission, to conduct an interim study regarding certain late claim issues."

*Late Claim Interim Study — Water Policy Committee:* Section 10, Ch. 629, L. 1993, provided: "(1) The water policy committee, in coordination with the department of justice, the department of natural resources and conservation, and the reserved water rights compact commission, shall conduct an interim study analyzing the need for and desirability and impacts of allowing the remission of forfeited water rights in addition to the remissions authorized under the provisions of [this act] [Ch. 629, L. 1993]. The study must analyze the impacts of additional forfeiture remission on:

(a) the general stream adjudication process, including but not limited to the issues of adequacy and Montana's and the federal government's concurrent water rights adjudication jurisdiction;

(b) the federal government and Indian tribes regarding existing and future negotiated water rights compacts, including but not limited to the issues of equal protection;

(c) timely claimants' water use;

(d) timely claimants' legal rights, including but not limited to constitutional requirements regarding the taking of property;

(e) the potential reduction in agricultural production resulting from not granting additional forfeiture remissions and the associated social and economic impacts;

(f) the issue of fairness to both late and timely claimants;

(g) the potential increased costs to the state and to late and timely claimants;

(h) potential losses in revenue to the state resulting from the state's failure to file claims to existing water rights on or before April 30, 1982;

(i) implications involving the state's trust responsibilities;

(j) potential litigation against the state by private parties; and

(k) impacts on municipal and county governments resulting from late claims.

(2) The study must include an analysis of the potential for identifying individuals or classes of individuals whose additional forfeiture remission could be authorized in a manner that would have an acceptable impact on those issues identified under subsection (1). The classes of late claimants include but are not limited to previously decreed water rights holders and classes established according to filing date.

(3) The study must be completed in consultation with other relevant state and federal agencies, relevant groups and organizations, and other interested and affected citizens.

(4) The water policy committee shall report the results of the study to the 54th legislature by October 1, 1994. The report must include any legislative or other policy options recommended by the water policy committee."

*Saving Clause:* Section 11, Ch. 629, L. 1993, provided: "[This act] does not affect proceedings that were begun before [passage and approval of this act] [approved May 11, 1993] in which relief for damages have been sought based upon the diversion, impoundment, or withdrawal of water without a water right established under state law."

*Severability — Partial Nonseverability:* Section 12, Ch. 629, L. 1993, provided: "(1) If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

(2) It is the intent of the legislature that each part of [this act] is essentially dependent upon [section 4], which amends 85-2-221, and that if one part of [section 4], except subsection (3)(f)(ii), is held unconstitutional or invalid, all other parts of [this act] are invalid."

*Water Rights Order and Extension:* Pursuant to Montana Supreme Court Order No. 14833 (July 13, 1979), every person asserting a claim to an existing right for the use of water prior to July 1, 1973, was ordered to file a statement of claim for the right with the Department of Natural Resources and Conservation no later than January 1, 1982. Failure to file a claim will result in a conclusive presumption that the water right or claimed water right has been abandoned. See In re Water Rights Order, 36 St. Rep. 1228 (1979) (apparently not reported in Montana Reports). The filing deadline was extended to April 30, 1982, with the court stating that no more extensions would be granted. See Supreme Court Order 14833 (Dec. 7, 1981).

**Case Notes**

*Failure to Timely File Claim for Exempt Ground Water Right Precluded Party From Invoking Water Court's Jurisdiction — 2017 Legislative Updates to Water Rights Statutes Set 2019 Deadline.* In re Hurd, 2022 MT 120, 409 Mont. 79, 512 P.3d 256.

*Amended Claim of Existing Water Right:* Section 85-2-221(1) requires a person claiming an existing water right to file their claim no later than June 30, 1983; however, that section does not provide a deadline for when amendments must be filed. Section 85-2-227(1) is the controlling statute for filing amendments to existing water rights when there has not been a final decree issued. Sunset Irrigation District v. U.S., 2021 MT 25, 403 Mont. 123, 480 P.3d 214.

*Failure to File Nonexempt Rights — Acquisition of Beneficial Use by Federal Government:* Grazing permittees contended that they had not forfeited the ability to assert water rights despite failing to file them, and they challenged the federal government's right to store water for wildlife purposes. The Water Court granted summary judgment for the federal government. The Supreme Court reviewed the summary judgment decision de novo and found that the Water Court correctly found a forfeiture of stock water rights for failure to file. The Supreme Court found the Water Court was correct regarding the right to store water for wildlife purposes, because the Bureau of Land Management began doing so in these reservoirs during the beneficial-use era of water rights. U.S. v. Korman, 2018 MT 232, 393 Mont. 1, 427 P.3d 72.

*Petition to Adjudicate Water Rights — Reversed and Remanded to Allow Owner to File Exempt Claim:* A ranch acquired Indian allotment land that had been previously held in trust by the United States and was later converted to fee status. The ranch petitioned the Water Court for adjudication of existing water rights appurtenant to the lands. The Water Court denied the petition, holding that the lands did not require a separate adjudication because they were part of the Crow Water Compact. On appeal, the Supreme Court reversed and remanded the case with instructions that the petition be dismissed without prejudice so that the ranch could timely file an exempt claim with the Department of Natural Resources and Conservation. In re Scott Ranch, LLC, 2017 MT 230, 388 Mont. 509, 402 P.3d 1207.

## 85-2-222. Definition — filing process — notice.

**Compiler's Comments**

*2017 Amendment:* Chapter 338 in (1) at beginning inserted "As used in this section, "exempt right" means those" and near end after "Laws of 1975" substituted "An exempt right is" for "are"; deleted former (2) that read: "(2) The owner of an existing right exempt from filing under this section who did not voluntarily file a claim may request a judicial determination from the water court of the existing water right at least 90 days prior to issuance of a final decree pursuant to 85-2-234 or upon the reopening of a final decree pursuant to 85-2-237, whichever occurs later"; in (2) substituted current text concerning requirements for claiming an exempt right for former (3) that read: "(3) To request a judicial determination of an existing right exempt from filing, the owner shall:

(a) file a petition in the water court and pay a filing fee, including the cost of examination by the department under 85-2-243;

(b) submit information required by 85-2-224(1) and (2) on a form provided by the department; and

(c) provide and pay for the notice required by 85-2-233(6)"; in (3) substituted "exempt right" for "existing right undergoing judicial determination pursuant to this section"; in (4) substituted "any statement of claim of an exempt right filed under this section" for "petitions for judicial determination under this section, except that the department may not resolve issue remarks"; in (5) substituted "exempt right under this section" for "existing right exempt under this section or failure to request a judicial determination for an existing right exempt under this section"; in (5)(b) substituted "exempt rights for which a claim has not been filed" for "that are exempt from this section and for which there has been neither a claim filed nor a judicial determination sought"; inserted (6) concerning providing notice of filing deadline; inserted (7) concerning untimely statements of claim; inserted (8) concerning deposit of collected fees; and made minor changes in style. Amendment effective May 7, 2017.

*Applicability:* Section 10, Ch. 338, L. 2017, provided: "[This act] applies to a statement of claim for an exempt right filed on or after [the effective date of this act]." Effective May 7, 2017.

*2013 Amendment:* Chapter 323 in (1) near beginning after "individual" inserted "uses" and deleted second sentence that read: "Such claims may, however, be voluntarily filed"; inserted (2), (3), (4), (5), and (6) creating a petition process to judicially determine claims for existing water rights that were exempt from certain water right filing requirements; and made minor changes in style. Amendment effective October 1, 2013.

**Case Notes**

*Failure to Timely File Claim for Exempt Ground Water Right Precluded Party From Invoking Water Court's Jurisdiction — 2017 Legislative Updates to Water Rights Statutes Set 2019 Deadline.* In re Hurd, 2022 MT 120, 409 Mont. 79, 512 P.3d 256.

*Failure to File Nonexempt Rights — Acquisition of Beneficial Use by Federal Government:* Grazing permittees contended that they had not forfeited the ability to assert water rights despite failing to file them, and they challenged the federal government's right to store water for wildlife purposes. The Water Court granted summary judgment for the federal government. The Supreme Court reviewed the summary judgment decision de novo and found that the Water Court correctly found a forfeiture of stock water rights for failure to file. The Supreme Court found the Water Court was correct regarding the right to store water for wildlife purposes, because the Bureau of Land Management began doing so in these reservoirs during the beneficial-use era of water rights. U.S. v. Korman, 2018 MT 232, 393 Mont. 1, 427 P.3d 72.

*Storage of Water Beneficial Use — BLM Held Stock Watering Rights for Use by Grazing Permittees — Multiple Appropriators Can Claim Water Rights from Same Source:* The Water Court did not err in concluding that the United States Bureau of Land Management (BLM) held stock watering rights under Montana law in reservoirs constructed on federal land for the use of grazing permittees. The Supreme Court recognized that storage of water as a beneficial use is expressly provided by the Montana Constitution and that the BLM was entitled to proceed under Montana law to appropriate water in its reservoirs for use by grazing permittees and others. It has long been the common law and then statutory law in Montana that multiple appropriators can claim water rights from the same source and that the first in time has the best right. While overappropriation creates its own issues, it does not mean that the person or entity that made the first use on a water source acquired the right to exclude any other person or entity from claiming water from the same source. A fundamental precept of Montana water law is that multiple claims can exist on a single source of water. U.S. v. Barthelemess Ranch Corp., 2016 MT 348, 386 Mont. 121, 386 P.3d 952.

*Water Right Held Through Pre-1973 Mesne Conveyances — Summary Judgment Incorrectly Granted — Abandonment of Right Factually Dependent:* Duncan, who lived on a tract of land in Madison County, used water from a spring located on property (the large parcel) now owned separately from the parcel (the small parcel) lived on by Duncan. In 1950, Duncan conveyed all the property in what is now the large and small parcels to Baker. In 1951, Baker divided the property, conveying the large parcel and all appurtenances to Halse and reserving the small parcel for herself. Baker made no express reservation of water rights with the reserved property, and the deed to Halse conveying the large parcel made no express grant of water rights. For the next 10 years, Baker made no use of the house located on the small parcel. In 1961, Baker conveyed the small parcel to the Hunts, expressly conveying water rights on the property. In 1963, Halse filed a declaration of vested ground water rights for the "total flow of all springs" located on the large parcel. Fosseco, who acquired the large parcel from Halse, conveyed it, through mesne conveyances, to M.S. Consulting. The Hunts conveyed the small parcel, through mesne conveyances, to the Axtells. All uses of the water were for livestock and domestic use. In 1993, the Axtells filed a notice of water rights with the Department of Natural Resources and Conservation. M.S. Consulting subsequently served the Axtells with notice that their water rights would be cut off in 45 days, and the Axtells brought an action to enjoin the discontinuance of their water supply. The District Court granted summary judgment for the Axtells, and M.S. Consulting appealed. The Supreme Court reviewed the background of the prior appropriation law in Montana, noting that because the current statutes recognize existing water rights, the law before the 1973 statutes were enacted is still the law with regard to water rights acquired before 1973. The Supreme Court reviewed the pre-1973 law and concluded that the water rights appurtenant to all the property passed to Baker but that there was a factual issue whether, as a result of Baker's nonuse of the property and its water rights for over 10 years, Baker had abandoned the water rights conveyed to her by Duncan. If the abandonment occurred, there was no reservation of conveyance and no right to use of the water after that period of nonuse. The issue of abandonment, the Supreme Court noted, depended in turn upon several other issues, such as whether Baker intended to abandon her water right. The Supreme Court also agreed with M.S. Consulting that several other issues of fact raised by the company may also exist, although it noted that these other issues were only material if the District Court ruled a particular way on the question of abandonment. Because there were genuine issues of material fact, the Supreme

Court held that the District Court erred in granting summary judgment to the Axtells. Axtell v. M.S. Consulting, 1998 MT 64, 288 M 150, 955 P2d 1362, 55 St. Rep. 276 (1998).

## 85-2-223. Public recreational uses.

**Case Notes**

*Storage of Water Beneficial Use — BLM Held Stock Watering Rights for Use by Grazing Permittees — Multiple Appropriators Can Claim Water Rights from Same Source:* The Water Court did not err in concluding that the United States Bureau of Land Management (BLM) held stock watering rights under Montana law in reservoirs constructed on federal land for the use of grazing permittees. The Supreme Court recognized that storage of water as a beneficial use is expressly provided by the Montana Constitution and that the BLM was entitled to proceed under Montana law to appropriate water in its reservoirs for use by grazing permittees and others. It has long been the common law and then statutory law in Montana that multiple appropriators can claim water rights from the same source and that the first in time has the best right. While overappropriation creates its own issues, it does not mean that the person or entity that made the first use on a water source acquired the right to exclude any other person or entity from claiming water from the same source. A fundamental precept of Montana water law is that multiple claims can exist on a single source of water. U.S. v. Barthelemess Ranch Corp., 2016 MT 348, 386 Mont. 121, 386 P.3d 952.

*Public Recreation and Conservation Interests in Water Adjudication Proceedings—Department of Fish, Wildlife, and Parks Not Exclusive Representative:* After the Water Court issued a temporary preliminary decree for the Big Hole River Basin, the objector filed timely objections to the claims of several claimants and requested a hearing. The Water Court granted summary judgment to the claimants on the basis that the objector lacked standing to file objections to the claims. The Supreme Court reversed. The Water Court erred in holding that under 85-2-223, only the Department of Fish, Wildlife, and Parks may represent public recreation and conservation interests in water rights adjudications. Section 85-2-223 does not prohibit other entities from filing objections. No statutory or regulatory restrictions exist regarding who may file an objection to a water rights claim contained in a temporary preliminary decree. Mont. Trout Unlimited v. Beaverhead Water Co., 2011 MT 151, 361 Mont. 77, 255 P.3d 179.

*Water Rights Adjudication — Standing to Object to Preliminary Decree:* After the Water Court issued a temporary preliminary decree for the Big Hole River Basin, the objector filed timely objections to the claims of several claimants and requested a hearing. The Water Court granted summary judgment to the claimants on the basis that the objector lacked standing to file objections to the claims. Although the objector had sufficiently alleged environmental and recreational interests of its members that were distinct from those of the general public, the Water Court concluded such interests were not sufficient to demonstrate standing because the objector lacked ownership of a water right. The Supreme Court reversed. The Water Court erroneously applied the "good cause" requirement contained in 85-2-233 to require an ownership interest in a water right. When a party has met all common-law and statutory requirements for standing and has shown that its interest in the use of water has been affected by the decree, that party is entitled to object to a preliminary decree under 85-2-233. Mont. Trout Unlimited v. Beaverhead Water Co., 2011 MT 151, 361 Mont. 77, 255 P.3d 179.

*Fish, Wildlife, and Recreational Purposes as Valid Basis for Appropriative Water Use — Diversion Not Requisite Element of Appropriation When Diversion Not Required — Bean Lake Overruled:* The Water Court ruled that five pre-1973 water rights claims based on diversions for fish, wildlife, or recreation were potentially invalid based on the holding in In re Water Rights in Dearborn Drainage, 234 M 331, 766 P2d 228 (1988), commonly known as the Bean Lake decision, because under Montana law before 1973, no appropriation right was recognized for fish, wildlife, or recreation except through a Murphy right statute. The Department of Fish, Wildlife, and Parks appealed. The Supreme Court noted that the common-law elements of a valid appropriation are intent, notice, diversion, and application to a beneficial use and held that to the extent that the Bean Lake decision suggests that diversions for fish, wildlife, or recreation are not beneficial uses, that case is overruled. The court went on to address the Bean Lake rationale that claims for the nondiversionary use of water for fish, wildlife, or recreation are not recognized under the prior appropriation doctrine, noting that although most traditional uses necessitate a diversion for application to a beneficial use, the prior appropriation doctrine's history supports the holding that a diversion is not a requisite element of an appropriation when it is not a physical necessity for application to a beneficial use. Thus, instream and inlake appropriations for beneficial uses may be valid when the purpose does not require a diversion. Beneficial use rather than diversion is the touchstone of the prior appropriation doctrine. Montana has validated nondiversionary appropriations, so Montana law prior to 1973 cannot be said to absolutely require a diversion for a valid appropriation of water. The conclusion in the Bean Lake decision that the framers of the 1972 Montana Constitution did not accept fish, wildlife, or recreation uses as a valid basis for appropriative water rights is not reflected in the convention transcripts, which indicate that it was the fear of future limitations on fish, wildlife, and recreation rights, rather than a belief that those rights did not exist, that led to the deletion of proposed constitutional language specifically referencing those uses. Therefore, the Bean Lake conclusion that prior to 1973, Montana did not recognize appropriations for fish, wildlife, and recreation, whether diversionary or nondiversionary, was overruled. In re Adjudication of Existing Water Rights of Basin 41I, 2002 MT 216, 311 M 327, 55 P3d 396 (2002), distinguished in Mont. Trout Unlimited v. Beaverhead Water Co., 2011 MT 151, 361 Mont. 77, 255 P.3d 179.

*State's Claim Asserted in Good Faith — Attorney Fees Not Allowed:* Under the American rule that a party in a civil action is generally not entitled to attorney fees absent a specific contractual or statutory provision, the party who prevailed against the state in a case involving the public's recreational water use rights is not entitled to such fees. The Montana Water Use Act provides that the adjudication process is adversarial in nature and does not determine that the prevailing party in an ordinary water dispute is entitled to attorney fees. Dept. of Fish, Wildlife, and Parks v. Mont. Stockgrowers Ass'n, Inc., 240 M 39, 782 P2d 898, 46 St. Rep. 1925 (1989). The American rule was applied in First Nat'l Bank of Glasgow v. First Sec. Bank of Mont., 260 M 38, 857 P2d 726, 50 St. Rep. 931 (1993).

*State's Right to a Pre-1973 Appropriation Use Right to Bean Lake for Recreation, Fish, and Wildlife:* As part of the statewide water rights adjudication process, the Department of Fish, Wildlife, and Parks filed a claim for a pre-1973 "use" water right appropriation for recreation, fishing, and wildlife purposes in the waters of Bean Lake. The Department had stocked the lake, maintained the fishery resource, made studies of lake surface levels and fish population, and enforced rules relating to motor boats, and the public had made general use of the lake. The Department had been involved with the lake since 1933 and in 1964 obtained a warranty deed to 16.33 acres abutting the lake. The Department's use of the lake was beneficial within the meaning of the appropriation doctrine, but the Water Court correctly denied the claim because of a lack of diversion, intent, and notice. It is clear that under Montana law before 1973, no appropriation right was recognized for recreation, fish, and wildlife purposes, except through a Murphy right statute. The prevailing legal theory was that some form of diversion or capture of water was necessary for an appropriation, though some forms of nondiversionary water rights were given appropriation status. Since the law recognized no appropriation, the Department and public could not have intended one and adverse appropriators could not have had notice of a claim. In re Water Rights in Dearborn Drainage, 234 M 331, 766 P2d 228, 45 St. Rep. 1948 (1988), overruled in In re Adjudication of Existing Water Rights of Basin 41I, 2002 MT 216, 311 M 327, 55 P3d 396 (2002). See also Mont. Trout Unlimited v. Beaverhead Water Co., 2011 MT 151, 361 Mont. 77, 255 P.3d 179 (distinguishing In re Adjudication of Existing Water Rights of Basin 41I, 2002 MT 216, 311 Mont. 327, 55 P.3d 396).

*Use Right of State in Bean Lake — Standing of Stockgrowers Association to Enter Suit — General Test for Any Association:* As part of the statewide water rights adjudication process, the Department of Fish, Wildlife, and Parks filed a claim for a pre-1973 "use" water right appropriation for recreation, fishing, and wildlife purposes in the waters of Bean Lake. The Montana Stockgrowers Association was a proper party in the case. The Water Court required statewide notice and invitation for others to appear. The Association stated that its members could be affected, and the two other potential appropriators in Bean Lake were members of the Association. The Supreme Court adopted the following as the test to determine the standing of an association to appear as a party on behalf of its members: (1) its members would otherwise have standing in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the suit. In re Water Rights in Dearborn Drainage, 234 M 331, 766 P2d 228, 45 St. Rep. 1948 (1988).

*Water Right of State in Bean Lake — Drainage Adjudication Process — Appealability of State's Claim Under Finality of Decision Rules:* As part of the statewide water rights adjudication process, the Department of Fish, Wildlife, and Parks filed a claim for a pre-1973 "use" water right appropriation for recreation, fishing, and wildlife purposes in the waters of Bean Lake. In recent consolidated cases relating to drainage areas, the Supreme Court dismissed appeals because a certificate had not been obtained under former Rule 54(b), M.R.Civ.P. (now superseded). In effect, the court held that the causes were not final for purposes of appeal. In this case, the court accepted jurisdiction under its power of general supervisory control over the Water Courts. The Department had filed 15 to 17 similar claims in various drainages, the same issues would recur, and a decision in the present case would help speed the water adjudication process. In re Water Rights in Dearborn Drainage, 234 M 331, 766 P2d 228, 45 St. Rep. 1948 (1988).

*Determination of Public's Right to Use Dearborn River — Standing of Coalition of Citizens:* In action for determination of the public's right to use the Dearborn River, whether the Montana Coalition for Stream Access, Inc., had standing to bring suit was immaterial because the Department of State Lands (functions now transferred to Department of Natural Resources and Conservation) and the Department of Fish, Wildlife, and Parks were also plaintiffs. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984).

## 85-2-224. Statement of claim.

### Compiler's Comments

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

*1985 Amendment:* In introduction of (1) inserted "arising under the laws of the state and for each right reserved under the laws of the United States which has been actually put to use"; in (2) substituted "Any claimant filing a statement of claim under subsection (1)" for "The claimant"; and inserted (3) listing requirements for filing a statement of claims for future federal reserved water rights.

### Case Notes

*Judicial Notice of Maps and Descriptions on Appeal:* In a dispute over control of an irrigation district's headgate, the Supreme Court permitted submission on appeal of government survey descriptions and maps that had not been introduced as evidence at trial. The court reasoned: first, that the commission comments to Rule 201, Montana Rules of Evidence, indicate that published maps or charts are included within the Rule's scope; and second, that maps and descriptions are acceptable articles of evidence by which to show a water right in the adjudication process. In re Establishment & Organization of Ward Irrigation District, 216 M 315, 701 P2d 721, 42 St. Rep. 824 (1985), distinguished in Frank v. Harding, 1998 MT 215, 290 M 448, 965 P2d 254, 55 St. Rep. 903 (1998).

## 85-2-225. Filing fee — processing fee for remitted claims.

### Compiler's Comments

*2017 Amendment:* Chapter 338 in (1) near beginning after "85-2-221" deleted "or 85-2-222"; and inserted (4) concerning filing fee for each claim filed under 85-2-222. Amendment effective May 7, 2017.

*Applicability:* Section 10, Ch. 338, L. 2017, provided: "[This act] applies to a statement of claim for an exempt right filed on or after [the effective date of this act]." Effective May 7, 2017.

*2007 Amendment:* Chapter 44 in (3)(a) at beginning deleted "Except as provided in subsection (3)(c)"; and made minor changes in style. Amendment effective October 1, 2007.

*1999 Amendment:* Chapter 389 in (3)(a) at end substituted "general fund" for "water rights adjudication account for the examination of late claims by the department and for the publication of notices by the department as required under 85-2-213(2)"; at end of (3)(b) substituted "general fund" for "water rights adjudication account"; deleted (3)(c) that read: "(c) For a statement of claim that was filed after April 30, 1982, but prior to July 1, 1993, or for a statement of claim filed by a state agency, the processing fee provided for in subsection (3)(a) must be paid on or before a date to be established by the department by rule, but no later than July 1, 1999"; and made minor changes in style. Amendment effective July 1, 1999.

*1993 Amendment:* Chapter 629 inserted (3) assessing and providing for disposition of a processing fee; and made minor changes in style. Amendment effective July 1, 1993.

*Preamble:* The preamble attached to Ch. 629, L. 1993, provided: "WHEREAS, Article IX, section 3, of the Montana Constitution provides that all existing rights to the use of any waters for any useful or beneficial purpose are recognized and confirmed; and

WHEREAS, Article IX, section 3, of the Montana Constitution requires the Legislature to provide for the administration, control, and regulation of water rights and to establish a system of centralized records for such rights; and

WHEREAS, the Legislature established a procedure for the general adjudication of existing rights to the use of water and provided in section 85-2-226, MCA, that the failure to file a claim of existing right on or before the deadline established under section 85-2-221, MCA, would establish a conclusive abandonment of the right; and

WHEREAS, the Montana Supreme Court, in In the Matter of the Adjudication of the Water Rights Within the Yellowstone River, 253 Mont. 167, 832 P.2d 1210 (1992), has determined that the failure to file a statement of claim to an existing right to the use of water on or before April 30, 1982, resulted in the forfeiture of that right; and

WHEREAS, it has come to the attention of the Legislature that the forfeiture of water rights for failure to timely file a claim has in some instances caused hardship, and the Legislature accordingly desires to provide water rights claimants with one more opportunity to file a water rights claim in the general adjudication; and

WHEREAS, in so doing, the Legislature recognizes that the adjudication process will not be completed for many years but that a substantial amount of progress has already occurred in the adjudication, specifically in the area of water rights compacts with Indian tribes and the federal government and in decrees and stipulations involving individual claimants, and thus the Legislature believes that it is necessary to ensure that parties who have been recognized as having filed claims on or before April 30, 1982, and holders of federal reserved water rights are not adversely affected by the inclusion of new parties in the adjudication by subjecting the right to file those claims in remission to certain terms and conditions; and

WHEREAS, the Legislature wishes to provide protection for timely filed claimants from incurring additional costs or from being adversely affected by justifiable reliance on the presumption of abandonment; and

WHEREAS, the Legislature wishes to provide a conclusive adjudication of existing water rights; and

WHEREAS, the Legislature recognizes that according a privilege to file additional statements of claim presents a potential for abuse by those who may attempt to refile previously adjudicated claims, and the Legislature thus believes that the courts should deal harshly with any abuses by such measures as, without limitation, the imposition of sanctions under [former] Rule 11, Montana Rules of Civil Procedure [now superseded]; and

WHEREAS, the Legislature determines that the deadline for filing water right claims as provided in this bill appropriately balances the interests at stake in the adjudication.

THEREFORE, the Legislature finds it is appropriate to make the following amendments to sections 85-2-102, 85-2-211 [now repealed], 85-2-213, 85-2-221, 85-2-225, 85-2-226, 85-2-234, 85-2-237, and 85-2-306, MCA, in order to provide for the acceptance of late claims to the use of water under the conditions set forth in this bill. Additionally, the Legislature directs the Water Policy Committee, in coordination with the Department of Justice, the Department of Natural Resources and Conservation, and the Reserved Water Rights Compact Commission, to conduct an interim study regarding certain late claim issues."

*Saving Clause:* Section 11, Ch. 629, L. 1993, provided: "[This act] does not affect proceedings that were begun before [passage and approval of this act] [approved May 11, 1993] in which relief for damages have been sought based upon the diversion, impoundment, or withdrawal of water without a water right established under state law."

*Severability — Partial Nonseverability:* Section 12, Ch. 629, L. 1993, provided: "(1) If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

(2) It is the intent of the legislature that each part of [this act] is essentially dependent upon [section 4], which amends 85-2-221, and that if one part of [section 4], except subsection (3)(f)(ii), is held unconstitutional or invalid, all other parts of [this act] are invalid."

*1981 Amendments:* Chapter 253 deleted "certified" before "copy" in (1)(b) and "or verified as otherwise ordered by the court" at the end of (1)(b).

Chapter 268 inserted "or 85-2-222" after "85-2-221" and substituted "must" for "shall" in (1); and added (2) establishing a $40 filing fee for exempt but voluntarily filed existing water rights claims.

## 85-2-226. Abandonment by failure to file claim.

### Compiler's Comments

*1993 Amendment:* Chapter 629 near middle inserted reference to subsection (1) of 85-2-221. Amendment effective July 1, 1993.

*Preamble:* The preamble attached to Ch. 629, L. 1993, provided: "WHEREAS, Article IX, section 3, of the Montana Constitution provides that all existing rights to the use of any waters for any useful or beneficial purpose are recognized and confirmed; and

WHEREAS, Article IX, section 3, of the Montana Constitution requires the Legislature to provide for the administration, control, and regulation of water rights and to establish a system of centralized records for such rights; and

WHEREAS, the Legislature established a procedure for the general adjudication of existing rights to the use of water and provided in section 85-2-226, MCA, that the failure to file a claim of existing right on or before the deadline established under section 85-2-221, MCA, would establish a conclusive abandonment of the right; and

WHEREAS, the Montana Supreme Court, in In the Matter of the Adjudication of the Water Rights Within the Yellowstone River, 253 Mont. 167, 832 P.2d 1210 (1992), has determined that the failure to file a statement of claim to an existing right to the use of water on or before April 30, 1982, resulted in the forfeiture of that right; and

WHEREAS, it has come to the attention of the Legislature that the forfeiture of water rights for failure to timely file a claim has in some instances caused hardship, and the Legislature accordingly desires to provide water rights claimants with one more opportunity to file a water rights claim in the general adjudication; and

WHEREAS, in so doing, the Legislature recognizes that the adjudication process will not be completed for many years but that a substantial amount of progress has already occurred in the adjudication, specifically in the area of water rights compacts with Indian tribes and the federal government and in decrees and stipulations involving individual claimants, and thus the Legislature believes that it is necessary to ensure that parties who have been recognized as having filed claims on or before April 30, 1982, and holders of federal reserved water rights are not adversely affected by the inclusion of new parties in the adjudication by subjecting the right to file those claims in remission to certain terms and conditions; and

WHEREAS, the Legislature wishes to provide protection for timely filed claimants from incurring additional costs or from being adversely affected by justifiable reliance on the presumption of abandonment; and

WHEREAS, the Legislature wishes to provide a conclusive adjudication of existing water rights; and

WHEREAS, the Legislature recognizes that according a privilege to file additional statements of claim presents a potential for abuse by those who may attempt to refile previously adjudicated claims, and the Legislature thus believes that the courts should deal harshly with any abuses by such measures as, without limitation, the imposition of sanctions under [former] Rule 11, Montana Rules of Civil Procedure [now superseded]; and

WHEREAS, the Legislature determines that the deadline for filing water right claims as provided in this bill appropriately balances the interests at stake in the adjudication.

THEREFORE, the Legislature finds it is appropriate to make the following amendments to sections 85-2-102, 85-2-211 [now repealed], 85-2-213, 85-2-221, 85-2-225, 85-2-226, 85-2-234, 85-2-237, and 85-2-306, MCA, in order to provide for the acceptance of late claims to the use of water under the conditions set forth in this bill. Additionally, the Legislature directs the Water Policy Committee, in coordination with the Department of Justice, the Department of Natural Resources and Conservation, and the Reserved Water Rights Compact Commission, to conduct an interim study regarding certain late claim issues."

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(2) It is the intent of the legislature that each part of [this act] is essentially dependent upon [section 4], which amends 85-2-221, and that if one part of [section 4], except subsection (3)(f)(ii), is held unconstitutional or invalid, all other parts of [this act] are invalid."

**Case Notes**

*Constitutional Validity of Conclusive Presumption of Water Right Abandonment:* The legislative definition of water right abandonment set out in this section, based on failure to file a timely claim of an existing right, does not require any individualized determinations but rather applies to all persons who filed after the deadline. Water Court hearings were available to make the individual determination as to whether the deadline was met. As established in U.S. v. Locke, 471 US 84, 85 L Ed 2d 64, 105 S Ct 1785 (1985), a Legislature can enact substantive rules of law that treat property as forfeited under conditions that the common law would not consider sufficient to indicate abandonment. The legislative choice to make the presumption of abandonment conclusive rather than rebuttable is constitutionally permissible. In re Adjudication of Existing Yellowstone River Water Rights, 253 M 167, 832 P2d 1210, 49 St. Rep. 413 (1992), distinguishing Vlandis v. Kline, 412 US 441, 37 L Ed 2d 63, 93 S Ct 2230 (1973).

*Duty to File Water Rights — Due Process Satisfied:* The objective of the Legislature in enacting this section was to meet the mandate of Art. IX, sec. 3, Mont. Const., to establish a system of centralized records for the administration of water rights. Before water rights could be adjudicated statewide, it was essential that existing rights be firmly established. This section provides a reasonable means of compelling comprehensive participation, extinguishing duplicative and exaggerated rights, and ridding local records of stale, unused water claims. The filing duty was not burdensome, unreasonable, or unrelated to the legitimate and proper legislative objective. Procedural due process considerations were sufficiently addressed through: (1) ample published and personal notice over a 4-year period; (2) an expanded opportunity to file a claim through an extension of the filing deadline; (3) an adequate opportunity for each claimant to show that he did not intend to abandon or forfeit water rights; and (4) an opportunity for all late claimants to request an evidentiary hearing with the Water Court to determine whether the deadline had in fact been missed. In re Adjudication of Existing Yellowstone River Water Rights, 253 M 167, 832 P2d 1210, 49 St. Rep. 413 (1992).

*Forfeiture of Water Rights Not Considered Unjust Taking Without Compensation:* Former water rights holders who forfeited their rights through failure to meet the filing deadline contended that this section was an unconstitutional taking without just compensation under state and federal laws because invalidating existing water rights for failure to file extended beyond what was reasonably necessary to preserve the public welfare. However, the deprivation occurred only as the result of the appropriators' neglect or the neglect of their predecessors and not as the result of excessive or unreasonable state action. This section does not result in taking property without just compensation because the state is not required to compensate the owner for the consequences of the owner's own neglect. In re Adjudication of Existing Yellowstone River Water Rights, 253 M 167, 832 P2d 1210, 49 St. Rep. 413 (1992). See also Texaco, Inc. v. Short, 454 US 516, 70 L Ed 2d 738, 102 S Ct 781 (1982).

*Forfeiture of Water Rights Not Impairment of Contracts:* Former water rights holders who forfeited their rights through failure to meet the filing deadline contended that this section constituted an impairment of contracts by rendering invalid water rights upon which substantial contractual relationships were based. However, failure to demonstrate the existence of any specific contract, let alone its impairment, was fatal to the impairment of contracts claim under either the state or federal constitution. In re Adjudication of Existing Yellowstone River Water Rights, 253 M 167, 832 P2d 1210, 49 St. Rep. 413 (1992).

*Forfeiture of Water Rights Not Violative of Equal Protection:* Former water rights holders who forfeited their rights through failure to meet the filing deadline contended that this section violated constitutional equal protection guarantees by imposing an arbitrary deadline that unreasonably divided water claimants into two classes: one class of persons who retained their rights and another, late claimants, who lost their rights without opportunity to show good cause for the late filing. This classification was alleged to have resulted in discrimination against late filers who in good faith attempted to meet the statutory filing deadline. The Supreme Court found that this section does not create different classes and that all claimants were treated equally, provided equal notice, and given equal time to file by the given deadline. Any alleged classification was created by the late filers' own negligence, and the equal protection challenge failed. In re Adjudication of Existing Yellowstone River Water Rights, 253 M 167, 832 P2d 1210, 49 St. Rep. 413 (1992).

*No Constitutional Protection for Pre-1973 Water Rights:* Appellants who forfeited their water rights for failing to file a timely claim pursuant to this section contended that Art. IX, sec. 3, subsection (1), Mont. Const., provided a guarantee of existing water rights and that while the Legislature may constitutionally affirm and protect existing water rights, those rights may not be statutorily forfeited or extinguished. The Supreme Court held that that subsection does not establish immunity from sovereign powers for pre-1973 water rights. Water rights, like other property rights, are protected against unreasonable state action but do not have indefeasible status. The Legislature may enact constitutionally sound regulations, including the requirement for property owners to take affirmative actions to maintain their water rights. In re Adjudication of Existing Yellowstone River Water Rights, 253 M 167, 832 P2d 1210, 49 St. Rep. 413 (1992).

### 85-2-227. Claim to constitute prima facie evidence — relevant evidence — abandonment — criteria for presumption of municipal nonabandonment.

**Compiler's Comments**

*2005 Amendment:* Chapter 17 in (4) near beginning after "municipal use" deleted "from a water classified by the board of environmental review before January 1, 1999, as A-Closed under administrative rule is a unique water suited to municipal water use and that such a claim"; in (4)(d)(i) after "emergency" inserted "municipal water supply"; inserted (4)(d)(iii) allowing application of the water right to any other department-approved use; and made minor changes in style. Amendment effective October 1, 2005.

*1999 Amendment:* Chapter 213 in (3) at beginning inserted "Subject to the provisions of subsection (4)"; and inserted (4) making a legislative finding, in regard to a determination of abandonment under subsection (3), that a water right claimed for municipal use to water classified as A-Closed is a unique water suited to municipal water use and the claim is presumed to not be abandoned if any part of the water right has been used and there is evidence that there is a filtration waiver under federal law, of diversion or conveyance structures for future use of the water right, of a study including an assessment that using the water right is feasible and the amount of the water right is reasonable for future needs, or of facilities connected to the municipal water supply system to apply the water right to an emergency or supplemental municipal water supply. Amendment effective March 30, 1999.

*Preamble:* The preamble attached to Ch. 213, L. 1999, provided: "WHEREAS, waters classified A-Closed pursuant to ARM 17.30.621 represent the highest quality waters in Montana; and

WHEREAS, almost all A-Closed drainages originate in remote, largely inaccessible, alpine settings that afford maximum natural protection for water quality; and

WHEREAS, there is either no habitation or development or extremely limited habitation or development in A-Closed drainages; and

WHEREAS, the existing municipal water rights in each of those drainages have been used for municipal supply purposes and will be needed in many of the drainages; and

WHEREAS, the high elevation alpine settings of A-Closed drainages provide gravity flowing systems that reduce the need for pumping facilities and related energy costs for Montana citizens; and

WHEREAS, the superior mineral, radiological, and microbiological quality of A-Closed waters renders them especially suitable as a raw source of municipal drinking water; and

WHEREAS, there are few gravity flow alternative sources for high quality municipal water, and therefore the loss of the right to use these high quality waters would result in the loss of a unique and irreplaceable natural resource.

THEREFORE, the 56th Legislature of the State of Montana finds that it is appropriate to enact legislation to establish a limited presumption of nonabandonment for municipal water rights situated in A-Closed basins."

*Severability:* Section 2, Ch. 213, L. 1999, was a severability clause.

*1997 Amendment:* Chapter 174 inserted (2) allowing consideration of all relevant evidence in determining existing water rights; inserted (3) allowing admissibility of evidence of abandonment; and made minor changes in style. Amendment effective March 28, 1997.

*Saving Clause:* Section 7, Ch. 174, L. 1997, was a saving clause.

*1989 Amendment:* At beginning inserted "For purposes of adjudicating rights pursuant to this part"; after "85-2-221" inserted "or an amended claim of existing right"; and inserted second sentence providing that modified preliminary decree supersedes claim of existing right until issuance of final decree. Amendment effective April 21, 1989.

*Saving Clause:* Section 9, Ch. 604, L. 1989, was a saving clause.

*Severability:* Section 10, Ch. 604, L. 1989, was a severability clause.

*Retroactive and Prospective Applicability:* Section 11, Ch. 604, L. 1989, provided: "(1) [This act] applies retroactively, within the meaning of 1-2-109, to all temporary preliminary decrees and preliminary decrees that have been issued by the Montana water courts and prospectively to all decrees issued on or after [the effective date of this act] [effective April 21, 1989].

(2) A person whose existing rights are determined in a temporary preliminary decree or a preliminary decree issued before [the effective date of this act] [effective April 21, 1989] may petition the water judge for relief concerning any matter in the decree prior to enforcement of the decree."

**Case Notes**

*Amended Claim of Existing Water Right:* Section 85-2-221(1) requires a person claiming an existing water right to file their claim no later than June 30, 1983; however, that section does not provide a deadline for when amendments must be filed. Section 85-2-227(1) is the controlling statute for filing amendments to existing water rights when there has not been a final decree issued. Sunset Irrigation District v. U.S., 2021 MT 25, 403 Mont. 123, 480 P.3d 214.

*Intent to Abandon — Intent and Actions of Nonuser Dispositive:* The Water Court found that 23 consecutive years of nonuse of a 1904 priority irrigation right had raised a presumption of abandonment. The current owner presented credible evidence of continuous irrigation by the nonuser's successor spanning from 1971 until the present day and argued on appeal that the Water Court should have instead considered the successor's intent in expanding irrigation and continuously irrigating. The Supreme Court affirmed the Water Court, concluding that the Water Court properly found that the original 1904 priority date had been abandoned by the nonuser and then properly assigned a 1971 priority date based on the beginning of the successor's continuous use. Twin Creeks Farm & Ranch, LLC v. Petrolia Irrigation District, 2020 MT 80, 399 Mont. 431, 461 P.3d 91. See also Twin Creeks Farm & Ranch, LLC v. Petrolia Irrigation District, 2022 MT 19, 407 Mont. 278, 502 P.3d 1080, affirming the Water Court's conclusion that much of the irrigated acreage had been abandoned between the initial claimed priority date and later irrigation development and holding the Water Court did not err in granting an implied claim with a later priority date rather than tying the later irrigated acreage to the original claim date.

*Nonabandonment Finding Reversed — Misapprehension of Effect of Evidence by Water Court:* The statement of claim for a water right claimed a 1903 priority date for 300 miner's inches to irrigate 210 acres. A 2005 issue remark noted that only 151 acres appeared to be under irrigation. An opposing party in the Water Court adjudication asserted that only 15 acres had been under irrigation prior to 1965. The Water Court upheld the claimant's full 210 acres as set forth in the statement of claim, based in part on a Department of Natural Resources and Conservation report that had attempted to resolve the issue remark with regard to the discrepancy between the 210 acres claimed and the 151 acres currently under irrigation. The Water Court interpreted the report as confirming that a minimum of 151 acres were irrigated prior to 1968. The opposing party argued, and the Supreme Court agreed, that the Department report had been based on a 1971 irrigation survey that offered no opinion or conclusion about the amount of land that had been irrigated prior to 1971. The Water Court's misapprehension of the Department report constituted clear error, and that element of the Water Court's ruling was reversed and remanded. Twin Creeks Farm & Ranch, LLC v. Petrolia Irrigation District, 2020 MT 80, 399 Mont. 431, 461 P.3d 91. See also Twin Creeks Farm & Ranch, LLC v. Petrolia Irrigation District, 2022 MT 19, 407 Mont. 278, 502 P.3d 1080, affirming the Water Court's conclusion that much of the irrigated acreage had been abandoned between the initial claimed priority date and later irrigation development and holding the Water Court did not err in granting an implied claim with a later priority date rather than tying the later irrigated acreage to the original claim date.

*Water Court Jurisdiction Properly Invoked — Creation of Implied Junior Water Right Proper:* By virtue of the parties' act of seeking certification to the Water Court for a determination of the rights of the parties, the Water Court has jurisdiction to adjudicate all water rights at issue between the parties whether a particular claim was asserted by a party or not. Thus, determination that the May 28, 1891, notice of appropriation was never put to a beneficial use and perfected was proper. Further, the creation of a junior water right to account for the historic use of the ditch's capacity and use by the parties in excess of the June 1, 1891, water right was also proper based on substantial credible evidence. Hoon v. Murphy, 2020 MT 50, 399 Mont. 110, 460 P.3d 849.

*Abandonment of Municipal Water Rights:* A municipality that shrank received a volume from the Water Court lower than historical use but based on current and reasonably foreseeable future use. The municipality appealed. The Supreme Court affirmed. Reviewing for clear error, the Supreme Court found that the presumption of nonabandonment had been overcome and that the evidentiary inquiry required by statute supported the volume assigned. U.S. v. U.S., 2019 MT 174, 396 Mont. 433, 445 P.3d 828.

*Water Commissioner, Billing Records Contrary to Witness Testimony — Evidence Undermining Written Records With Witness Testimony Sufficient to Establish Continual Use — Failure to Assert Rights Through Water Commissioner — Nonuse:* In an action involving water rights adjudication, the Water Court adopted the Water Master's report, finding that the objectors failed to prove that the claimant had abandoned the water right due to 10 successive years of misuse. While the objectors provided evidence that the Water Commissioner and billing records established a period of nonuse for 17 years, the Water Court determined that witness testimony contradicted this evidence and that, while the records were instructive, evidence undermining the credibility of the records was persuasive. On appeal, the Supreme Court affirmed, holding that the objectors failed to establish a continuous period of nonuse, the Water Master's report was based on substantial credible evidence, the Water Commissioner and billing records were not dispositive, the failure to assert water rights through the Water Commissioner was not the equivalent of nonuse, and the Water Court was correct to not address the issues of partial abandonment and whether additional remedies were available to the objectors. In re Klamert, 2019 MT 110, 395 Mont 420, 443 P.3d 379.

*Notice of Appropriation Under 1885 Act Valid:* The objectors to a water right argued that the claimant's appropriation was invalid because it failed to comply with the 1885 Appropriation Act. The objectors claimed that the claimant's notice of appropriation was vague and speculative and did not identify the reservoir. They also claimed that the claimant had not constructed the reservoir in a timely fashion or with reasonable diligence. The Water Court disagreed and held that the appropriation was valid. The objectors appealed to the Supreme Court, which affirmed the decision, ruling that the failure to identify the reservoir in the notice did not render the appropriation invalid and that substantial evidence demonstrated that the claimant had made steady and ongoing efforts to construct the reservoir and its systems. In re Teton Co-op Reservoir Co., 2018 MT 66, 391 Mont. 66, 414 P.3d 1249.

*Failure to Show by Preponderance of Evidence That Claim Should Be Rejected:* In an appeal concerning water rights along the Teton River, the objectors disputed claims to divert water for irrigation and stock water that were based on activity beginning in 1874 by an early settler on the basis that the claimants could not point to precise facts and dates of activities of the early settler that established water rights. The claimants cross-appealed the Water Court's determination that recognized two separate irrigation rights, dating 1880 and 1887. The Supreme Court concluded that the objectors failed to overcome the statutory presumption in favor of the truth of the elements set forth in the statement of claim and failed to show by a preponderance of the evidence that the claims should be rejected. Evidence that the early settler was cropping a precise number of acres, along with the fact that crops will not grow in the area without irrigation, and evidence of historical accounts of the settler's stock water use supported the existence of the claims. In regard to the cross-appeal, the Supreme Court concluded that the Water Court misapprehended the evidence and that the evidence demonstrated a continuation of the irrigation effort, which the early settler began in 1880 and completed in 1887. Therefore, the claimants were entitled to a single irrigation right with a priority date of 1880. In re Danreuther Ranches, 2017 MT 241, 389 Mont. 15, 403 P.3d 332.

*Presumption of Nonabandonment — 2005 Legislature's Amendments Procedural, Not Retroactive:* In a water adjudication action, the community of Rimini argued that the city of Helena had abandoned a portion of its water claim to Ten Mile Creek. On appeal, the Supreme Court found that the 2005 Legislature's amendments to 85-2-227, creating a presumption of nonabandoment for municipal use water rights, did not amount to a retroactive application of law because the effect of the 2005 amendments was procedural and not substantive. The Supreme Court additionally found that actions taken by Helena established a presumption of municipal nonabandonment, that the Water Court erred in determining that the city had abandoned a portion of its right, and that the city of Helena would have to notify the Attorney General under Rule 5.1 M.R.Civ.P. (Title 25, ch. 20), if it were to challenge the constitutionality of 85-2-234. In re Helena v. Community of Rimini, 2017 MT 145, 388 Mont. 1, 397 P.3d 1.

*Storage of Water Beneficial Use — BLM Held Stock Watering Rights for Use by Grazing Permittees — Multiple Appropriators Can Claim Water Rights from Same Source:* The Water Court did not err in concluding that the United States Bureau of Land Management (BLM) held stock watering rights under Montana law in reservoirs constructed on federal land for the use of grazing permittees. The Supreme Court recognized that storage of water as a beneficial use is expressly provided by the Montana Constitution and that the BLM was entitled to proceed under Montana law to appropriate water in its reservoirs for use by grazing permittees and others. It has long been the common law and then statutory law in Montana that multiple appropriators can claim water rights from the same source and that the first in time has the best right. While overappropriation creates its own issues, it does not mean that the person or entity that made the first use on a water source acquired the right to exclude any other person or entity from claiming water from the same source. A fundamental precept of Montana water law is that multiple claims can exist on a single source of water. U.S. v. Barthelemess Ranch Corp., 2016 MT 348, 386 Mont. 121, 386 P.3d 952.

*Earlier Decree Superseded by Modified Temporary Preliminary Decree — Properly Enforced by Commissioner:* The plaintiff filed a dissatisfied water user complaint against a Water Commissioner for enforcing a modified temporary preliminary decree issued by the Water Court. The plaintiff argued that the commissioner should enforce the decree that preceded the temporary preliminary decree and that the decree was unenforceable. The District Court denied the plaintiff's complaint, holding that the temporary preliminary decree superseded the earlier decree and that the commissioner was correct in enforcing the temporary preliminary decree. On appeal, the Supreme Court agreed that the temporary preliminary decree superseded the plaintiff's claim of existing right and affirmed. Eldorado Coop Canal Co. v. Hoge, 2016 MT 145, 383 Mont. 523, 373 P.3d 836.

*Claim Form Is Proof of Contents of Claim — Overcome Only by Preponderance of Evidence:* The Supreme Court rejected an argument that the Water Court is required to find proof of the elements of water right claims made by a preponderance of the evidence. Pursuant to this section, the Water Court is obligated to accept the claim form as proof of the contents of a claim, to be overcome only by a preponderance of the evidence. In essence, a water right as it is reflected on a claim form is entitled to be taken as true on its face, unless proven otherwise. In re Eldorado Coop Canal Co., 2016 MT 94, 383 Mont. 205, 369 P.3d 1034.

*Place-of-Use Requirement — Water Supply Company's Claim of Service Area and Not Historic Place of Use Proper:* The plaintiffs sued a water supply company after it locked the plaintiffs' headgate. The parties disputed the extent to which the company satisfied the place-of-use requirement. The company argued that the water rights it acquired prior to the Water Use Act extended to its claimed service area. The Water Master, however, concluded that the company's rights were limited to the boundaries of its historical use. The Water Court rejected the Water Master's conclusions. On appeal, the Supreme Court affirmed the Water Court, holding that the concept of a service area is the proper method of satisfying the place-of-use requirement for a water service company. Curry v. Pondera County Canal & Reservoir Co., 2016 MT 77, 383 Mont. 93, 370 P.3d 440.

*Rights of Water Supply Company — Measurement Based on Shares Authorized by Carey Land Board, Not Actual Acreage Irrigated:* The plaintiffs sued a water supply company after it locked the plaintiffs' headgate. The plaintiffs argued that the company's water rights that were authorized by the Montana Carey Land Board (MCLB) extended only to the amount of actual acreage irrigated by the shareholders of the company, whereas the company claimed that its rights extended to the maximum number of shares authorized by the MCLB. The Water Master concluded that the company's rights extended to the actual acreage irrigated by the shareholders. The Water Court rejected the Water Master's conclusion, holding that the company's rights extended to the maximum number of shares authorized by the MCLB. On appeal, the Supreme Court affirmed the Water Court's ruling, holding that the Water Master's conclusion ran contrary to the policy and intent of the Carey Land Act. Curry v. Pondera County Canal & Reservoir Co., 2016 MT 77, 383 Mont. 93, 370 P.3d 440.

*Water Court — Demonstrated by Uncontradicted Evidence That Predecessors Constructed Diversion — Construction of Reservoir Not Until 1930s:* In a water adjudication action involving multiple reservoirs, claimants, and diversion points along the Teton River, the Water Court found that the canal's predecessors never developed the water diversion point referenced in the 1890 Notice. Additionally, the Water Court found that one reservoir was properly administered under the 1890 Notice. On appeal, the Supreme Court reversed, holding that substantial uncontradicted evidence established that a diversion point was developed as contemplated in the 1890 Notice and that there was not a good faith effort to establish one of the reservoirs until the mid-1930s. The case was remanded to establish a new priority date. Teton Co-op Canal Co. v. Teton Co-op Reservoir Co., 2015 MT 344, 382 Mont. 1, 365 P.3d 442. See also In re Teton Co-op Reservoir Co., 2018 MT 66, 391 Mont. 66, 414 P.3d 1249.

*Water Court's Consideration of Objection to Preliminary Decree — Rule 12(b)(6) Jurisprudence Inapplicable:* The Water Court is not required to apply Rule 12(b)(6), M.R.Civ.P. (Title 25, ch. 20), and accept the truth of factual allegations when considering an objection to a preliminary decree. Rather, a properly filed claim of water right constitutes prima facie proof of its content until the issuance of a final decree. In re Crow Water Compact, 2015 MT 217, 380 Mont. 168, 354 P.3d 1217.

*Water Court — Insufficient Evidence to Rebut Claimed Point of Diversion and Place of Use for Water Rights:* The plaintiff objected to findings from the Water Master that the place of use and point of diversion for water rights held by the defendant, the 71 Ranch on Confederate Creek, were properly changed. The Water Court concluded that the record supported the Water Master's findings, and the plaintiff appealed to the Supreme Court. The plaintiff alleged that the water rights had not been beneficially used at the upstream location, that the upper and lower portions of Confederate Creek are supplied by different sources, and that the rights had been abandoned. The Supreme Court affirmed, concluding that the plaintiff failed to present sufficient evidence to rebut the defendant's claimed point of diversion and place of use for its pre-1973 water rights. Marks v. 71 Ranch, LP, 2014 MT 250, 376 Mont. 340, 334 P.3d 373.

*Water Rights — Ancient Documents Hearsay Exception:* Claimants sharing a diversion point filed statements of claim for existing rights based on notices of appropriation filed between 1895 and 1913. The Chief Water Judge found that the flume historically limited the quantity of water that had been put to beneficial use. This finding was partly based on historical documentation prepared in anticipation of potential litigation. The Supreme Court held that the ancient document exception applied and that it had not created a per se rule to exclude all documents prepared in anticipation of litigation. Skelton Ranch, Inc. v. Pondera County Canal & Reservoir Co., 2014 MT 167, 375 Mont. 327, 328 P.3d 644.

*Motion to Amend Claim — No Repudiation:* Defendants' motion to amend a statement of claim's priority date, place of use, and amount of use did not repudiate the claim and thereby place the burden of proof on the defendants to establish their claims. Rather, the original filed claim was prima facie proof of its contents, and the amendment did not require the defendants to prove a new claim. The defendants' amendment and the plaintiff's objections to the claim were properly required to be proven by a preponderance of the evidence to overcome the prima facie proof of the original claim. The plaintiff's inference that the defendants began to use a disputed well only when a mine became dormant did not sufficiently overcome the filed statement of claim for the disputed well. Nelson v. Brooks, 2014 MT 120, 375 Mont. 86, 329 P.3d 558.

*Water Right Held Through Pre-1973 Mesne Conveyances — Summary Judgment Incorrectly Granted — Abandonment of Right Factually Dependent:* Duncan, who lived on a tract of land in Madison County, used water from a spring located on property (the large parcel) now owned separately from the parcel (the small parcel) lived on by Duncan. In 1950, Duncan conveyed all the property in what is now the large and small parcels to Baker. In 1951, Baker divided the property, conveying the large parcel and all appurtenances to Halse and reserving the small parcel for herself. Baker made no express reservation of water rights with the reserved property, and the deed to Halse conveying the large parcel made no express grant of water rights. For the next 10 years, Baker made no use of the house located on the small parcel. In 1961, Baker conveyed the small parcel to the Hunts, expressly conveying water rights on the property. In 1963, Halse filed a declaration of vested ground water rights for the "total flow of all springs" located on the large parcel. Fosseco, who acquired the large parcel from Halse, conveyed it, through mesne conveyances, to M.S. Consulting. The Hunts conveyed the small parcel, through mesne conveyances, to the Axtells. All uses of the water were for livestock and domestic use. In 1993, the Axtells filed a notice of water rights with the Department of Natural Resources and Conservation. M.S. Consulting subsequently served the Axtells with notice that their water rights would be cut off in 45 days, and the Axtells brought an action to enjoin the discontinuance of their water supply. The District Court granted summary judgment for the Axtells, and M.S. Consulting appealed. The Supreme Court reviewed the background of the prior appropriation law in Montana, noting that because the current statutes recognize existing water rights, the law before the 1973 statutes were enacted is still the law with regard to water rights acquired before 1973. The Supreme Court reviewed the pre-1973 law and concluded that the water rights appurtenant to all the property passed to Baker but that there was a factual issue whether, as a result of Baker's nonuse of the property and its water rights for over 10 years, Baker had abandoned the water rights conveyed to her by Duncan. If the abandonment occurred, there was no reservation of conveyance and no right to use of the water after that period of nonuse. The issue of abandonment, the Supreme Court noted, depended in turn upon several other issues, such as whether Baker intended to abandon her water right. The Supreme Court also agreed with M.S. Consulting that several other issues of fact raised by the company may also exist, although it noted that these other issues were only material if the District Court ruled a particular way on the question of abandonment. Because there were genuine issues of material fact, the Supreme Court held that the District Court erred in granting summary judgment to the Axtells. Axtell v. M.S. Consulting, 1998 MT 64, 288 M 150, 955 P2d 1362, 55 St. Rep. 276 (1998).

*Additional Burden of Proof Beyond Prima Facie Showing:* The defendant's introduction into evidence of three notices of appropriation established a prima facie case but did not completely discharge his burden of proof. The defendant still had the burden of showing that all water claimed had been put to a beneficial use within a reasonable period of time. Holmstrom Land Co., Inc. v. Newlan Creek Water District, 185 M 409, 605 P2d 1060, 36 St. Rep. 1403 (1979), rehearing denied, 185 M 409, 605 P2d 1060, 37 St. Rep. 295 (1980).

*Insufficient Notice of Appropriation Not Prima Facie Evidence:* In enacting section 89-814, R.C.M. 1947 (now repealed), the Legislature established a reward for those parties who comply with section 89-810, R.C.M. 1947 (now repealed), by considering a notice of appropriation as prima facie evidence of a claimed water right. However, the former section is to be construed strictly. If the notice does not comply with section 89-810, it is of no evidentiary value. Holmstrom Land Co., Inc. v. Newlan Creek Water District, 185 M 409, 605 P2d 1060, 36 St. Rep. 1403 (1979), rehearing denied, 185 M 409, 605 P2d 1060, 37 St. Rep. 295 (1980). See also Shammel v. Vogl, 144 M 354, 396 P2d 103 (1964); Galahan v. Lewis, 105 M 294, 72 P2d 1018 (1937); Peck v. Simon, 101 M 12, 52 P2d 164 (1935).

*Contents of Record of Notice:* The record of notice of appropriation of water conforming to the provisions of section 89-810, R.C.M. 1947 (now repealed), and filed as provided therein is prima facie evidence of its contents. Anderson v. Spear-Morgan Livestock Co., 107 M 18, 79 P2d 667 (1938); Wills v. Morris, 100 M 514, 50 P2d 862 (1935). See Vidal v. Kensler, 100 M 592, 51 P2d 235 (1935).

*Delay in Recording Notice:* Notices of appropriation of water not recorded within the time provided in the saving clause found in the original recording act (L. 1885, p. 131) are of no evidentiary value in proving the amount and date of an appropriation in case of noncompliance. Galahan v. Lewis, 105 M 294, 72 P2d 1018 (1937).

*Verification of Notice:*

A water right, when acquired by appropriation, amounts to a grant by the United States or the state, and the appropriator is in position of a grantee. The affidavit required by statute to be attached to a notice of appropriation serves the same purpose as and is of equal dignity with an acknowledgment. Where an appropriation was made by a firm composed of two brothers and the affidavit accompanying the notice of appropriation was verified by one of them, a grantee, as notary public, the verification was void and the notice was not entitled to record. Musselshell Valley Farming & Livestock Co. v. Cooley, 86 M 276, 283 P 213 (1929).

A notice of location of a water right is fatally defective unless it is verified in conformity with section 89-810, R.C.M. 1947 (now repealed). Murray v. Tingley, 20 M 260, 50 P 723 (1897).

## 85-2-228. Federal reserved water rights with priority date of July 1, 1973, or later — process and adjudication — purpose.

### Compiler's Comments

*1997 Amendment:* Chapter 497 in (4), near end before "reserved water right", inserted "federal"; and made minor changes in style. Amendment effective May 1, 1997.

*Saving Clause:* Section 22, Ch. 497, L. 1997, was a saving clause.

*Severability:* Section 23, Ch. 497, L. 1997, was a severability clause.

*Effective Date:* Section 4, Ch. 343, L. 1991, provided: "[This act] is effective on passage and approval." Approved April 4, 1991.

## 85-2-231. Temporary preliminary decree, preliminary decree, and supplemental preliminary decree.

### Compiler's Comments

*2021 Amendment:* Chapter 154 in (2)(c) near middle after "supplemental preliminary decree" substituted "that includes but is not limited to" for "containing only those"; and made minor changes in style. Amendment effective April 8, 2021.

*2019 Amendment:* Chapter 211 in (2)(a)(i) near middle substituted "all claims" for "those claims"; and in (2)(c) near middle substituted "that were not included in a preliminary decree" for "filed between the date of issuance of the preliminary decree and the filing deadline provided for in 85-2-222". Amendment effective April 30, 2019.

*Retroactive Applicability:* Section 3, Ch. 211, L. 2019, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to all claims for exempt rights, as defined in 85-2-222, filed on or before June 30, 2019."

*2017 Amendment:* Chapter 338 in (2)(a)(i) inserted "including those claims filed pursuant to 85-2-222 for a preliminary decree issued after June 30, 2019"; inserted (2)(c) concerning issuance of supplemental preliminary decree; in (4) near beginning inserted "or supplemental preliminary decree"; and made minor changes in style. Amendment effective May 7, 2017.

*Applicability:* Section 10, Ch. 338, L. 2017, provided: "[This act] applies to a statement of claim for an exempt right filed on or after [the effective date of this act]." Effective May 7, 2017.

*2015 Purported Amendment:* Although sec. 2, Ch. 269, L. 2015, purported to amend this section, only the section's termination date was amended.

*Extension of Termination Date:* Section 10, Ch. 269, L. 2015, amended sec. 18, Ch. 288, L. 2005, by extending the termination date imposed by Ch. 288 to June 30, 2028. Amendment effective July 1, 2015.

*Contingent Voidness Repealed:* Section 9, Ch. 319, L. 2007, repealed sec. 15, Ch. 288, L. 2005, a contingent voidness section concerning fiscal year line item appropriations to fund Montana's water adjudication program. Effective July 1, 2007.

*2005 Amendment:* Chapter 288 inserted (6) concerning examining claims in basins that were verified. Amendment effective July 1, 2005, and terminates June 30, 2020.

*Contingent Voidness:* Section 15, Ch. 288, L. 2005, provided: "If at least $2 million is not appropriated in a line item for each fiscal year from state sources other than the water adjudication account provided for in [section 7] [85-2-280], for the purposes of funding Montana's water adjudication program, then [this act] is void."

*1997 Amendment:* Chapter 174 substituted (2)(c) regarding issuance of an interlocutory decree for former language that read: "This section does not prevent the water judge from issuing an interlocutory decree or other temporary decree, pursuant to 85-2-321 or as provided in subsection (1) of this section, or if such a decree is otherwise necessary for the orderly administration of water rights prior to the issuance of a preliminary decree"; in (3), at beginning, inserted "temporary", near middle, after "supply of water", inserted "or any claim or group of claims", near end, before "preliminary", inserted "temporary", and at end deleted "or portions of the same decree"; in (4), at beginning, inserted "temporary preliminary decree" and deleted second sentence that read: "The water judge shall include in the preliminary decree the contents of a compact negotiated under the provisions of part 7 that has been approved by the legislature and the tribe or federal agency"; in (5), near middle of first sentence after "preliminary decree", deleted "set forth in subsections (1) and (3)"; deleted (6) that read: "(6) In issuing a subsequent preliminary decree, the water judge shall incorporate the temporary preliminary decree for the basin as modified by objections and hearings. The temporary preliminary decree or preliminary decree, as modified after objections and hearings, is enforceable and administrable according to its terms among parties ordered under 85-2-406. The preliminary decree, as modified after objections and hearings, shall upon issuance supersede and replace the temporary preliminary decree"; and made minor changes in style. Amendment effective March 28, 1997.

*Saving Clause:* Section 7, Ch. 174, L. 1997, was a saving clause.

*1989 Amendment:* Inserted (1) authorizing Water Judge to issue temporary preliminary decree if necessary for orderly adjudication or administration of water rights; in (1)(c) inserted "or as provided in subsection (1) of this section"; inserted (6) requiring Water Judge in issuing preliminary decree to incorporate temporary preliminary decree, as modified, after objections and hearings and providing that preliminary decree, as modified, supersedes and replaces temporary preliminary decree; and made minor changes in form. Amendment effective April 21, 1989.

*Severability:* Section 6, Ch. 605, L. 1989, was a severability clause.

*Applicability:* Section 8, Ch. 605, L. 1989, provided: "[This act] applies to any temporary preliminary decree or preliminary decree issued on or after [the effective date of this act]." Effective April 21, 1989.

*1985 Amendments:* Chapter 394 in (1)(d) near end after "temporary decree", inserted "pursuant to 85-2-321 or", and after "decree is", inserted "otherwise".

Chapter 667 near end of (3) after "agency", deleted "whether or not it has been ratified by congress".

*Select Committee Bill:* Chapter 667, L. 1985, was introduced at the request of the Select Committee on Indian Affairs (now Law and Justice Interim Committee). See Committee report published December 1984 by the Montana Legislative Council.

*1981 Amendment:* Deleted "Within a reasonable time after the close of the filing period" at the beginning of (1); inserted (1)(c) requiring water judge to consider the contents of an approved compact or filings for federal and Indian reserved rights when issuing a preliminary decree; added the material beginning with "The preliminary decree shall be issued . . ." in (1)(d); inserted (2) authorizing water judge to issue a preliminary decree for a madrologically interrelated portion of a water division at a time different from the issuance of other preliminary decrees or portions of the same decree; substituted "approved by the legislature and the tribe or federal agency" for "agreed upon by the parties to the compact" in (3).

*Code Commissioner Correction:* Because of rearrangement of sec. 27, Ch. 697, L. 1979, the Code Commissioner, 1979, added the words "negotiated under the provisions of part 7" to the last sentence of (2).

*Rules of Procedure:* Rules of procedure (including Rules 1 through 9 of the following) for the Water Courts for the state of Montana were approved by Supreme Court order on October 29, 1981, became effective on March 1, 1982, and apply to all proceedings in the Water Courts on or after that date. Rule 10 was approved and became effective on February 9, 1984. The complete text of the rules may be accessed from the Montana Water Court at https://courts.mt.gov/courts/water.

**Case Notes**

*Crow Compact Upheld — Compact Held Reasonable — Public Property and Water Rights Reasonable Under Compact — Public Comment Satisfied Due Process:* Individual objectors to the Crow Water Compact appealed to the Supreme Court following the Water Court's determination that the Compact was valid. This action was subsequent to In re Crow Water Compact, 2015 MT 217, 380 Mont 168, 354 P.3d 1217. The objectors, who were not parties to the Compact but who owned land and water rights near the reservation, argued that the Water Court did not apply the proper legal standard, that they sustained injury because the Compact was unreasonable, and that their due process rights were violated during the Compact negotiation process. The Supreme Court disagreed with the objectors, holding that the Water Court correctly applied the correct standard articulated in Crow I, that the Compact was reasonable and had reasonable protection of state water and property rights, that the objectors' argument of future potential problems was beyond the scope of its review, that reservation of water for public recreation, wildlife, and aquatic life was for the benefit of the public, and that the record demonstrated sufficient opportunities for public comment during the Compact approval process. In re Crow Water Compact, 2015 MT 353, 382 Mont. 46, 364 P.3d 584.

**Collateral References**

Montana Water Court Rules, https://courts.mt.gov/courts/water/LegalResources.

**85-2-232. Availability of temporary preliminary decree, preliminary decree, or supplemental preliminary decree.**

**Compiler's Comments**

*2017 Amendment:* Chapter 338 in (1)(a), (1)(b), (1)(c), (1)(d), (3), and (4) inserted reference to supplemental preliminary decree; and made minor changes in style. Amendment effective May 7, 2017.

*Applicability:* Section 10, Ch. 338, L. 2017, provided: "[This act] applies to a statement of claim for an exempt right filed on or after [the effective date of this act]." Effective May 7, 2017.

*2005 Amendment:* Chapter 526 inserted (1)(g) providing that the water court's notice of the opportunity to object must contain information on the right to appeal a water court decision. Amendment effective April 28, 2005.

*1999 Amendment:* Chapter 389 in (4) inserted second sentence requiring fee to be deposited in state general fund. Amendment effective July 1, 1999.

*1995 Amendment:* Chapter 197 in (1)(c) and (1)(d) inserted language requiring Water Judge to serve by mail a notice of availability of the temporary preliminary decree or preliminary decree; at end of (1)(b), (1)(d), and (1)(e) inserted language providing for notice of availability of decrees to be sent to successors of the original owners of water rights; and made minor changes in style. Amendment effective March 23, 1995.

*1989 Amendment:* In four places, before "preliminary decree", inserted "temporary preliminary decree or"; in three places inserted "within the decreed basin"; in (1), after "decree", inserted "issued for a basin" and in third sentence, before "permit", deleted "beneficial water use" and after "permit" inserted "to beneficially use water within the decreed basin"; inserted (2) requiring publication of a notice of availability of preliminary decree in three newspapers where basin is located for 3 consecutive weeks before final decree is issued; and made minor changes in phraseology. Amendment effective April 21, 1989.

*Severability:* Section 6, Ch. 605, L. 1989, was a severability clause.

*Applicability:* Section 8, Ch. 605, L. 1989, provided: "[This act] applies to any temporary preliminary decree or preliminary decree issued on or after [the effective date of this act]." Effective April 21, 1989.

*1983 Amendment:* In first sentence of (1), after "existing right" inserted "and to the purchaser under contract for deed, as defined in 70-20-115, of property in connection with which a claim of existing right has been filed".

## 85-2-233. Hearing on decrees or petition — procedure.

**Compiler's Comments**

*2017 Amendment:* Chapter 338 in (1)(a) near end of introductory clause substituted "supplemental preliminary decree" for "petition for judicial determination under 85-2-222"; in (1)(a)(ii), (2), and (5)(a) inserted "or supplemental preliminary decree"; deleted former (6)(a)(iii) that read: "(iii) a petition for judicial determination as provided for in 85-2-222"; and made minor changes in style. Amendment effective May 7, 2017.

*Applicability:* Section 10, Ch. 338, L. 2017, provided: "[This act] applies to a statement of claim for an exempt right filed on or after [the effective date of this act]." Effective May 7, 2017.

*2015 Amendment:* Chapter 283 in (1)(b) substituted definition of good cause shown for "means a written statement showing that a person has an ownership interest in water or its use that has been affected by the decree". Amendment effective October 1, 2015.

*2013 Amendment:* Chapter 323 in (1)(a) near end after "preliminary decree" inserted "or a petition for judicial determination under 85-2-222"; in (6)(a) substituted current language for former text that read: "After the issuance of a temporary preliminary decree or preliminary decree, notice of any motion to amend a statement of claim or a timely filed objection that may adversely affect other water rights must be published for 3 consecutive weeks in two newspapers of general circulation in the basin where the statement of claim or objection was filed"; and made minor changes in style. Amendment effective October 1, 2013.

*2005 Amendment:* Chapter 526 in (5)(a) in first sentence near middle after "records" inserted "and shall notify the attorney general"; and inserted (11) providing that issue remarks must be resolved before the issuance of a final decree. Amendment effective April 28, 2005.

*1997 Amendment:* Chapter 174 in (1)(a), in introductory clause, substituted "subsection (9)" for "subsection (7)"; in (1)(c), at end of first sentence, inserted "issued before March 28, 1997"; inserted (1)(d) setting out allowable reasons for objecting or counterobjecting to a matter contained in a prior decree; in (2), at beginning, substituted "Objections" for "If a hearing is requested, the request"; inserted (3) regarding notification of parties whose claim received an objection; in (4), at beginning, substituted "Objections and counterobjections" for "The request for a hearing"; in (5)(a), in first sentence after "filing", substituted "counterobjections under subsection (3)" for "objections and upon timely receipt of a request for a hearing" and after "preliminary decree" substituted "or that person's successor as documented in the department records that objections and counterobjections have been filed" for "that a hearing has been requested" and in fifth sentence, after "conducted", inserted "in the same manner"; inserted (5)(b) allowing the parties to participate in settlement conferences or mediation; inserted (6) regarding public notice provisions; in (10) substituted "subsection (9)" for "subsection (7)"; and made minor changes in style. Amendment effective March 28, 1997.

*Saving Clause:* Section 7, Ch. 174, L. 1997, was a saving clause.

*1995 Amendment:* Chapter 421 in (1)(a) inserted "and subject to the provisions of subsection (7)"; inserted (1)(b) defining good cause shown; in (3), after "must", deleted "contain a precise statement of the findings and conclusions in the temporary preliminary decree or preliminary decree with which the department or person requesting the hearing disagrees"; inserted (7) concerning dismissal of objection pertaining to previously decreed element; inserted (8) concerning applicability of subsection (7); and made minor changes in style. Amendment effective April 13, 1995.

*1989 Amendment:* At beginning of (1)(a) substituted language requiring a hearing, upon showing of good cause, on objection to temporary preliminary or preliminary decree for "Upon objection to the"; in (1)(a)(ii) inserted "temporary preliminary decree or"; in (1)(a)(iii) substituted "within the basin entitled to receive notice under 85-2-232(1)" for language entitling person showing good cause to a hearing before judge; inserted (1)(a)(iv) requiring hearing, upon showing of good cause, on objection to decree by any person claiming use of water from sources in other basins hydrologically connected to sources in decreed basin and who is entitled to statutory notice; inserted (1)(b) providing that a person does not waive right to preliminary decree by failing to object to temporary preliminary decree and outlining under what circumstances a person who was a party when an objection was previously litigated and resolved in a temporary preliminary decree may subsequently raise an objection in a preliminary decree; in first sentence of (2) increased filing time from "90 days" to "180 days", before "entry" deleted "notice of" and inserted "temporary preliminary decree or" and in second sentence, after "limit", substituted "up to two" for "an", substituted "90-day periods" for "90 days", and after "made" substituted "prior to expiration of the original 180-day period or any extension of it" for "within 90 days after notice of entry of the preliminary decree"; in (3) and (4), before "preliminary decree", inserted "temporary preliminary decree or"; and made minor changes in phraseology. Amendment effective April 21, 1989.

*Severability:* Section 6, Ch. 605, L. 1989, was a severability clause.

*Applicability:* Section 8, Ch. 605, L. 1989, provided: "[This act] applies to any temporary preliminary decree or preliminary decree issued on or after [the effective date of this act]." Effective April 21, 1989.

*1985 Amendment:* Inserted (5) barring a subsequent cause of action upon failure to object to a preliminary decree in a compact negotiated and ratified with an Indian tribe or the federal government; and inserted (6) describing procedures following invalidation of a compact with an Indian tribe or federal agency.

*1981 Amendment:* Increased the additional time extension from 30 to 90 days in (2).

**Case Notes**

DECISIONS UNDER CURRENT LAW

*Substitution of Objector — Permissive Motion Required:* A ranch operator purchased land and water rights with knowledge that the predecessor-in-interest was an objector in certain ongoing Water Court cases. The predecessor-in-interest later filed a notice with the court disclaiming any interest in the purchased water rights, and the cases were dismissed. The Water Court held that there was no violation of due process when the ranch operator's motion to reopen cases was denied because when a party wishes to substitute itself for an objector, the party must file a motion for substitution with the court, which is permissive and controlled by Rule 25(c), M.R.Civ.P (Title 25, ch. 20). The Supreme Court affirmed. Little Big Warm Ranch, LLC v. Doll, 2018 MT 300, 393 Mont. 435, 431 P.3d 342.

*Crow Compact Upheld — Compact Held Reasonable — Public Property and Water Rights Reasonable Under Compact — Public Comment Satisfied Due Process:* Individual objectors to the Crow Water Compact appealed to the Supreme Court following the Water Court's determination that the Compact was valid. This action was subsequent to In re Crow Water Compact, 2015 MT 217, 380 Mont 168, 354 P.3d 1217. The objectors, who were not parties to the Compact but who owned land and water rights near the reservation, argued that the Water Court did not apply the proper legal standard, that they sustained injury because the Compact was unreasonable, and that their due process rights were violated during the Compact negotiation process. The Supreme Court disagreed with the objectors, holding that the Water Court correctly applied the correct standard articulated in Crow I, that the Compact was reasonable and had reasonable protection of state water and property rights, that the objectors' argument of future potential problems was beyond the scope of its review, that reservation of water for public recreation, wildlife, and aquatic life was for the benefit of the public, and that the record demonstrated sufficient opportunities for public comment during the Compact approval process. In re Crow Water Compact, 2015 MT 353, 382 Mont. 46, 364 P.3d 584.

*Timely Objection — Sufficient Evidence to Establish Type of Use:* The Water Master found that a disputed well's use did not include domestic use because the defendants did not timely object to the purpose of use; however, the defendants requested that domestic use be added before the deadline for the objections to the Water Master's report, and the parties had previously discussed domestic use in the record. The Water Court subsequently determined that the purpose of the disputed well included domestic use. The Supreme Court held that the Water Court's finding was not clearly erroneous because evidence of domestic use prior to 1973 was established. Nelson v. Brooks, 2014 MT 120, 375 Mont. 86, 329 P.3d 558.

DECISIONS UNDER FORMER LAW

*Standing to Challenge Award of Water Right:* A party has standing to challenge a water right only if it conflicts with those granted to him. Thus, he has no standing to challenge a right to water from a source in which he has no water right. However, he may challenge a water right from a source from which he has a water right whether the challenged right is prior or subsequent to his own. Holmstrom Land Co., Inc. v. Newlan Creek Water District, 185 M 409, 605 P2d 1060, 36 St. Rep. 1403 (1979). Rehearing denied, 185 M 409, 605 P2d 1060, 37 St. Rep. 295 (1980).

## 85-2-234. Final decree.

**Compiler's Comments**

*2017 Amendment:* Chapter 338 in (1) near beginning inserted "and any supplemental preliminary decree"; in (3) after "85-2-221" inserted "and 85-2-222" and after "Laws of 1973" deleted "of any judicial determinations made pursuant to 85-2-222"; and made minor changes in style. Amendment effective May 7, 2017.

*Applicability:* Section 10, Ch. 338, L. 2017, provided: "[This act] applies to a statement of claim for an exempt right filed on or after [the effective date of this act]." Effective May 7, 2017.

*2013 Amendment:* Chapter 323 in (3) near end after "Laws of 1973" inserted "of any judicial determinations made pursuant to 85-2-222". Amendment effective October 1, 2013.

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

*2005 Amendment:* Chapter 526 in (1) near middle after "held" inserted "and on the final resolution of all issue remarks, as defined in 85-2-250" and deleted former second sentence that read: "If no request for a hearing is filed within the time allowed, the preliminary decree automatically becomes final, and the water judge shall enter it as the final decree." Amendment effective April 28, 2005.

*1993 Amendment:* Chapter 629 near beginning of (3), after "persons", substituted "who have filed a claim in accordance with 85-2-221" for "required by 85-2-221 to file a claim for an existing right"; and made minor changes in style. Amendment effective July 1, 1993.

*Preamble:* The preamble attached to Ch. 629, L. 1993, provided: "WHEREAS, Article IX, section 3, of the Montana Constitution provides that all existing rights to the use of any waters for any useful or beneficial purpose are recognized and confirmed; and

WHEREAS, Article IX, section 3, of the Montana Constitution requires the Legislature to provide for the administration, control, and regulation of water rights and to establish a system of centralized records for such rights; and

WHEREAS, the Legislature established a procedure for the general adjudication of existing rights to the use of water and provided in section 85-2-226, MCA, that the failure to file a claim of existing right on or before the deadline established under section 85-2-221, MCA, would establish a conclusive abandonment of the right; and

WHEREAS, the Montana Supreme Court, in In the Matter of the Adjudication of the Water Rights Within the Yellowstone River, 253 Mont. 167, 832 P.2d 1210 (1992), has determined that the failure to file a statement of claim to an existing right to the use of water on or before April 30, 1982, resulted in the forfeiture of that right; and

WHEREAS, it has come to the attention of the Legislature that the forfeiture of water rights for failure to timely file a claim has in some instances caused hardship, and the Legislature accordingly desires to provide water rights claimants with one more opportunity to file a water rights claim in the general adjudication; and

WHEREAS, in so doing, the Legislature recognizes that the adjudication process will not be completed for many years but that a substantial amount of progress has already occurred in the adjudication, specifically in the area of water rights compacts with Indian tribes and the federal government and in decrees and stipulations involving individual claimants, and thus the Legislature believes that it is necessary to ensure that parties who have been recognized as having filed claims on or before April 30, 1982, and holders of federal reserved water rights are not adversely affected by the inclusion of new parties in the adjudication by subjecting the right to file those claims in remission to certain terms and conditions; and

WHEREAS, the Legislature wishes to provide protection for timely filed claimants from incurring additional costs or from being adversely affected by justifiable reliance on the presumption of abandonment; and

WHEREAS, the Legislature wishes to provide a conclusive adjudication of existing water rights; and

WHEREAS, the Legislature recognizes that according a privilege to file additional statements of claim presents a potential for abuse by those who may attempt to refile previously adjudicated claims, and the Legislature thus believes that the courts should deal harshly with any abuses by such measures as, without limitation, the imposition of sanctions under [former] Rule 11, Montana Rules of Civil Procedure [now superseded]; and

WHEREAS, the Legislature determines that the deadline for filing water right claims as provided in this bill appropriately balances the interests at stake in the adjudication.

THEREFORE, the Legislature finds it is appropriate to make the following amendments to sections 85-2-102, 85-2-211 [now repealed], 85-2-213, 85-2-221, 85-2-225, 85-2-226, 85-2-234, 85-2-237, and 85-2-306, MCA, in order to provide for the acceptance of late claims to the use of water under the conditions set forth in this bill. Additionally, the Legislature directs the Water Policy Committee, in coordination with the Department of Justice, the Department of Natural Resources and Conservation, and the Reserved Water Rights Compact Commission, to conduct an interim study regarding certain late claim issues."

*Saving Clause:* Section 11, Ch. 629, L. 1993, provided: "[This act] does not affect proceedings that were begun before [passage and approval of this act] [approved May 11, 1993] in which relief for damages have been sought based upon the diversion, impoundment, or withdrawal of water without a water right established under state law."

*Severability — Partial Nonseverability:* Section 12, Ch. 629, L. 1993, provided: "(1) If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

(2) It is the intent of the legislature that each part of [this act] is essentially dependent upon [section 4], which amends 85-2-221, and that if one part of [section 4], except subsection (3)(f)(ii), is held unconstitutional or invalid, all other parts of [this act] are invalid."

*1989 Amendment:* Inserted (4) relating to tabulation of water rights and their priorities in final decree; and inserted (8) relating to correction of clerical mistakes in final decree.

*Severability:* Section 2, Ch. 426, L. 1989, was a severability clause.

*Retroactive and Prospective Applicability:* Section 3, Ch. 426, L. 1989, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to all final decrees that have been issued by the Montana water courts and prospectively to all final decrees issued on or after [the effective date of this act]." Effective October 1, 1989.

*1987 Amendment:* In (5)(b), after "water", deleted "rate, and volume" and after "right" inserted "as follows"; and inserted (5)(b)(i) through (5)(b)(iii) requiring final water decree to state amount of water by flow rate for direct flow rights, by volume for rights not susceptible to flow rate measurement, or by flow rate and volume for rights determined by Water Judge to require both. Amendment applies retroactively to decrees issued by a Water Judge under Title 85, ch. 2. part 2, after April 30, 1982.

*1987 Statement of Intent:* The statement of intent attached to Ch. 438, L. 1987, provided: "The legislature intends that water rights should not be quantified in a temporary preliminary, preliminary, or final decree except as historically defined in Montana and except where a water judge determines that quantification of both volume and flow rate are required to adequately administer the right. For example, most irrigation water rights have been defined in Montana only by flow rate, reservoir rights have been commonly defined by volume, and hydropower rights have been defined by both flow rate and volume. The courts retain discretionary power to quantify water rights in terms of their historic definitions. It is the intent of the legislature that the water judges exercise their discretionary power on all existing and future decrees to reduce, to the extent possible, objections to water rights that have not historically been defined by volume."

*Applicability:* Section 2, Ch. 438, L. 1987, provided: "This act applies retroactively, within the meaning of 1-2-109, to all decrees issued by a water judge under Title 85, chapter 2, part 2, after April 30, 1982."

*1985 Amendment:* Inserted (2) requiring terms of compact to be included in the final decree; in (3) inserted "and of any federal agency or Indian tribe possessing water rights arising under federal law, required by 85-2-702 to file claims"; in (4) inserted "federal agency, and Indian tribe"; in (5) inserted "arising under the laws of the state of Montana"; and inserted (6) listing requirements for a final decree for a person, tribe, or federal agency possessing federal water rights.

*Select Committee Bill:* Chapter 667, L. 1985, was introduced at the request of the Select Committee on Indian Affairs (now Law and Justice Interim Committee). The Legislature did not adopt the exact version proposed by the Committee. See Committee report published December 1984 by the Montana Legislative Council.

*Compiler's Note:* The reader is referred to the compiler's note under 85-2-231 for a description of the adoption of the rules of procedure for the Water Courts for the state of Montana and for the text of the rules.

**Case Notes**

## DECISIONS UNDER CURRENT LAW

*Perfected Rights of Appropriation Contemplating Future Use — When Water Right Not Appurtenant to Land, Specific Lands Not Required — Removal of Unnecessary Curtailment Remark — No Error:* The Water Court correctly concluded that the Bureau of Reclamation's intent and the extent of its appropriations were not limited to the irrigable acreage listed in a feasibility document or already under irrigation by shareholders at the time that the East Bench Unit Project was completed. Because the Bureau of Reclamation was entitled to file notice of an appropriation that contemplated its future uses and needs, which included the expansion of irrigable lands in the valley as articulated in planning documents, its perfected rights were not legally circumscribed by a feasibility document, and since the Water Court's findings of fact regarding maximum irrigated acreage for the East Bench Unit Project were supported by substantial evidence, they were not clearly erroneous. Further, the Water Court did not err by adding an information remark to a claim defining the place of use as the lands served by the Clark Canyon Water Supply Company shareholders' underlying water rights rather than providing specific boundaries or maximum irrigated acreage. Because the Clark Canyon Reservoir storage water was appropriated with the intent to sell the water to others, the storage right was not strictly appurtenant to the property where the water is used. Therefore, a service area was the proper method for defining place of use in that context. Lastly, the Water Court did not err in removing a curtailment remark from the Clark Canyon Water Supply Company shareholders' private water rights because the curtailment remarks were not necessary to the proper enforcement of the Bureau of Reclamation's water rights claims and were factually inaccurate. In re E. Bench Irrigation District, 2021 MT 319, 406 Mont. 502, 501 P.3d 380.

*Discretion of Water Court to Review All Elements of Water Right When Priority Date Disturbed on Appeal:* In Teton Co-op Canal Co. v. Teton Co-op Reservoir Co., 2015 MT 344, 382 Mont. 1, 365 P.3d 442 (Teton I), the Supreme Court reversed the priority date of the plaintiff's water rights and remanded the matter to the Water Court to determine the correct priority date. The Water Court determined a priority date for the water rights and also apportioned volume limits for those rights. The plaintiff appealed, contending that the Water Court had improperly expanded the scope of the remand by apportioning water limits. The Supreme Court disagreed, holding that when a priority date of a water right is disturbed on appeal the Water Court has discretion to consider whether other elements of the right are affected. Given that the volume assigned by the Water Court was based on substantial evidence, the Supreme Court affirmed the decision. Teton Co-op Canal Co. v. Teton Co-op Reservoir Co., 2018 MT 20, 390 Mont. 210, 412 P.3d 1.

*Minutes of Shareholder Meetings — Substantial Evidence to Support Finding of Year-Round Diversion:* In a case involving disputed water rights, the Water Court held that the water rights belonging to the plaintiff, a canal company, were year-round rights. On appeal, the Supreme Court affirmed, holding that there was substantial evidence to support the finding that the diversion was year-round, including minutes of the plaintiff's shareholder meetings. Teton Co-op Canal Co. v. Teton Co-op Reservoir Co., 2018 MT 20, 390 Mont. 210, 412 P.3d 1.

*Presumption of Nonabandonment — 2005 Legislature's Amendments Procedural, Not Retroactive:* In a water adjudication action, the community of Rimini argued that the city of Helena had abandoned a portion of its water claim to Ten Mile Creek. On appeal, the Supreme Court found that the 2005 Legislature's amendments to 85-2-227, creating a presumption of nonabandoment for municipal use water rights, did not amount to a retroactive application of law because the effect of the 2005 amendments was procedural and not substantive. The Supreme Court additionally found that actions taken by Helena established a presumption of municipal nonabandonment, that the Water Court erred in determining that the city had abandoned a portion of its right, and that the city of Helena would have to notify the Attorney General under Rule 5.1 M.R.Civ.P. (Title 25, ch. 20) if it were to challenge the constitutionality of 85-2-234. In re Helena v. Community of Rimini, 2017 MT 145, 388 Mont. 1, 397 P.3d 1.

*Preliminary Injunction Despite Disputed Location of Point of Diversion — Final Determination of Merits Reserved for Trial — Rights to Jury Trial Not Usurped:* The defendants had placed a dam that diverted water from the plaintiffs' ditch. The plaintiffs sought a preliminary injunction in order to distribute water to their property by installing a headgate on the defendants' land. The defendants countered that the ditch, through which the plaintiffs' water had traveled, was not located on their land. After 4 days of hearings on the location of the ditch, the District Court granted a preliminary injunction allowing the plaintiffs to install a headgate on the defendants' property. The defendants appealed, arguing that by granting the preliminary injunction the judge had usurped their right to a jury trial. The Supreme Court disagreed and affirmed, noting the language in the order that explicitly provided for a jury to make a final determination of the location of the ditch at trial. Mack v. Anderson, 2016 MT 204, 384 Mont. 368, 380 P.3d 730.

*Change to Disputed Well Type — No Effect on Plaintiff's Legal Rights:* A plaintiff in a water rights case objected to the change of a disputed well's use from "filed" to "use", but the Water Master subsequently granted the change in type of water right. Noting that the defendants constituted the only party with a valid claim to the disputed well and that any change to the disputed well's type of right did not affect any of the plaintiff's legal rights, the Supreme Court affirmed the decision of the reviewing Water Court. The Supreme Court found that because a decree issued by the Water Court is not required to distinguish the type of right under this section, the court did not need to consider the type of right, and any error was harmless. Nelson v. Brooks, 2014 MT 120, 375 Mont. 86, 329 P.3d 558.

*District Court Error in Restraining Use of Contracted Irrigation Water:* Micks contracted to purchase the right to 775 acre-feet of water from the Deadman's Basin Water Users Association, to be appropriated from the Deadman's Basin Reservoir, in order to irrigate a hay crop. In April 2000, the District Court appointed two Water Commissioners to distribute the reservoir water pursuant to a rotation plan. In August 2000, the District Court, on its own motion, found that the water level in the reservoir had reached a critical level, that the remaining water was necessary to maintain domestic, municipal, stock, and wildlife usage, and that the irrigation of crops from the river was prohibited as long as the reservoir level remained critically low. Micks determined that he had used only 431 acre-feet of his contracted 775 acre-feet, and based on his limited usage and other reasons, he presumed that the District Court prohibition did not apply to him, so he continued to irrigate his hay crop. Micks' continued irrigation was discovered, and he was ordered by the District Court to show cause why he should not be held in contempt for failure to comply with the prohibition order. Micks requested that the District Court reconsider its order, but the request was denied, so Micks appealed. The Supreme Court noted that under Mildenberger v. Galbraith, 249 M 161, 815 P2d 130 (1991), and Baker Ditch Co. v. District Court, 251 M 251, 824 P2d 260 (1992), the jurisdiction to interpret and determine existing water rights rests exclusively with the Water Courts and that although the District Court has the authority to supervise the distribution of previously adjudicated water or to enforce an existing water decree and may in certain cases fill in a pre-1973 decree with further delineations, such as time or season of use and acreage of application, in this case, the District Court made a priority determination regarding domestic and irrigation water consumption based on the court's own inclinations, exceeding its authority to simply fill in a water decree with further delineations. Micks' contract unambiguously required a pro rata reduction in water distribution when an inadequate amount existed to satisfy outstanding water purchase contracts. Therefore, the District Court erred as a matter of law when it employed a first come, first served policy in contravention of the water contract. Denial of Micks' motion to reconsider the prohibition order was reversible error, and his motion to restrain the Water Commissioners from interfering with use of Deadman's Basin Reservoir irrigation water to which he was entitled should have been granted. In re Petition of Deadman's Basin Water Users Ass'n to Appoint Water Comm'r to Distribute Stored Water, 2002 MT 15, 308 M 168, 40 P3d 387 (2002).

*Jurisdiction of District Court to "Update" Old Water Rights Decree — Statute Governing Complaints by Dissatisfied Users Inapplicable:* Pursuant to a previous writ of supervisory control, a remand to the District Court, and findings entered by the Senior Water Master, the Supreme Court found that the Order Authorizing Updated Decree, entered by the judges of the Fourth Judicial District in January of 1989, was beyond the jurisdiction of the District Court. The order was intended to deal with the problem of a 1902 water rights decree by a District Court, in which the judge adjudicated 27 water rights on Carlton Creek, that had become so brittle with age and damaged by time that the decree could not be readily handled. In the process of updating and reissuing the 1902 order, the Supreme Court found that the Fourth Judicial District Judges had actually made a de facto adjudication of water rights in an overly appropriated drainage and that that adjudication had been undertaken without notice and hearing to the holders of certain of those water rights. Citing Mildenberger v. Galbraith, 249 M 161, 815 P2d 130 (1991), and Baker Ditch Co. v. District Court, 251 M 251, 824 P2d 260 (1992), the Supreme Court held that under subsection (6) of this section, it is within the sole jurisdiction of the Water Court to determine such things as priority dates, flow rates, place of use, and means of diversion with respect to a water right. The Supreme Court also held that the matters adjudicated by the decree were not within the scope of matters cognizable under 85-5-301 because that section concerns the correct administration of a water rights decree while the Updated Decree attempts to change the terms of the decree itself. For these reasons, the Supreme Court vacated the 1989 Updated Decree. State ex rel. Jones v. District Court, 283 M 1, 938 P2d 1312, 54 St. Rep. 460 (1997).

*No Right of Appeal Except From Final Judgment:* There is no right of appeal granted to a water right claimant under the state water rights adjudication process except from a final decree entered under this section. In re Adjudication of Sage Creek Water Rights, 234 M 243, 763 P2d 644, 45 St. Rep. 1876 (1988).

*"Beneficial Use":* No matter how a water right is expressed in the decrees of the Water Court, that expression of amount is not the final determining factor. Beneficial use is the basis, the measure, and the limit of all rights to the use of water. McDonald v. St., 43 St. Rep. 576 (1986), rehearing denied, 220 M 519, 722 P2d 598, 43 St. Rep. 1397 (1986).

*Expression of Water Rights in Volume Rather than Flow Rate — Not Unconstitutional:* Even though almost every irrigation water right prior to the 1973 water use law was expressed in flow rate, the requirement of 85-2-234(5)(b) that the final decree state "the amount of water, rate, and volume, included in the right" is not unconstitutional under Article IX, sec. 3(1) of the Montana Constitution. The amount, rate, and volume are at all times subject to the requirement of beneficial use. McDonald v. St., 43 St. Rep. 576 (1986), rehearing denied, 220 M 519, 722 P2d 598, 43 St. Rep. 1397 (1986).

*Supreme Court Original Jurisdiction Over Declaratory Action Concerning Statewide Water Adjudication:* The Supreme Court had power to determine an action for declaratory judgment involving the constitutionality of the requirement in 85-2-234 that final water decrees state "the amount of water, rate, and volume, included in the right". The issue affects all rights in the statewide adjudication process. Determination of the issue by the Supreme Court: (1) will provide guidance to the water court; (2) is in the interests of judicial economy; and (3) would serve the public policy of the state by expediting the determination of existing water rights. McDonald v. St., 43 St. Rep. 576 (1986), rehearing denied, 220 M 519, 722 P2d 598, 43 St. Rep. 1397 (1986).

*Appeal of Water Court Order Regarding Two Parties Before Final Decree — Rule 54(b) Certification of Tort Issues:* A Water Court order awarding priorities between two parties is a final and appealable order even though the basin-wide adjudication has not been completed. It is necessary that the parties' respective irrigation water allowances be determined without their having to wait for the basin-wide decree before appealing to the Supreme Court. The fact that trespass and damage claims have not yet been decided does not deprive the Supreme Court of jurisdiction to hear the appeal. The Water Court properly entered a Rule 54(b) certification. The determination of these claims is beyond the jurisdiction of the Water Court, but they cannot be decided until the water rights are resolved. Hill v. Merrimac Cattle Co., Inc., 211 M 479, 687 P2d 59, 41 St. Rep. 1504 (1984).

*"All Existing Rights":* The right to acquire water rights is a valuable right, and its value often depends on its priority. Hence, to deprive plaintiff of his priority by dismissal because the petition was filed under former law is to deprive him of an existing and valuable water right. Gen. Agriculture Corp. v. Moore, 166 M 510, 534 P2d 859 (1975).

## DECISIONS UNDER FORMER LAW

*Amount of Water Appropriated — Lack of Capacity at Diversion Point:* An appropriator could not acquire a right to more water than his ditch would carry, if the ditch could not carry more than the headgate capacity. Because of lack of capacity at the diversion point, the Supreme Court rejected as inherently improbable evidence of a greater appropriation and reduced the award on the basis of its independent review of the transcript. Holmstrom Land Co., Inc. v. Newlan Creek Water District, 185 M 409, 605 P2d 1060, 36 St. Rep. 1403 (1979). Rehearing denied, 185 M 409, 605 P2d 1060, 37 St. Rep. 295 (1980).

*Sufficiency of Decree:* Under section 89-815, R.C.M. 1947 (now repealed), a decree is sufficiently definite if it designates the owners of the various water rights, their priority dates, the amount of the awards in miner's inches, and the source of the water. Holmstrom Land Co., Inc. v. Newlan Creek Water District, 185 M 409, 605 P2d 1060, 36 St. Rep. 1403 (1979). Rehearing denied, 185 M 409, 605 P2d 1060, 37 St. Rep. 295 (1980).

*Collateral Attack:* A decree giving an appropriator the right to use water on certain named land outside the drainage area where appropriated could not be attacked in a later proceeding on the ground that appropriator had never applied water to that land. McIntosh v. Graveley, 159 M 72, 495 P2d 186 (1972).

*Date of Appropriation Where Statute Is Not Complied With:*

Where a ditch was not constructed within a reasonable time after date of notice of appropriation, the date of appropriation would not relate back to the date of such notice but would date from the time the water was actually used. Clausen v. Armington, 123 M 1, 212 P2d 440 (1949).

A prior appropriator may acquire a valid water right by a completed ditch, actual diversion of the water, and its application to a beneficial use without complying with the statute and have a right which is good against everyone, except against an appropriator who complies with the statute before the first claimant has applied the water to a beneficial use. Vidal v. Kensler, 100 M 592, 51 P2d 235 (1935); Bailey v. Tintinger, 45 M 154, 122 P 575 (1912); Murray v. Tingley, 20 M 260, 50 P 723 (1897).

Of two claimants of water, neither of whom had complied with the statute, he who first completes his ditch and puts it to a beneficial use has the prior right, although he began to build his ditch after the ditch of the other claimant had been commenced. Murray v. Tingley, 20 M 260, 50 P 723 (1897), but see Wright v. Cruse, 37 M 177, 95 P 370 (1908).

*Extent of Use in Terms of Flow Per Unit of Time:* The fact that for many years the courts in water right decrees have followed the custom of expressing water rights in terms of flow per unit of time without stating during how many hours or days the water could be taken or defining the volume of water which could be used may not be taken as an adjudication that appropriations were of an absolutely uninterrupted flow, thereby removing the established limitation of the appropriator's right to water actually taken and beneficially applied, or to expand appropriations to the detriment of subsequent appropriators. Quigley v. McIntosh, 110 M 495, 103 P2d 1067 (1940).

*Beneficial Use — Measurement of Water:*

The rights of appropriators of water may not be measured entirely by what they claimed in their notices of appropriation but must be measured by their beneficial use thereof over reasonable periods; consideration must be given to the extent and manner of their use, the character of the land upon which used, and the general necessities of the case, as well as whether the stream is furnished by usual rains or snows, extraordinary rain or snowfall, or by springs or seepage. Irion v. Hyde, 107 M 84, 81 P2d 353 (1938).

Neither the appropriator of water nor one to whom a right is decreed owns the corpus of any part of the flow of a stream. He is entitled only to the beneficial use of the amount of water called for by his appropriation or the decree when he has need for it, provided his distributing system has a sufficient capacity to carry that amount. If it is incapable of carrying that amount, his right is measured by the capacity of his system of distribution regardless of his needs. Tucker v. Missoula Light & Ry., 77 M 91, 250 P 11 (1926).

*Quieting Title:* An action under Montana law to determine relative rights and priorities of parties claiming interests in waters of a stream, while in personam, is in effect one to quiet title to real property. Sain v. Mont. Power Co., 84 F2d 126 (9th Cir. 1936).

*Fixing Date in Decree:* There is no valid objection to the fixing of an arbitrary date of appropriation in a decree unless another appropriator can show that his right antedates the date fixed, instead of being subsequent thereto as shown by the decree. Vidal v. Kensler, 100 M 592, 51 P2d 235 (1935).

*Appeal Lying From Part of Judgment:* Where two or more parties are awarded a water right under the terms of the decree, each of them recovers a judgment against the other or others; such a judgment is divisible into parts and therefore an appeal lies from a part thereof. Wills v. Morris, 100 M 504, 50 P2d 858 (1935).

*Date of Appropriation When Notice Is Defective:* Appropriators of water were denied the right to relate back the life of their appropriation to the date of posting their notice of appropriation because their recorded notice was rendered ineffective by a fatally defective verification. Because the evidence showed that they put water on their land for a beneficial purpose on or about a certain time, their right bore the date as of that time. Musselshell Valley Farming & Livestock Co. v. Cooley, 86 M 276, 283 P 213 (1929).

*Water Necessary Per Acre:* The question as to what amount of water is necessary per acre for irrigation is one of fact and never one of law, notwithstanding the adoption of the rule generally in this state to allow an inch to the acre, in the absence of evidence warranting a greater or lesser award. Tucker v. Missoula Light & Ry., 77 M 91, 250 P 11 (1926).

*Beneficial Use — Irrigation:* Respecting the use of water for purposes of irrigation, the ultimate question in every case is how much will supply the actual needs of the prior claimant under existing conditions. Conrow v. Huffine, 48 M 437, 138 P 1094 (1914).

*Land Qualifications Unnecessary for Appropriation:*

An appropriator of water need not be either an owner or in possession of land to make a valid appropriation for irrigation purposes. Bailey v. Tintinger, 45 M 154, 122 P 575 (1912); Smith v. Denniff, 24 M 20, 60 P 398 (1900), distinguished in Dept. of State Lands v. Pettibone, 216 M 361, 702 P2d 948, 42 St. Rep. 869 (1985); Toohey v. Campbell, 24 M 13, 60 P 396 (1900).

The right to the use of water may be owned without regard to the title to lands on which the water is to be used. Toohey v. Campbell, 24 M 13, 60 P 396 (1900).

*Beneficial Use — Intent of Claimant:* As every appropriation must be made for a beneficial or useful purpose, it becomes the duty of the courts to try the question of the claimant's intent by his acts and the circumstances surrounding his possession of the water, its actual or contemplated use, and the purposes thereof. Smith v. Duff, 39 M 382, 102 P 984 (1909); Miles v. Butte Elec. & Power Co., 32 M 56, 79 P 549 (1905); Toohey v. Campbell, 24 M 13, 60 P 396 (1900). See also In re E. Bench Irrigation District, 2021 MT 319, 406 Mont. 502, 501 P.3d 380.

*Rights of Parties Defendant:* The Legislature, in enacting section 89-815, R.C.M. 1947 (now repealed), did not state that it intended to compel parties, made defendants to a water right suit pursuant to its provisions, to litigate their respective titles as between themselves. Further, it is doubtful that the Legislature has the power to coerce them to do so. Sloan v. Byers, 37 M 503, 97 P 855 (1908), followed in Bennett v. Quinlan, 47 M 247, 131 P 1067 (1913).

**Law Review Articles**

Montana Water Rights—A New Opportunity, Stone, 34 Mont. L. Rev. 1 (1973).

## 85-2-235. Appeals.

**Compiler's Comments**

*2005 Amendment:* Chapter 526 inserted (1)(c) and (1)(d) providing that a person may appeal a final decree if the person requested and appeared in a hearing on an issue remark or if the person is a claimant appealing an adverse decision under certain circumstances; inserted (2) providing for appeal by the attorney general of a final decree; and made minor changes in style. Amendment effective April 28, 2005.

*1995 Amendment:* Chapter 421 inserted (2) concerning appeal of interlocutory decree; and made minor changes in style. Amendment effective April 13, 1995.

*1989 Amendment:* In (1) and (2) inserted reference to temporary preliminary decree; and in (2), after "rights", inserted "or priorities", substituted "affected" for "altered", and substituted "an objection filed" for "a hearing requested". Amendment effective April 21, 1989.

*Severability:* Section 6, Ch. 605, L. 1989, was a severability clause.

*Applicability:* Section 8, Ch. 605, L. 1989, provided: "[This act] applies to any temporary preliminary decree or preliminary decree issued on or after [the effective date of this act]." Effective April 21, 1989.

**Case Notes**

DECISIONS UNDER CURRENT LAW

*Determination of Final Water Rights Judgment Under Rule — Appeal From Water Court:* Former Rule 54(b), M.R.Civ.P. (now superseded), provides for and allows a water right claimant to seek and procure from the Water Court an express direction for the entry of a final judgment as to his claim upon the express determination of the Water Court that there is no just reason for delay. Such action under former Rule 54(b) constitutes a final judgment within the meaning of this section, which provides for appeals from the Water Court. In re Adjudication of Sage Creek Water Rights, 234 M 243, 763 P2d 644, 45 St. Rep. 1876 (1988).

*Appeal of Water Court Order Regarding Two Parties Before Final Decree — Former Rule 54(b) Certification of Tort Issues:* A Water Court order awarding priorities between two parties is a final and appealable order even though the basin-wide adjudication has not been completed. It is necessary that the parties' respective irrigation water allowances be determined without their having to wait for the basin-wide decree before appealing to the Supreme Court. The fact that trespass and damage claims have not yet been decided does not deprive the Supreme Court of jurisdiction to hear the appeal. The Water Court properly entered a former Rule 54(b) certification. The determination of these claims is beyond the jurisdiction of the Water Court, but they cannot be decided until the water rights are resolved. Hill v. Merrimac Cattle Co., Inc., 211 M 479, 687 P2d 59, 41 St. Rep. 1504 (1984).

DECISIONS UNDER FORMER LAW

*Standing to Challenge Award of Water Right:* A party has standing to challenge a water right only if it conflicts with those granted to him. Thus, he has no standing to challenge a right to water from a source in which he no water right. However, he may challenge a water right from a source from which he has a water right whether the challenged right is prior or subsequent to his own. Holmstrom Land Co., Inc. v. Newlan Creek Water District, 185 M 409, 605 P2d 1060, 36 St. Rep. 1403 (1979). Rehearing denied, 185 M 409, 605 P2d 1060, 37 St. Rep. 295 (1980).

## 85-2-236. Certificate of water right.

**Compiler's Comments**

*1991 Amendment:* Deleted (2) that read: "(2) The department shall provide to the county clerk and recorder of the county wherein the point of diversion or place of use is located quarterly reports and an annual summary report of all certificates of water right issued by the department within the county". Amendment effective July 1, 1991.

*1987 Amendment:* In (1), at beginning of second sentence, inserted exception clause.

*1983 Amendment:* In (1), after "sent to the" substituted "person to whom the right is decreed" for "county clerk and recorder of the county where the point of diversion or place of use is located for recordation"; deleted last sentence of (1), which read: "After recordation, the clerk and recorder shall send the certificate to the person to whom the right is decreed."; and inserted (2) requiring Department to provide the County Clerk and Recorder where the diversion is located a quarterly and annual summary report of certificates of water rights issued in the county.

## **85-2-237. Reopening and review of decrees.**

### **Compiler's Comments**

*2015 Purported Amendment:* Although sec. 3, Ch. 269, L. 2015, purported to amend this section, only the section's termination date was amended.

*Extension of Termination Date:* Section 10, Ch. 269, L. 2015, amended sec. 18, Ch. 288, L. 2005, by extending the termination date imposed by Ch. 288 to June 30, 2028. Amendment effective July 1, 2015.

*Contingent Voidness Repealed:* Section 9, Ch. 319, L. 2007, repealed sec. 15, Ch. 288, L. 2005, a contingent voidness section concerning fiscal year line item appropriations to fund Montana's water adjudication program. Effective July 1, 2007.

*2005 Amendment:* Chapter 288 inserted (1)(c) concerning basins that were verified and not examined; inserted (10) concerning limit on types of claims identified in basin that was initially verified; and made minor changes in style. Amendment effective July 1, 2005, and terminates June 30, 2020.

*Contingent Voidness:* Section 15, Ch. 288, L. 2005, provided: "If at least $2 million is not appropriated in a line item for each fiscal year from state sources other than the water adjudication account provided for in [section 7] [85-2-280], for the purposes of funding Montana's water adjudication program, then [this act] is void."

*1993 Amendment:* Chapter 629 at beginning of (1) inserted "After July 1, 1996"; in (1)(a), after "issued", deleted "by the water courts"; inserted (1)(b) that read: "(b) for basins for which claims have been filed under 85-2-221(3)"; and made minor changes in style. Amendment effective July 1, 1993.

*Preamble:* The preamble attached to Ch. 629, L. 1993, provided: "WHEREAS, Article IX, section 3, of the Montana Constitution provides that all existing rights to the use of any waters for any useful or beneficial purpose are recognized and confirmed; and

WHEREAS, Article IX, section 3, of the Montana Constitution requires the Legislature to provide for the administration, control, and regulation of water rights and to establish a system of centralized records for such rights; and

WHEREAS, the Legislature established a procedure for the general adjudication of existing rights to the use of water and provided in section 85-2-226, MCA, that the failure to file a claim of existing right on or before the deadline established under section 85-2-221, MCA, would establish a conclusive abandonment of the right; and

WHEREAS, the Montana Supreme Court, in In the Matter of the Adjudication of the Water Rights Within the Yellowstone River, 253 Mont. 167, 832 P.2d 1210 (1992), has determined that the failure to file a statement of claim to an existing right to the use of water on or before April 30, 1982, resulted in the forfeiture of that right; and

WHEREAS, it has come to the attention of the Legislature that the forfeiture of water rights for failure to timely file a claim has in some instances caused hardship, and the Legislature accordingly desires to provide water rights claimants with one more opportunity to file a water rights claim in the general adjudication; and

WHEREAS, in so doing, the Legislature recognizes that the adjudication process will not be completed for many years but that a substantial amount of progress has already occurred in the adjudication, specifically in the area of water rights compacts with Indian tribes and the federal government and in decrees and stipulations involving individual claimants, and thus the Legislature believes that it is necessary to ensure that parties who have been recognized as having filed claims on or before April 30, 1982, and holders of federal reserved water rights are not adversely affected by the inclusion of new parties in the adjudication by subjecting the right to file those claims in remission to certain terms and conditions; and

WHEREAS, the Legislature wishes to provide protection for timely filed claimants from incurring additional costs or from being adversely affected by justifiable reliance on the presumption of abandonment; and

WHEREAS, the Legislature wishes to provide a conclusive adjudication of existing water rights; and

WHEREAS, the Legislature recognizes that according a privilege to file additional statements of claim presents a potential for abuse by those who may attempt to refile previously adjudicated claims, and the Legislature thus believes that the courts should deal harshly with any abuses by such measures as, without limitation, the imposition of sanctions under [former] Rule 11, Montana Rules of Civil Procedure [now superseded]; and

WHEREAS, the Legislature determines that the deadline for filing water right claims as provided in this bill appropriately balances the interests at stake in the adjudication.

THEREFORE, the Legislature finds it is appropriate to make the following amendments to sections 85-2-102, 85-2-211 [now repealed], 85-2-213, 85-2-221, 85-2-225, 85-2-226, 85-2-234, 85-2-237, and 85-2-306, MCA, in order to provide for the acceptance of late claims to the use of water under the conditions set forth in this bill. Additionally, the Legislature directs the Water Policy Committee, in coordination with the Department of Justice, the Department of Natural Resources and Conservation, and the Reserved Water Rights Compact Commission, to conduct an interim study regarding certain late claim issues."

*Saving Clause:* Section 11, Ch. 629, L. 1993, provided: "[This act] does not affect proceedings that were begun before [passage and approval of this act] [approved May 11, 1993] in which relief for damages have been sought based upon the diversion, impoundment, or withdrawal of water without a water right established under state law."

*Severability — Partial Nonseverability:* Section 12, Ch. 629, L. 1993, provided: "(1) If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

(2) It is the intent of the legislature that each part of [this act] is essentially dependent upon [section 4], which amends 85-2-221, and that if one part of [section 4], except subsection (3)(f)(ii), is held unconstitutional or invalid, all other parts of [this act] are invalid."

*Retroactive Applicability:* Section 4, Ch. 586, L. 1989, provided: "[This act] applies retroactively, within the meaning of 1-2-209 [sic, 1-2-109], to all preliminary decrees and final decrees that have been issued by the Montana water courts prior to [the effective date of this act]." Effective April 21, 1989.

*Severability:* Section 3, Ch. 586, L. 1989, was a severability clause.

*Effective Date:* Section 5, Ch. 586, L. 1989, provided: "[This act] is effective on the latest date on which any of the following occur:

(1) passage and approval of [this act] [approved April 20, 1989], [Senate Bill No. 169 (LC 683)] [Chapter 605, approved April 21, 1989] or [Senate Bill No. 166 (LC 684)] [Chapter 604, approved April 21, 1989]; or

(2) a final determination of failure to receive passage and approval of [Senate Bill No. 169 (LC 683)] or [Senate Bill No. 166 (LC 684)]."

## 85-2-243. Department assistance to water judges.

### Compiler's Comments

*1987 Amendment:* At end of (1), after "shall", deleted "without cost to the judicial districts wholly or partly within his water division"; and inserted (2) requiring Department to assist Water Judge without cost to judicial districts within water division.

*1987 Statement of Intent:* The statement of intent attached to Ch. 651, L. 1987, provided in part: "The legislature intends by the amendment to 85-2-243 in section 8 of this bill that it be interpreted to restrict the department to utilize funds that have been appropriated for the adjudication program. The department's funding level in adjudicating water claims for the 1987-89 biennium is as specifically set forth in House Bill No. 2."

*Water Right Claim Examination Rules:* In response to In re Dept. of Natural Resources and Conservation, 226 M 221, 740 P2d 1096, 44 St. Rep. 604 (1987), the Supreme Court approved an order July 7, 1987, adopting water right claim examination rules. The 1987 rules were subsequently amended by orders of the Montana Supreme Court and became effective on January 15, 1991. The 1991 rules are available at the Montana State Law Library. However, another revision to the rules occurred as a result of the Supreme Court's order in Cause No. 86-397. The current rules became effective on December 5, 2006, and are available on the Montana Supreme Court's website.

### Case Notes

*No Departmental Rulemaking Authority Regarding Water Claims — Jurisdiction in Water Courts — Rulemaking Reserved to Supreme Court:* Legislation in 1979 placed the procedure for adjudication of water claims in the Water Courts and reserved the power of rulemaking with respect to pending judicial proceedings to the Supreme Court. Lacking express legislative authority, neither the Board (functions now transferred to Department of Natural Resources and Conservation) nor Department of Natural Resources and Conservation has any rulemaking authority with respect to procedures in the adjudication of water rights before the Water Courts, and the Montana Administrative Procedure Act does not supply such authority. Functions of the Department respecting water claims are limited to rendering assistance to the Water Judges as set out in 85-2-243. In re Dept. of Natural Resources and Conservation, 226 M 221, 740 P2d 1096, 44 St. Rep. 604 (1987).

## 85-2-247. Purpose.

**Compiler's Comments**

*Effective Date:* Section 11, Ch. 526, L. 2005, provided that this section is effective on passage and approval. Approved April 28, 2005.

## 85-2-248. Resolution of issue remarks other than by objection.

**Compiler's Comments**

*Effective Date:* Section 11, Ch. 526, L. 2005, provided that this section is effective on passage and approval. Approved April 28, 2005.

**Case Notes**

*No Error in Limiting Diversion Period — Analysis Necessitated by Resolution of Issue Remarks:* The claimant appealed the Water Court's limitation of the claimant's diversion period, alleging the Water Court should not have considered the diversion period because the objector was barred from objecting to its claims. The Supreme Court affirmed, concluding that even if the objector was barred from objecting, the Water Court was required to resolve issue remarks entered by the Department of Natural Resources and Conservation concerning whether the claimant's reservoirs had expanded its water rights, the resolution of which required the Water Court to consider and determine the claimant's historical diversion period. Teton Co-op Reservoir Co. v. Farmers Co-op Canal Co., 2015 MT 208, 380 Mont. 146, 354 P.3d 579. See also In re Teton Co-op Reservoir Co., 2018 MT 66, 391 Mont. 66, 414 P.3d 1249.

## 85-2-249. Prioritization of workload.

**Compiler's Comments**

*Effective Date:* Section 11, Ch. 526, L. 2005, provided that this section is effective on passage and approval. Approved April 28, 2005.

## 85-2-250. Definition.

**Compiler's Comments**

*Effective Date:* Section 11, Ch. 526, L. 2005, provided that this section is effective on passage and approval. Approved April 28, 2005.

## 85-2-270. Findings — purpose.

**Compiler's Comments**

*2019 Amendment:* Chapter 72 in (2) near end of second sentence substituted "June 30, 2024" for "June 30, 2020". Amendment effective October 1, 2019.

*2015 Purported Amendment:* Although sec. 4, Ch. 269, L. 2015, purported to amend this section, only the section's termination date was amended.

*Extension of Termination Date:* Sections 10 and 11, Ch. 269, L. 2015, amended sec. 18, Ch. 288, L. 2005, and sec. 11, Ch. 319, L. 2007, by extending the termination date imposed by those sections to June 30, 2028. Amendment effective July 1, 2015.

*2007 Amendment:* Chapter 319 in (1) substituted current text concerning the purpose of listed statutes for former text that read: "The purpose of 85-2-270 through 85-2-273, 85-2-276, and 85-2-279 through 85-2-283 is to generate revenue to adequately fund Montana's water adjudication program to"; deleted former (3) that read: "(3) It is essential to preserve the trust that the water users of Montana have placed in the legislature by ensuring that the revenue generated by the water adjudication fee established in 85-2-276 is used only for the purpose of adjudicating Montana's water rights"; and made minor changes in style. Amendment effective July 1, 2007, and terminates June 30, 2020.

*Contingent Voidness Repealed:* Section 9, Ch. 319, L. 2007, repealed sec. 15, Ch. 288, L. 2005, a contingent voidness section concerning fiscal year line item appropriations to fund Montana's water adjudication program. Effective July 1, 2007.

*Effective Date:* Section 17, Ch. 288, L. 2005, provided: "[This act] is effective July 1, 2005."

*Termination:* Section 18, Ch. 288, L. 2005, provided: "[This act] terminates June 30, 2020."

*Contingent Voidness:* Section 15, Ch. 288, L. 2005, provided: "If at least $2 million is not appropriated in a line item for each fiscal year from state sources other than the water adjudication account provided for in [section 7] [85-2-280], for the purposes of funding Montana's water adjudication program, then [this act] is void."

*Water Right Claim Examination Rules:* In response to In re Dept. of Natural Resources and Conservation, 226 M 221, 740 P2d 1096, 44 St. Rep. 604 (1987), the Supreme Court approved an order July 7, 1987, adopting water right claim examination rules. The 1987 rules were subsequently amended by orders of the Montana Supreme Court and became effective on January 15, 1991. The 1991 rules are available at the Montana State Law Library. However, another revision to the rules occurred as a result of the Supreme Court's order in Cause No. 86-397. The current rules became effective on December 5, 2006, and are available on the Montana Supreme Court's website.

## **85-2-271. Benchmarks — action taken if not met — claims examination priority.**

### **Compiler's Comments**

*2021 Amendment:* Chapter 154 in (2)(b)(iii) substituted current text for "the department shall reexamine 60,000 verified claims by June 30, 2021;" in (2)(b)(iv) substituted current text for "the department shall reexamine 90,000 verified claims by June 30, 2023"; inserted (2)(b)(v) requiring examination or reexamination of 95,000 claims by June 30, 2024; inserted (2)(b)(vi) requiring examination or reexamination of all timely filed claims by June 30, 2025; and made minor changes in style. Amendment effective April 8, 2021.

*2015 Amendment:* Chapter 269 deleted former (1) and (2) that read: "(1) (a) The completion of initial claims examination is of a higher priority than reexamination of claims that were subject to the verification process unless the chief water judge issues an order making reexamination a higher priority, as provided in subsection (3)(b).

(b) The department shall develop a list of basins to be examined that is prioritized by year and updated annually. In order to facilitate the efficient use of department and water court resources, the department shall adhere to the basin priorities unless directed otherwise by the water court or the legislature.

(2) There are approximately 57,000 water right claims that were filed pursuant to 85-2-212 that must be examined. There are approximately 98,000 claims that were verified that may be reexamined using the supreme court examination rules if the water court receives a petition and issues an order as provided in 85-2-282 or the water court issues an order on its own initiative"; in (2)(a) near beginning before "benchmarks" deleted "cumulative" and deleted last sentence that read: "All claims must be examined by June 30, 2015"; in (2)(b) substituted current language for former table of cumulative benchmarks for 2006 through 2015 (see 2015 Session Law for former text); and made minor changes in style. Amendment effective July 1, 2015.

*Extension of Termination Date:* Sections 10 and 11, Ch. 269, L. 2015, amended sec. 18, Ch. 288, L. 2005, and sec. 11, Ch. 319, L. 2007, by extending the termination date imposed by those sections to June 30, 2028. Amendment effective July 1, 2015.

*2007 Amendment:* Chapter 319 inserted (1)(b) concerning prioritized list of basins; in (4)(a) in second sentence after "not met" substituted "money for water adjudication may not be included in the department's base budget" for "the fee contained in 85-2-276 that is attached to a water right for the purpose of funding the adjudication may not be assessed the following even-numbered year"; and made minor changes in style. Amendment effective July 1, 2007, and terminates June 30, 2020.

*Contingent Voidness Repealed:* Section 9, Ch. 319, L. 2007, repealed sec. 15, Ch. 288, L. 2005, a contingent voidness section concerning fiscal year line item appropriations to fund Montana's water adjudication program. Effective July 1, 2007.

*Effective Date:* Section 17, Ch. 288, L. 2005, provided: "[This act] is effective July 1, 2005."

*Termination:* Section 18, Ch. 288, L. 2005, provided: "[This act] terminates June 30, 2020."

*Contingent Voidness:* Section 15, Ch. 288, L. 2005, provided: "If at least $2 million is not appropriated in a line item for each fiscal year from state sources other than the water adjudication account provided for in [section 7] [85-2-280], for the purposes of funding Montana's water adjudication program, then [this act] is void."

*Water Right Claim Examination Rules:* In response to In re Dept. of Natural Resources and Conservation, 226 M 221, 740 P2d 1096, 44 St. Rep. 604 (1987), the Supreme Court approved an order July 7, 1987, adopting water right claim examination rules. The 1987 rules were subsequently amended by orders of the Montana Supreme Court and became effective on January

15, 1991. The 1991 rules are available at the Montana State Law Library. However, another revision to the rules occurred as a result of the Supreme Court's order in Cause No. 86-397. The current rules became effective on December 5, 2006, and are available on the Montana Supreme Court's website.

### 85-2-280. Water adjudication account.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 4, Ch. 119, L. 2023. Amendment effective April 18, 2023.

*2015 Amendment:* Chapter 269 in (2) substituted current language for former language that read: "(2) (a) Subject to legislative fund transfers, for the period ending June 30, 2015, there is allocated to the department and the water court up to $2.6 million, plus the approved inflation factor contained in the revenue estimating resolution, each fiscal year from the water adjudication account for the sole purpose of funding the water adjudication program. These funds may not be used for the purpose of updating or maintaining a computer database.

(b) For the period beginning July 1, 2015, and ending June 30, 2020, there is allocated to the department and the water court up to $1 million, plus the approved inflation factor contained in the revenue estimating resolution, each fiscal year from the account for the sole purpose of funding the water adjudication program.

(c) The allocations in subsections (2)(a) and (2)(b) are subject to appropriation by the legislature"; in (3) inserted "and may not be transferred to any other account prior to June 30, 2028"; in (4) substituted "June 30, 2028" for "June 30, 2020"; and made minor changes in style. Amendment effective July 1, 2015.

*Extension of Termination Date:* Sections 10 and 11, Ch. 269, L. 2015, amended sec. 18, Ch. 288, L. 2005, and sec. 11, Ch. 319, L. 2007, by extending the termination date imposed by those sections to June 30, 2028. Amendment effective July 1, 2015.

*2009 Amendment:* Chapter 486 in (2)(a) at beginning of first sentence inserted "Subject to legislative fund transfers" and after "period" deleted "beginning July 1, 2005, and"; and made minor changes in style. Amendment effective July 1, 2009.

*2007 Amendment:* Chapter 319 deleted former (3) that read: "(3) (a) Subject to subsection (3)(b), the total amount of revenue deposited in the water adjudication account from the fee provided for in 85-2-276 may not exceed $31 million.

(b) If federal funds are appropriated for the purposes of 85-2-270 through 85-2-273, 85-2-276, and 85-2-279 through 85-2-283, the maximum amount that may be deposited in the account must be reduced by the amount of federal funds appropriated.

(c) Once revenue generated from the fees provided for in 85-2-276 and any federal revenue appropriations have reached $31 million, the fee may no longer be assessed"; in (4) at beginning substituted "Money" for "Revenue"; inserted (5) concerning accountability benchmarks; and made minor changes in style. Amendment effective July 1, 2007, and terminates June 30, 2020.

*Contingent Voidness Repealed:* Section 9, Ch. 319, L. 2007, repealed sec. 15, Ch. 288, L. 2005, a contingent voidness section concerning fiscal year line item appropriations to fund Montana's water adjudication program. Effective July 1, 2007.

*Effective Date:* Section 17, Ch. 288, L. 2005, provided: "[This act] is effective July 1, 2005."

*Termination:* Section 18, Ch. 288, L. 2005, provided: "[This act] terminates June 30, 2020."

*Contingent Voidness:* Section 15, Ch. 288, L. 2005, provided: "If at least $2 million is not appropriated in a line item for each fiscal year from state sources other than the water adjudication account provided for in [section 7] [85-2-280], for the purposes of funding Montana's water adjudication program, then [this act] is void."

**Attorney General's Opinions**

*Water Adjudication Program Not Void Given Sufficient Line Item Appropriations to Avoid Voidness:* A contingent voidness clause attached to legislation establishing the water adjudication account required that at least $2 million each fiscal year be appropriated to the water adjudication account by line item appropriation. Although the line item appropriations were directed to two agencies instead of being included in a single programmatic line item, the Attorney General concluded that more than $2 million had been appropriated from state sources other than the water adjudication account to avoid the contingent voidness provision. 51 A.G. Op. 3 (2005).

## 85-2-281. Reporting requirements.

**Compiler's Comments**

*2021 Amendment:* See 2021 Session Law for amendment made by sec. 119, Ch. 261, L. 2021. Amendment effective April 20, 2021.

*2015 Amendments — Composite Section — Coordination:* Chapter 122 in (1) substituted "water policy committee established in 5-5-231" for "environmental quality council" (rendered void by Ch. 269). Amendment effective March 25, 2015.

Chapter 269 in (1) after "council" deleted "at each meeting" (rendered void by sec. 9, Ch. 269); inserted (1)(c), (1)(d), (1)(e), and (1)(f) concerning decrees issued and updates on summary reports, claims resolved, percentage of claims resolved by basin, and compact status; and made minor changes in style. Amendment effective July 1, 2015.

Section 9, Ch. 269, L. 2015, a coordination section, in (1) before "water policy committee" deleted "environmental quality council annually and to the".

*Extension of Termination Date:* Sections 10 and 11, Ch. 269, L. 2015, amended sec. 18, Ch. 288, L. 2005, and sec. 11, Ch. 319, L. 2007, by extending the termination date imposed by those sections to June 30, 2028. Amendment effective July 1, 2015.

*2007 Amendment:* Chapter 319 in (1)(a) at end inserted "on a basin-by-basin basis"; substituted (1)(b) concerning number of basins for which examination was completed for former text that read: "the total revenue generated by the fees established in 85-2-276 and deposited in the account provided for in 85-2-280"; in (2) at end inserted "including the number of basins for which examination was completed during the reporting period"; in (3) at end deleted "and the allocated fee revenue"; and made minor changes in style. Amendment effective July 1, 2007, and terminates June 30, 2020.

*Contingent Voidness Repealed:* Section 9, Ch. 319, L. 2007, repealed sec. 15, Ch. 288, L. 2005, a contingent voidness section concerning fiscal year line item appropriations to fund Montana's water adjudication program. Effective July 1, 2007.

*Effective Date:* Section 17, Ch. 288, L. 2005, provided: "[This act] is effective July 1, 2005."

*Termination:* Section 18, Ch. 288, L. 2005, provided: "[This act] terminates June 30, 2020."

*Contingent Voidness:* Section 15, Ch. 288, L. 2005, provided: "If at least $2 million is not appropriated in a line item for each fiscal year from state sources other than the water adjudication account provided for in [section 7] [85-2-280], for the purposes of funding Montana's water adjudication program, then [this act] is void."

## 85-2-282. Examination of claims in verified basins.

**Compiler's Comments**

*2015 Purported Amendment:* Although sec. 8, Ch. 269, L. 2015, purported to amend this section, only the section's termination date was amended.

*Extension of Termination Date:* Section 10, Ch. 269, L. 2015, amended sec. 18, Ch. 288, L. 2005, by extending the termination date imposed by Ch. 288 to June 30, 2028. Amendment effective July 1, 2015.

*Contingent Voidness Repealed:* Section 9, Ch. 319, L. 2007, repealed sec. 15, Ch. 288, L. 2005, a contingent voidness section concerning fiscal year line item appropriations to fund Montana's water adjudication program. Effective July 1, 2007.

*Effective Date:* Section 17, Ch. 288, L. 2005, provided: "[This act] is effective July 1, 2005."

*Termination:* Section 18, Ch. 288, L. 2005, provided: "[This act] terminates June 30, 2020."

*Contingent Voidness:* Section 15, Ch. 288, L. 2005, provided: "If at least $2 million is not appropriated in a line item for each fiscal year from state sources other than the water adjudication account provided for in [section 7] [85-2-280], for the purposes of funding Montana's water adjudication program, then [this act] is void."

# Part 3

# Appropriations, Permits, and Certificates of Water Rights

**Part Compiler's Comments**

*Closed Basin Case Study:* Section 23, Ch. 391, L. 2007, provided: "(1) (a) The Montana bureau of mines and geology, provided for in 20-25-211, shall review, assess for scientific accuracy, and compile and summarize ground water studies that have been conducted in the last 20 years in closed basins or subbasins in Montana that may have a bearing on better understanding the water balance in these basins with respect to potential ground water withdrawal impacts on surface water. The bureau of mines and geology shall also study the extent to which ground water withdrawals may result in net depletion of surface water in a closed basin or in specific areas of a closed basin.

(b) After compilation of the information, the bureau of mines and geology shall present recommendations to the appropriate legislative interim committee regarding any additional studies that would help to assess the water balance in closed basins or subbasins with respect to potential ground water withdrawal impacts on surface waters.

(2) The bureau of mines and geology shall conduct a case study to gather and develop data to determine the adequacy of any additional recommended minimum standards and criteria for hydrogeologic assessments, as defined in [section 15] [85-2-361], associated with ground water withdrawals and the range of impacts of those withdrawals on surface water and ground water resources. The department of natural resources and conservation shall coordinate with the bureau of mines and geology with regard to surface water monitoring and other elements of the case study as necessary.

(3) The case study must be conducted in basins closed pursuant to sections 85-2-330, 85-2-336, 85-2-341, 85-2-343, or 85-2-344. The bureau of mines and geology shall ensure that at each site involved in the case study the following, at a minimum, is accomplished to provide the necessary scientific data and information to policymakers:

(a) an appropriate number of monitoring wells are drilled or available to provide scientifically defensible data;

(b) aquifer testing and recovery testing is conducted at the site;

(c) water quality samples are collected from each pumping or primary well at the beginning of the case study and at the end of the case study;

(d) if information or data has already been collected for the site, the information is reviewed, analyzed, and verified by the bureau of mines and geology;

(e) if the site has an established system, that the established system is monitored under its current or planned operating conditions; and

(f) any other information is collected that the bureau of mines and geology determines is necessary to determine recommendations for additional minimum standards and criteria for hydrogeologic assessments, as defined in [section 15] [85-2-361], associated with ground water withdrawals and the range of impacts those withdrawals have on surface water and ground water resources.

(4) In addition to the requirements of subsection (3), the bureau of mines and geology shall develop a system to compile existing aquifer testing data, as well as data resulting from hydrogeologic assessments, as defined in [section 15] [85-2-361], and monitoring activities.

(5) The department of natural resources and conservation shall coordinate with the bureau of mines and geology to provide surface water measurements, as appropriate, when a well located at a case study site is pumped.

(6) The bureau of mines and geology shall:

(a) provide updates to the appropriate legislative interim committee throughout the interim related to the progress of the review pursuant to subsection (1) and the case study pursuant to subsections (2) through (5), data trends, if any, and other information necessary to assist the legislative interim committee in developing any necessary policy recommendations;

(b) upon request, provide updates to the ground water assessment steering committee provided for in 2-15-1523; and

(c) submit a report to the appropriate legislative interim committee and the 61st legislature providing a detailed analysis of the results of the review and case study."

*Case Study — Requirements for Participation — Fee:* Section 24, Ch. 391, L. 2007, provided: "(1) (a) Participants in the case study that are proposing a new ground water appropriation are subject to the requirements of [sections 14 through 21] [75-5-410, 85-2-360 through 85-2-364, 85-2-368, and 85-2-369].

(b) Up to a maximum of 10 sites that are the result of a new appropriation or a change in appropriation right may be included in the case study provided for in [section 23] [not codified]. If there are more than 10 entities wishing to participate in the case study, the bureau of mines and geology shall select participants to ensure that to the extent possible each closed basin is represented and as many different scenarios are represented as necessary to ensure a scientifically accurate analysis.

(c) If there are fewer than 10 entities wishing to participate or if there is a scenario that is not represented by case study participants that is necessary to ensure a scientifically accurate analysis, the bureau of mines and geology may request cooperation and participation from entities that hold appropriation rights for wells within closed basins.

(d) Entities that had an application pending with the department of natural resources and conservation on April 11, 2006, must be given the option to participate in the case study before the bureau accepts other requests for participation.

(2) The bureau of mines and geology, in cooperation with the appropriate legislative interim committee, shall notify each of the entities described in subsection (1)(d), in writing, of the opportunity to participate in the case study and the requirements for participation.

(3) To participate in the case study, a participant shall agree:

(a) that the use of a ground water well in accordance with an application submitted pursuant to [section 14] [85-2-360] does not grant or give the participant an appropriation right;

(b) to allow the installation of monitoring wells and shall allow access for monitoring and review purposes;

(c) if monitoring or test wells exist at the site, to allow the bureau of mines and geology access to those wells for monitoring and review purposes;

(d) to allow for the measurement of pumping at the primary pumping well, including any plumbing requirements necessary to ensure an accurate analysis of pumping records and of the impacts, if any, resulting from pumping of the well;

(e) that the participant is responsible for costs associated with drilling the primary pumping well, maintenance associated with the well, and other costs reasonably related to the normal operation of a pumping well in the absence of the case study; and

(f) to pay a fee of $15."

**Part Administrative Rules**

Title 36, chapter 12, subchapter 1, ARM Water Rights Bureau — Montana Water Use Act.

Title 36, chapter 16, ARM Water reservations — Water Resources Division.

**Part Case Notes**

*Administrative Bias Not Rising to Level of Substantial Prejudice:* The plaintiff applied to the Department of Natural Resources and Conservation (DNRC) for a ground water permit. DNRC denied the permit, and during ensuing litigation, the Supreme Court remanded the permit application. The plaintiff requested a neutral party to consider its application, but DNRC denied this request. A DNRC employee was appointed to hear the request, and e-mails suggested the employee exhibited bias against the defendant. Although there may have been error in the application process, the District Court independently reached the same conclusions as DNRC. Because the plaintiff failed to show substantial prejudice, the Supreme Court affirmed the District Court's findings. Bostwick Properties, Inc. v. Dept. of Natural Resources and Conservation, 2013 MT 48, 369 Mont. 150, 296 P.3d 1154, following Erickson v. St., 282 Mont. 367, 938 P.2d 625 (1997).

*Department Authorized to Condition Permits:* The Department of Natural Resources and Conservation has authority to grant conditional use permits under 85-2-312 when restrictions are necessary to protect the rights of prior appropriators or are used to impose time limits to perfect a water right under the permit. Mont. Power Co. v. Carey, 211 M 91, 685 P2d 336, 41 St. Rep. 1233 (1984).

*1899 Appropriation — Testimony of Persons on Land Showing Beneficial Use:* Where the plaintiffs filed a water rights action, seeking a decree that they were entitled to the use of 500 miner's inches of water a year, the District Court did not err in finding that that amount was reasonably required for irrigation purposes. While that amount of water, as specified in the statement of appropriation filed by the plaintiffs' predecessor in interest, cannot be dispositive of the issue, under the rationale of Holmstrom Land Co., Inc. v. Newlan Creek Water District, 185 M 409, 605 P2d 1060, 36 St. Rep. 1403 (1979), the Supreme Court could not say that the evidence produced at trial did not support the District Court's decree. That evidence consisted primarily of testimony of men who worked and knew the land in question, and that testimony, under the rationale of Fed. Land Bank v. Morris, 112 M 445, 116 P2d 1007 (1941), constituted substantial evidence. Grimsley v. Estate of Spencer, 206 M 184, 670 P2d 85, 40 St. Rep. 1585 (1983).

*Water Rights by Prescription — Hostile Use Required:* Where the plaintiffs brought an action against the decedent's estate, claiming a prescriptive right to water diverted by the decedent's descendants, the District Court did not err in holding that proof of hostile use of the water is a required element of acquisition of water rights by prescription. Without such a requirement, the holder of a water right could be deprived of that right without notice. In the case before the court, use of the water could not be said to be hostile unless the defendants were deprived of the water in question at a time when they actually had need of it. Language in the opinion in Cook v. Hudson, 110 M 263, 103 P2d 137 (1940), appearing to abrogate the requirement of hostile use, is expressly disapproved. Grimsley v. Estate of Spencer, 206 M 184, 670 P2d 85, 40 St. Rep. 1585 (1983).

*Findings and Conclusions as to Water Rights Held Inadequate — Judgment Vacated and Remanded:* When a midstream and downstream water user filed suit against the upstream user to have the District Court declare the relative water rights of the parties, the findings of fact and conclusions of law entered by the District Court were so bare and inadequate as to provide no basis for meaningful appellate review. Because it could not be determined from the District Court's bare conclusions (i.e., that the parties had failed to prove their case by a preponderance of the evidence and had abandoned their rights) what the factual or evidentiary basis for the District Court's decision was, the Supreme Court vacated the judgment as to all of the three parties, remanded the case to the District Court, and directed it to enter findings and conclusions reflective of the evidence presented at trial and the legal contentions of the parties. 79 Ranch, Inc. v. Pitsch, 193 M 229, 631 P2d 690, 38 St. Rep. 1048 (1981).

**Part Law Review Articles**

The Future of Prior Appropriation in the New West, Tarlock, 41 Nat. Resources J. 769 (2001).

**Part Collateral References**

A Right to Stream Conditions as they Existed: A Study of the Process for Changing a Water Right, Report to the 66th Legislature, Water Policy Interim Committee (September 2018).

**85-2-301. Right to appropriate — recognition and confirmation of permits issued after July 1, 1973.**

**Compiler's Comments**

*2015 Amendment:* Chapter 294 inserted (5) concerning applicability of section. Amendment effective April 24, 2015.

*2011 Amendment:* Chapter 112 in (2)(a) after "may appropriate water by permit" deleted "in either of the following instances"; deleted former (2)(a)(ii) that read: "(ii) whenever water in excess of 4,000 acre-feet a year and 5.5 cubic feet per second, for any use, is to be consumed"; in (2)(b) at beginning substituted "The department may lease water subject to this subsection (2)" for "Water for these purposes or in these amounts may be leased from the department by any person"; and made minor changes in style. Amendment effective October 1, 2011.

*1997 Amendment:* Chapter 497 inserted (4) concerning permitting actions of Department after July 1, 1973; and made minor changes in style. Amendment effective May 1, 1997.

*Saving Clause:* Section 22, Ch. 497, L. 1997, was a saving clause.

*Severability:* Section 23, Ch. 497, L. 1997, was a severability clause.

*1985 Amendment:* Inserted (2) listing instances under which only the Department may appropriate water by permit.

**Case Notes**

DECISIONS UNDER CURRENT LAW

*Challenge to Constitutionality of Statute That Presumes Against State Ownership of Water Rights in Ground Water Diverted From Private Property for Use on Leased School Trust Land — Claim by Plaintiffs That Statute Devalues State Land — District Court Summary Judgment Holding Statute Facially Constitutional Affirmed.* Advocates for School Trust Lands v. St., 2022 MT 46, 408 Mont. 39, 505 P.3d 825.

*No Right of Hydroelectric Facility to Make Free Appropriation of Water on State-Owned Land:* A hydroelectric facility does not have the right to make free appropriation of water on and within state-owned land without paying compensation to the state. PPL Mont., LLC v. St., 2010 MT 64, 355 Mont. 402, 229 P.3d 421, distinguishing Smith v. Deniff, 24 Mont. 20, 60 P 398 (1900), U.S. v. Conrad Invest. Co., 156 F 123 (D.C. Mont. 1907), and Mattson v. Mont. Power Co., 2009 MT 286, 352 Mont. 212, 215 P.3d 675. See also Prentice v. McKay, 38 Mont. 114, 98 P 1081 (1909).

Following the Montana Supreme Court's decision, PPL appealed to the United States Supreme Court. The United States Supreme Court reversed the Montana court's ruling, holding that the Montana court had not properly considered the rivers in question on a segment-by-segment basis and had not determined whether they were navigable in fact at the time of statehood. The United States Supreme Court remanded the case for proceedings consistent with its opinion. PPL Montana, LLC v. Montana, 565 US 576, 132 S Ct 1215, 182 L Ed 2d 77 (2012).

*School Trust Land Water Rights Owned by State:* In a case involving a dispute over ownership of water rights on state school trust lands, the Supreme Court ruled that title to the surface and ground water rights on school trust lands vests in the state and that the lessee, in making appropriations on and for school trust sections, is acting on behalf of the state. It is only through state action that the lessee is on the land, and Montana law expressly provides that the lessee shall be reimbursed for all capital expenditures made in putting the water to beneficial use. The state is the beneficial user of the water, and its duty as trustee of the school trust lands prohibits it from alienating any interest in the land without receiving full compensation for it or from giving up control over the water rights. Dept. of State Lands v. Pettibone, 216 M 361, 702 P2d 948, 42 St. Rep. 869 (1985). However, see Advocates for School Trust Lands v. St., 2022 MT 46, 408 Mont. 39, 505 P.3d 825, holding that 85-2-441, which allows a water right owner to put water from a well or developed spring located on private land to beneficial use on state trust land and presumes against a state ownership in that water right, was not facially unconstitutional.

*No Prescriptive Use of Water Found:* The Water Court was correct in holding that Merrimac did not prove its claim of prescriptive use to the waters of Martin Creek and Davis Creek from the 1800s through 1980. Merrimac did not acquire adverse possession through 1973 since the water use was based on an accommodation between the parties. In 1973, the Water Use Act eliminated the right to acquire a water-use right by prescription. Merrimac was not entitled to a fractional share of water on the ground that Merrimac had always used one-third of the waters of Martin Creek and Davis Creek since Merrimac never deprived Hill of his water supply. There was no adverse taking. Hill v. Merrimac Cattle Co., Inc., 211 M 479, 687 P2d 59, 41 St. Rep. 1504 (1984).

*Water Use Act Exclusive Procedure for Acquisition:* Where the defendant in litigation to establish priority in appropriations was held to have abandoned his claim to a water right because of the lack of his predecessor's reasonable diligence in applying the water to a beneficial use, the District Court erred in holding that the defendant nevertheless had a "use" right as of 1976. The Water Use Act of 1973 contains the exclusive procedure for acquisition of water rights after 1973. Nothing in the record shows the defendant complied with the statutory procedures. No right to any use of any water is therefore to be recognized in the defendant. 79 Ranch, Inc. v. Pitsch, 204 M 426, 666 P2d 215, 40 St. Rep. 981 (1983), followed in In re Adjudication of Musselshell River Rights, 255 M 43, 840 P2d 577, 49 St. Rep. 866 (1992).

*Yellowstone River Compact Filings — In Wyoming — Priority Date:* The Yellowstone River Compact, signed by Montana, North Dakota, and Wyoming and ratified by Congress, has the status of a treaty, and Montana water law statutes are subordinate to it. Utah International, Inc. (Utah) filed a Wyoming application to appropriate water, as required by the Compact because Wyoming was the state of diversion (Montana being the state of ultimate use of the water). Utah then filed the same information in Montana, and Montana assigned the date of the Wyoming filing as the priority date in conformity with Wyoming law. Intake Water Company did not attack the Wyoming filing but claimed mandamus should issue requiring Montana to assign the Montana filing date as the priority date. Montana correctly assigned the Wyoming filing date as the priority date, as required by the Compact, and mandamus would not issue, since there was no clear legal duty for Montana to assign the Montana filing date as the priority date. State ex rel. Intake Water Co. v. Bd. of Nat'l Resources & Conserv., 197 M 482, 645 P2d 383, 39 St. Rep. 717 (1982).

## DECISIONS UNDER FORMER LAW

*Ownership of Land Where Water Has Source:* Seepage water which has its rise along the bed of a stream and forms a natural accretion thereto belongs to that stream as part of its source of supply, and the ownership of land where water has its source does not necessarily give the exclusive right to use such water to the landowner so as to prevent others from acquiring rights therein. Woodward v. Perkins, 116 M 46, 147 P2d 1016 (1944), distinguished in Forrester v. Rock Island Oil & Ref. Co., 133 M 333, 323 P2d 597 (1958). See also Nelson v. Brooks, 2014 MT 120, 375 Mont. 86, 329 P.3d 558.

*Beneficial Use — Measurement of Water:*

The rights of appropriators of water may not be measured entirely by what they claimed in their notices of appropriation but must be measured by their beneficial use thereof over reasonable periods; consideration must be given to the extent and manner of their use, the character of the land upon which used, and the general necessities of the case, as well as whether the stream is furnished by usual rains or snows, extraordinary rain or snowfall, or by springs or seepage. Irion v. Hyde, 107 M 84, 81 P2d 353 (1938).

Neither the appropriator of water nor one to whom a right is decreed owns the corpus of any part of the flow of a stream. Each is entitled only to the beneficial use of the amount of water called for by his appropriation or the decree when he has need for water, provided his distributing system has a sufficient capacity to carry that amount. If the distribution system is incapable of carrying that amount, his right is measured by the capacity of his system of distribution regardless of his needs. Tucker v. Missoula Light & Ry., 77 M 91, 250 P 11 (1926). (Annotator's note: For additional cases pertaining to courts' interpretation of beneficial use, see the annotations under 85-2-102.)

*Appropriator Not Owner of Water — Sale of Water:* An appropriator of water does not become the owner thereof but only of the right to use it; he may not sell the water to another to be used by the purchaser when not in use by the appropriator. Galahan v. Lewis, 105 M 294, 72 P2d 1018 (1937).

*Appropriation on Private Land:*

An appropriation of water is not confined to waters flowing in streams upon public land but may be made from a stream flowing through privately owned land by invoking the aid of eminent domain proceedings, if necessary. Mettler v. Ames Realty Co., 61 M 152, 201 P 702 (1921).

Sections 89-801 through 89-805, 89-807 through 89-828, and 89-839 through 89-844, R.C.M. 1947, do not and cannot authorize a person to go upon the private property of another for the purpose of making an appropriation, except by condemnation proceedings. Prentice v. McKay, 38 M 114, 98 P 1081 (1909), explained in Connolly v. Harrel, 102 M 295, 57 P2d 781 (1936).

The mere fact that water has its source on land owned by a plaintiff does not of itself give him the exclusive right therein so as to prevent others from acquiring rights to it under the laws of the state. Quinlan v. Calvert, 31 M 115, 77 P 428 (1904).

*Source of Right:* An appropriator of water derives his right from the state and not from the national government, the use of waters flowing in natural streams in Montana being subject to state regulation and control. Mettler v. Ames Realty Co., 61 M 152, 201 P 702 (1921).

*Land Qualifications Unnecessary for Appropriations:*

An appropriator of water need not be either an owner or in possession of land to make a valid appropriation for irrigation purposes. Bailey v. Tintinger, 45 M 154, 122 P 575 (1912); Smith v. Denniff, 24 M 20, 60 P 398 (1900), distinguished in Dept. of State Lands v. Pettibone, 216 M 361, 702 P2d 948, 42 St. Rep. 869 (1985); Toohey v. Campbell, 24 M 13, 60 P 396 (1900).

The right to the use of water may be owned without regard to the title to lands on which the water is to be used. Toohey v. Campbell, 24 M 13, 60 P 396 (1900).

### 85-2-302. Application for permit or change in appropriation right.

**Compiler's Comments**

*2023 Amendment — Code Commissioner Correction:* See 2023 Session Law for amendment made by sec. 1, Ch. 244, L. 2023. Amendment effective January 1, 2024, and terminates June 30, 2031.

In (2)(a) the Code Commissioner substituted "preapplication meeting" for "premeeting application" for consistency with multiple correct uses of the intended term in (3)(b).

*2019 Amendments — Composite Section:* Chapter 192 inserted (4)(c) concerning necessary notice to each owner of an appropriation right sharing a point of diversion or means of conveyance. Amendment effective October 1, 2019.

Chapter 209 in (6) substituted "within 120 days of the date of initial notification" for "within 30 days of the date of notification" and after "defects" deleted "or within a further time as the department may allow, but not to exceed 90 days from the date of notification. If an application is made correct and complete after the mandated time period, but within 90 days of the date of notification of the defects, the priority date of the application is the date the application is made correct and complete"; and in (7) substituted "within 120 days of the date of initial notification" for "within 90 days from the date of notification". Amendment effective October 1, 2019.

*2015 Amendment:* Chapter 294 inserted (8) concerning applicability of section. Amendment effective April 24, 2015.

*2013 Amendment:* Chapter 335 in (1) after "distribution works" substituted "unless the person applies for and receives a permit or an authorization for a change in appropriation right" for "except by applying for and receiving a permit"; in (2) inserted "or a change in appropriation right pursuant to Title 85, chapter 2, part 4"; and deleted former (4)(c) that read: "(c) As used in this part, "national forest system lands" has the same meaning as that provided in 85-20-1401, Article I". Amendment effective October 1, 2013.

*2007 Amendments — Composite Section:* Chapter 213 in (4)(a) at beginning inserted "Subject to subsection (4)(b)"; inserted (4)(b) regarding requirements for an appropriation permit on national forest system lands; inserted (4)(c) defining national forest system lands; and made minor changes in style. Amendment effective April 17, 2007.

Chapter 391 in (1) in exception clause inserted reference to 85-2-369; and made minor changes in style. Amendment effective May 3, 2007.

*Preamble:* The preamble attached to Ch. 391, L. 2007, provided: "WHEREAS, it is the policy of this state to encourage the wise use of the state's water resources by making them available for appropriation and to provide wise utilization, development, and conservation of the water of the state for the maximum benefit of its people with the least possible degradation of the state's natural aquatic ecosystems; and

WHEREAS, there has been confusion regarding ground water issues in closed basins and the Department of Natural Resources and Conservation needs guidance from the Legislature on how to proceed; and

WHEREAS, the basin closure laws were passed to protect senior appropriators while the state water adjudication is ongoing; and

WHEREAS, ground water development in closed basins should be able to proceed as long as the applicant collects the necessary scientific information to determine if there will be an adverse effect on a prior appropriator and takes the necessary actions to mitigate or prevent any adverse effects on a prior appropriator; and

WHEREAS, it is critical that the Legislature develop state water policies in a way that protects the prior appropriation doctrine while at the same time protecting the quality of Montana's water and the ability to appropriate water consistent with section 85-1-101, MCA, and Article IX, section 3, of the Montana Constitution; and

WHEREAS, augmentation is statutorily authorized for the Clark Fork River Basin only; and

WHEREAS, the Department of Natural Resources and Conservation has developed administrative rules and applied augmentation through these administrative rules to all basins even though not specifically statutorily authorized; and

WHEREAS, administrative rules and rulemaking must comply with section 2-4-305, MCA, and may not engraft material not contemplated by the Legislature; and

WHEREAS, this bill provides definitions and a new procedure for mitigation and aquifer recharge."

*Applicability:* Section 31, Ch. 391, L. 2007, provided: "[This act] applies to applications for an appropriation right in a closed basin filed on or after [the effective date of this act]." Effective May 3, 2007.

*Severability:* Section 29, Ch. 391, L. 2007, was a severability clause.

*2003 Amendment:* Chapter 574 inserted (2) requiring the adoption of rules for determining whether an application is correct and complete; in (4) inserted second sentence requiring that the determination of whether an application is correct and complete be based on rules in effect at the time the application is submitted; in (5) at end of first sentence inserted "within 180 days" and inserted second and third sentences concerning identification and notice related to application defects; and made minor changes in style. Amendment effective October 1, 2003.

*2001 Amendment:* Chapter 78 in first sentence substituted "85-2-306" for "85-2-306(1) through (3)" and at end of third sentence after "offices" deleted "and the offices of the county clerk and recorders"; and made minor changes in style. Amendment effective March 20, 2001.

*1999 Amendment:* Chapter 422 in first sentence after "withdrawal, or" inserted "related"; after fourth sentence substituted fifth, sixth, seventh, and eighth sentences relating to correction in defects in an application for "The department shall return a defective application for correction or completion, together with the reasons for returning it. An application does not lose priority of filing because of defects if the application is corrected, completed, and refiled with the department within 30 days after its return to the applicant or within a further time as the department may allow. If an application is not corrected and completed within 30 days or within a further time as the department allows, up to 3 months, the priority date of the application shall be the date of refiling the application with the corrections with the department. An application not corrected within 3 months shall be terminated"; and made minor changes in style. Amendment effective April 23, 1999.

*Severability:* Section 6, Ch. 422, L. 1999, was a severability clause.

*1993 Amendment:* Chapter 370 in (1) inserted fourth sentence that read: "The applicant shall submit a correct and complete application." Amendment effective April 16, 1993.

*Severability:* Section 11, Ch. 370, L. 1993, was a severability clause.

*Retroactive Applicability:* Section 12, Ch. 370, L. 1993, provided: "[Sections 1 through 8] apply retroactively, within the meaning of 1-2-109, to all applications and objections pending on [the effective date of this act] [effective April 16, 1993] that are subject to the provisions of Title 85, chapter 2."

*1991 Amendment:* Inserted (2) imposing a fee of $1 per acre-foot of ground water appropriated for deposit in the ground water assessment account. Amendment effective July 1, 1991, and terminates July 1, 1993.

*1983 Amendment:* Near beginning of first sentence changed reference from (1) and (2) to (1) through (3) of 85-2-306; in last sentence changed correction period for application to 3 months from 18 months.

**Case Notes**

*Inadequate Deficiency Letter — Application Correct and Complete as Matter of Law After Elapsed Time:* A party applied for a permit to pump aquifer water for a bottling plant. The Department of Natural Resources and Conservation (DNRC) issued a deficiency letter that did not identify defects. Then, 180 days later, DNRC notified the party that its application was correct and complete and issued a preliminary determination to grant the application. Objectors then sued in District Court, arguing that DNRC erred by granting a preliminary determination on allegedly incomplete information. The District Court agreed with the objectors and reversed DNRC's decision. On appeal, the Supreme Court reversed the District Court on the grounds that, after 180 days elapsed without an identification of deficiencies, the application became correct and complete as a matter of law. Flathead Lakers Inc. v. Dept. of Natural Resources and Conservation, 2020 MT 132, 400 Mont. 170, 464 P.3d 396.

*Application for Change to Water Rights — Lack of Information on Historical Use of Water Grounds for Termination:* The Department of Natural Resources and Conservation (DNRC) notified the town of Manhattan that its application for approval of proposed changes to its municipal well water rights was deficient because it lacked information on historical water use. After DNRC terminated the town's application, the town sought judicial review. The District Court affirmed and the town appealed, arguing that historical usage was irrelevant. The Supreme Court affirmed DNRC's termination, concluding that historical information was necessary to determine whether the proposed changes could adversely impact other water users. Manhattan v. Dept. of Natural Resources and Conservation, 2012 MT 81, 364 Mont. 450, 276 P.3d 920.

*Agency Prerogative to Repeal Administrative Rules as Long as Statute Not Violated — Repeal of Administrative Definition of Municipal Use in Water Use Act:* Although the term "municipal use" is used repeatedly in the Water Use Act, the term was not statutorily defined. In 2005, the Department of Natural Resources and Conservation adopted ARM 36.12.101 that defined municipal use as water appropriated by and provided for those in and around a municipality or unincorporated town. Under the rule, only a municipality or unincorporated town arguably qualified as an acceptable appropriator, when previously it was only necessary that water be appropriated for those in a municipality or unincorporated area. About 1 year after the rule was adopted, the Department sought to repeal the rule because the definition was not in keeping with the historical interpretation of the term by the Department and the Montana Water Court. Following repeal, plaintiffs requested that the District Court declare that repeal of the rule was invalid. The District Court held that by repealing the rule: (1) the definition of municipal use was rendered nebulous and unfairly accommodating of private developers' applications for water use permits; (2) the purpose of the basin closure law to protect and preserve existing water rights would be undermined, potentially threatening senior water rights in an already overappropriated basin; and (3) legislative intent was contravened and plaintiffs' water rights were placed in jeopardy. Plaintiffs' request was granted and repeal of the rule was declared invalid. On appeal, the Supreme Court reversed. The court first determined that the issue was justiciable because it continued to present a controversy concerning the nature of water rights applications and because plaintiffs had a statutory right to challenge the repeal of the rule under 2-4-506, although plaintiffs had the burden to show that the repeal interfered with or impaired their legal rights or privileges or that repeal was implemented with an arbitrary or capricious disregard for the purpose of the implementing legislation as evidenced by the documented legislative intent. Plaintiffs did not meet their burden. The rule was not in effect long enough for plaintiffs to demonstrate that their rights or privileges were impaired or threatened by the repeal, and private entities had previously been granted municipal use permits. Additionally, plaintiffs failed to show that the repeal was arbitrary or capricious. It was the agency's prerogative to enact rules to aid in the permitting process and to repeal rules that were not of assistance as long as the agency does not violate 2-4-506. Lohmeier v. St., 2008 MT 307, 346 M 23, 192 P3d 1137 (2008).

*Water Appropriation Application Amendments So Significant as to Constitute New Appropriations — Original Applications Considered Shams — New Applications Barred by Subbasin Closure:* Just 10 days before the Legislature closed the Bitterroot River subbasin to new water appropriations in 1999, defendants submitted four appropriation applications to develop ponds on their property for the beneficial use of wildlife. All four applications were subsequently amended to variously revise volume and flow rates, proposed pond depth, points and means of diversion, place of use, and beneficial uses. Numerous parties objected to the proposed appropriations, including plaintiff, which moved to terminate the applications on grounds that the amendments were submitted in bad faith and were new applications and that deficiencies in the applications were not cured within the statutory time limit. A hearings examiner denied the motion to terminate the applications, but nevertheless denied the applications on numerous grounds. Defendants filed exceptions to the hearings examiner's decision, and the Department of Natural Resources and Conservation reversed the hearings examiner and granted all four applications. Plaintiff petitioned the District Court for review, and the court concluded that the Department erred in accepting and processing the amended applications after the subbasin closure and in other ways and denied the applications. On appeal, the Supreme Court affirmed. The amendments to the applications were not mere refinements, but constituted changes so significant that the amended applications bore such little resemblance to the original applications as to be considered shams. The nature and extent of the changes could be consistent only with new applications with new priority dates, which were prohibited by the subbasin closure. The Supreme Court noted that to hold otherwise would establish a precedent allowing a prospective appropriator to file a deficient application and later amend the application without penalty, thereby gaining an advantage over other appropriators and circumventing other restrictions associated with a subbasin closure. Bitterroot River Protective Ass'n, Inc. v. Siebel, 2005 MT 60, 326 M 241, 108 P3d 518 (2005).

*Defective Filing — Yellowstone River Compact Filing — Priority Date:* Corporation filed application in Wyoming, as required by the Yellowstone River Compact signed by Montana and Wyoming, to appropriate water in Wyoming for use in Montana. Montana notified corporation that it should also file the same information on Montana forms and that if it did so the corporation would retain the priority date of the date it filed in Wyoming. The corporation filed in Montana within 18 months of its Wyoming filing. This section gives Montana discretion to allow the applicant up to 18 months for a correction of a defective filing without losing the original filing date as the priority date. Thus, the corporation was entitled to have Montana, in its discretion, assign as a priority date the date of the Wyoming filing. Montana had no clear legal duty to do otherwise and was not subject to a mandate that it assign as the priority date the date of the Montana filing. (Annotator's note: Chapter 448, L. 1983, reduced the correction period from 18 months to 3 months (now 90 days).) State ex rel. Intake Water Co. v. Bd. of Nat'l Resources & Conserv., 197 M 482, 645 P2d 383, 39 St. Rep. 717 (1982).

**Law Review Articles**

Commerce Clause Scrutiny of Montana's Water Export Statutes, Eaton, 7 Pub. Land L. Rev. 97 (1986).

## 85-2-303. Permit for conversion of nonproductive oil or gas well.

**Compiler's Comments**

*1983 Amendment:* After "water well" deleted "may do so immediately but"; and after "maximum" substituted "appropriation" for "yield".

## 85-2-304. Appropriation by state board of land commissioners.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 in first sentence, after "department", deleted "of natural resources and conservation"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

## 85-2-306. Exceptions to permit requirements.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 1, Ch. 561, L. 2023. Amendment effective May 18, 2023.

*Retroactive Applicability:* Section 3, Ch. 561, L. 2023, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to water supply systems constructed after December 31, 2000."

*2017 Amendments — Composite Section:* Chapter 243 in (7)(a) inserted last sentence regarding the department not considering adverse effects on any water right identified in written consent to approval. Amendment effective October 1, 2017, and terminates September 30, 2023.

Chapter 264 in (3)(a)(i) after "fire protection" inserted "emergency fire training, and emergency fire-related operations"; and made minor changes in style. Amendment effective October 1, 2017.

*2015 Amendments — Composite Section:* Chapter 294 inserted (9) concerning applicability of section. Amendment effective April 24, 2015.

Chapter 455 in (6)(c) inserted "an ephemeral stream, an intermittent stream, or another"; and made minor changes in style. Amendment effective October 1, 2015.

*Preamble:* The preamble attached to Ch. 221, L. 2015, provided: "WHEREAS, the Legislature, consistent with its constitutional duties, adopted the Montana Water Use Act in 1973, which recognizes existing water rights and provides for the orderly administration of new water right permits while protecting senior water right users; and

WHEREAS, the Legislature recognizes that a permit to appropriate water is not necessary in all circumstances and has created certain exceptions to the permit requirement; and

WHEREAS, the Legislature has provided that a permit is not required for an appropriation that is 35 gallons a minute or less and does not exceed 10 acre-feet a year unless the appropriation is determined to be a combined appropriation; and

WHEREAS, since 1993 the Department of Natural Resources and Conservation has defined the term "combined appropriation" as an appropriation of water from the same source aquifer by two or more ground water developments that are physically manifold into the same system; and

WHEREAS, water users in the state have relied upon the department's definition of "combined appropriation" for more than 20 years; and

WHEREAS, on October 17, 2014, the Montana First Judicial District Court in Clark Fork Coalition v. Tubbs, Cause No. BDV-2010-874, invalidated the Department's combined appropriation definition as being inconsistent with the Water Use Act; and

WHEREAS, substantial financial investment was made by persons on the basis of the 1993 definition of "combined appropriation" prior to the District Court's October 17, 2014, order; and

WHEREAS, the District Court ordered that the Department's rule defining "combined appropriation", in effect from 1987 to 1993, be reinstated; and

WHEREAS, it is the intent of the Legislature to ensure that the Department's 1993 definition of combined appropriation applies to all projects, developments, or subdivisions in existence or for which an application for review was pending on or before the District Court's October 17, 2014, ruling."

*Wells Exempt From Permitting — Definition of Combined Appropriation — Retroactive Applicability:* Section 1, Ch. 221, L. 2015, provided: "For purposes of implementing the provisions of 85-2-306, the department of natural resources and conservation's definition of combined appropriation as an appropriation of water from the same source aquifer by two or more ground water developments that are physically manifold into the same system applies retroactively to any project, development, or subdivision in existence on or before October 17, 2014, and to any pending project, development, or subdivision for which the application and required fees were received by the department of environmental quality in accordance with 76-4-125 or by the local reviewing authority in accordance with 76-3-604(1)(a) on or before October 17, 2014."

*2013 Amendment:* Chapter 421 in (3)(a) at beginning deleted "Except as provided in subsection (3)(a)(ii)"; deleted former (3)(a)(i)(A) that read: "(A) with a maximum appropriation of 35 gallons a minute or less, not to exceed 10 acre-feet a year, except that a combined appropriation from the same source from two or more wells or developed springs exceeding this limitation requires a permit"; inserted (3)(a)(iii) and (3)(a)(iv) relating to stream depletion zones; and made minor changes in style. Amendment effective October 1, 2013.

*2011 Amendments — Composite Section:* Chapter 96 in (3)(a)(i) at beginning inserted exception clause; inserted (3)(a)(ii) regarding lack of necessity for ground water appropriation permit; and made minor changes in style. Amendment effective October 1, 2011.

Chapter 97 inserted (3)(a)(i)(B) regarding appropriation made by local government fire agency; and made minor changes in style. Amendment effective October 1, 2011.

*Interim Study of Issues Related to Ground Water Wells Exempt From Permitting:* Section 2, Ch. 256, L. 2011, provided: "(1) The water policy interim committee, provided for in 5-5-231, shall conduct a study of:

(a) wells that are exempt from permitting pursuant to 85-2-306, including:

(i) determining the number of existing exempt wells and estimating the number of ground water wells that may be exempted from permitting over the next decade under current laws and regulations;

(ii) summarizing the types of beneficial uses to which water from exempt wells is applied;

(iii) analyzing the amount of water reasonably necessary for the various beneficial uses served by exempt wells compared to the current statutory limits for flow rate and volume;

(iv) exploring options to provide accurate measurement of water appropriated via exempt wells;

(v) examining enforcement options for exempt wells to ensure that they do not exceed statutory limits or disrupt the priority system for water right administration governed by the Water Use Act and the Montana constitution;

(vi) examining applicable research and analysis conducted by the ground water investigation program at the Montana bureau of mines and geology provided for in 85-2-525;

(vii) examining the historical treatment of exempt wells and the evolution of laws and rules governing exempt wells;

(viii) analyzing how the water appropriated by exempt wells may affect surface water appropriations, including existing claims, permits, certificates, and reservations; and

(ix) examining the legal options for integrating exempt wells into the principle that first in time is first in right when senior water rights are not fulfilled;

(b) the statutes, rules, programs, and policies employed by other prior appropriation states for exempt wells, including legal challenges;

(c) the adequacy of existing programs and tools for managing and mitigating the development of wells that would otherwise be exempt from permitting, including but not limited to controlled ground water areas created pursuant to Title 85, chapter 2, part 5, water mitigation banks, community water system incentives, and in-lieu-of-fee programs;

(d) the relationship between exempt wells and land use decisions, including the relationship between exempt wells and individual septic systems, the cost comparison of installing public water systems or extending existing water infrastructure, and the role of local governments in requiring alternatives to exempt wells; and

(e) the rulemaking authority of the department of natural resources and conservation in relation to the statutory policy and purpose provided for in 85-2-101.

(2) The committee shall prepare a report to submit to the 63rd legislature that provides clear policy direction and necessary legislation to guide Montana's policy regarding wells that may be exempt from the permitting process."

*Limit on Rulemaking Authority:* Section 3, Ch. 256, L. 2011, provided: "(1) Except as provided in subsection (2), the department of natural resources and conservation may not adopt rules to implement the provisions of 85-2-306(3) for ground water wells that are exempt from permitting until October 1, 2012.

(2) The department may adopt rules to implement amendments to 85-2-306(3) that were passed and approved by the 62nd legislature for:

(a) appropriations by a local governmental fire agency organized under Title 7, chapter 33, provided that the appropriation is used only for emergency fire protection; or

(b) nonconsumptive appropriations for geothermal heating or cooling exchange applications." Effective April 21, 2011, and terminates June 30, 2013.

*2009 Amendment:* Chapter 86 in (2)(b) at end substituted "a rule promulgated pursuant to 85-2-506" for "an order issued pursuant to 85-2-507". Amendment effective March 25, 2009.

*Saving Clause:* Section 9, Ch. 86, L. 2009, was a saving clause.

*2007 Amendment:* Chapter 213 in (1)(a) at beginning inserted exception clause; in (1)(b) near beginning after "works" inserted "water may be appropriated" and at end after "rights" inserted "or, if the ground water development works are on national forest system lands, with any prior written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the certificate"; in (3)(c) near middle of first sentence after "notification" inserted "or a written federal special use authorization"; in (7)(a) at beginning of second sentence inserted "Subject to subsection (7)(b)"; inserted (7)(b) providing that if the impoundment or pit is on national forest system lands, an application is not correct and complete until the applicant has submitted proof of any written special use authorization required by federal law; and made minor changes in style. Amendment effective April 17, 2007.

*2005 Amendment:* Chapter 161 inserted (2) pertaining to appropriating ground water according to a permit or an order; in (3)(c) in first sentence at end substituted "subsection (1)" for "this subsection"; in (4) in first sentence near end and in third sentence substituted "subsection (3)" for "subsection (1)"; in (5) in first sentence near beginning substituted "subsection (4)" for "this subsection"; in (6)(d) deleted former second sentence that read: "As used in this subsection, "perennial flowing stream" means a stream that historically has flowed continuously during all seasons of the year, during dry as well as wet years"; and made minor changes in style. Amendment effective April 7, 2005.

*2001 Amendment:* Chapter 78 in (1) inserted fourth sentence providing that the written notification does not create an easement, at end of sixth sentence after "department" substituted "through its offices" for "at its offices and at the offices of the county clerk and recorders", and in eighth sentence after "30 days" inserted "of notification of defects"; and made minor changes in style. Amendment effective March 20, 2001.

*1999 Amendment:* Chapter 250 inserted second and third sentences in (1) requiring person developing ground water source on another person's land to provide 30 days' written notice of proposed development and appropriation and at end of ninth sentence inserted "including proof of landowner notification as necessary under this subsection"; and made minor changes in style. Amendment effective July 1, 1999.

*1995 Amendment:* Chapter 418 in (4) substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1993 Amendment:* Chapter 629 near beginning of second sentence of (2), after "claim", deleted "of existing water right"; and made minor changes in style. Amendment effective July 1, 1993.

*Preamble:* The preamble attached to Ch. 629, L. 1993, provided: "WHEREAS, Article IX, section 3, of the Montana Constitution provides that all existing rights to the use of any waters for any useful or beneficial purpose are recognized and confirmed; and

WHEREAS, Article IX, section 3, of the Montana Constitution requires the Legislature to provide for the administration, control, and regulation of water rights and to establish a system of centralized records for such rights; and

WHEREAS, the Legislature established a procedure for the general adjudication of existing rights to the use of water and provided in section 85-2-226, MCA, that the failure to file a claim of existing right on or before the deadline established under section 85-2-221, MCA, would establish a conclusive abandonment of the right; and

WHEREAS, the Montana Supreme Court, in In the Matter of the Adjudication of the Water Rights Within the Yellowstone River, 253 Mont. 167, 832 P.2d 1210 (1992), has determined that the failure to file a statement of claim to an existing right to the use of water on or before April 30, 1982, resulted in the forfeiture of that right; and

WHEREAS, it has come to the attention of the Legislature that the forfeiture of water rights for failure to timely file a claim has in some instances caused hardship, and the Legislature accordingly desires to provide water rights claimants with one more opportunity to file a water rights claim in the general adjudication; and

WHEREAS, in so doing, the Legislature recognizes that the adjudication process will not be completed for many years but that a substantial amount of progress has already occurred in the adjudication, specifically in the area of water rights compacts with Indian tribes and the federal government and in decrees and stipulations involving individual claimants, and thus the Legislature believes that it is necessary to ensure that parties who have been recognized as having filed claims on or before April 30, 1982, and holders of federal reserved water rights are not adversely affected by the inclusion of new parties in the adjudication by subjecting the right to file those claims in remission to certain terms and conditions; and

WHEREAS, the Legislature wishes to provide protection for timely filed claimants from incurring additional costs or from being adversely affected by justifiable reliance on the presumption of abandonment; and

WHEREAS, the Legislature wishes to provide a conclusive adjudication of existing water rights; and

WHEREAS, the Legislature recognizes that according a privilege to file additional statements of claim presents a potential for abuse by those who may attempt to refile previously adjudicated claims, and the Legislature thus believes that the courts should deal harshly with any abuses by such measures as, without limitation, the imposition of sanctions under [former] Rule 11, Montana Rules of Civil Procedure [now superseded]; and

WHEREAS, the Legislature determines that the deadline for filing water right claims as provided in this bill appropriately balances the interests at stake in the adjudication.

THEREFORE, the Legislature finds it is appropriate to make the following amendments to sections 85-2-102, 85-2-211 [now repealed], 85-2-213, 85-2-221, 85-2-225, 85-2-226, 85-2-234, 85-2-237, and 85-2-306, MCA, in order to provide for the acceptance of late claims to the use of water under the conditions set forth in this bill. Additionally, the Legislature directs the Water Policy Committee, in coordination with the Department of Justice, the Department of Natural Resources and Conservation, and the Reserved Water Rights Compact Commission, to conduct an interim study regarding certain late claim issues."

*Saving Clause:* Section 11, Ch. 629, L. 1993, provided: "[This act] does not affect proceedings that were begun before [passage and approval of this act] [approved May 11, 1993] in which relief for damages have been sought based upon the diversion, impoundment, or withdrawal of water without a water right established under state law."

*Severability — Partial Nonseverability:* Section 12, Ch. 629, L. 1993, provided: "(1) If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

(2) It is the intent of the legislature that each part of [this act] is essentially dependent upon [section 4], which amends 85-2-221, and that if one part of [section 4], except subsection (3)(f)(ii), is held unconstitutional or invalid, all other parts of [this act] are invalid."

*1991 Amendments:* Chapter 769 in (1), at end of third sentence, inserted "and pay a filing fee"; and inserted (5) assessing a $10 filing fee for filing notice of completion and directing deposit of the fee in the ground water assessment account. Amendment effective July 1, 1991, and terminates July 1, 1993.

Chapter 805 in (1) and (2) substituted "35 gallons per minute or less, not to exceed 10 acre-feet per year" for "less than 100 gallons per minute". Amendment effective July 1, 1991.

*1989 Amendment:* In (1), after "person who has", deleted "either", inserted clause relating to a possessory interest, and after "or" inserted clause relating to another's rights in ground water development works. Amendment effective April 4, 1989.

*1987 Amendment:* In (1), in second sentence, inserted exception relating to combined appropriation, near end substituted "appropriator" for "county clerk and recorder in the county where the point of diversion or place of use is located for recordation", and deleted sentence that read: "After recordation, the clerk and recorder shall send the certificate to the appropriator"; and in (2) inserted last sentence concerning certificate issuance.

*1985 Amendment:* In (1) inserted first sentence limiting the appropriation of ground water to a person who has either exclusive property rights in the ground water development works or written consent of the person with those property rights.

*1983 Amendment:* Inserted second sentence of (2), dealing with existing water right under 85-2-221; in third sentence of (2) after "section" inserted "or the date of the filing of the claim of existing water right"; in (3) after "the appropriation is" inserted "less than 30 acre-feet per year and is".

*1981 Amendments:* Chapter 30 inserted "and the impoundment or pit is to be constructed on and will be accessible to a parcel of land that is owned or under the control of the applicant and that is 40 acres or larger" in the middle of (3).

Chapter 160 substituted "within 60 days after" for "before" in the third sentence of (3); inserted the fourth sentence in (3) requiring the Department to automatically issue a provisional permit upon receipt of a correct and complete stockwater provisional permit application; substituted "after a hearing" for "after processing the application" in the last sentence of (3); substituted "it may revoke the permit or require the permittee to modify the impoundment or pit and may then make" for "it may require the applicant to modify the construction of the impoundment or pit and issue" in the last sentence of (3).

Chapter 357 inserted "or developed spring" after "well" in two places in (1); substituted "maximum appropriation of less than 100 gallons per minute" for "maximum yield of less than 100 gallons a minute" in the first sentence of (1); inserted "with the department" after "notice of completion" in the second sentence of (1); substituted "the department shall review the notice and may, before issuing a certificate of water right, return a defective notice for correction or completion, together with the reasons for returning it" for "the department shall automatically issue a certificate of water rights" in the third sentence of (1); inserted the fourth, fifth, and sixth sentences in (1) relating to procedures when notice of ground water appropriation is defective; and inserted (2) describing procedures for issuance of a certificate of water right for a person who appropriates ground water by means of a well or developed spring, put to beneficial use between January 1, 1962, and July 1, 1973, and who did not file a required notice of completion.

*Applicability:* Section 2, Ch. 30, L. 1981, provided: "This act applies to applications pending with the department on the effective date of this act, as well as applications filed with the department after the effective date of this act."

Subsection (1), sec. 7, Ch. 357, L. 1981, provided: "Subsection (2) of section 1 [sec. 1, Ch. 357, L. 1981, amending 85-2-306] applies to all notices of completion filed with the department after July 1, 1973."

Subsection (2), sec. 7, Ch. 357, L. 1981, provided: "Subsection (1) of section 1 [sec. 1, Ch. 357, L. 1981, amending 85-2-306], section 3 [sec. 3, Ch. 357, L. 1981, amending 85-2-310], and section 4 [sec. 4, Ch. 357, L. 1981, amending 85-2-311] apply to notices of completion and applications pending before the department and to those filed with the department after April 14, 1981."

**Case Notes**

*Attorney Fees Not Recoverable Under Private Attorney General Doctrine if Decision Statute-Based:* The plaintiffs challenged the validity of a Department of Natural Resources and Conservation administrative rule exempting groundwater appropriations from the Department's permitting process. The Supreme Court invalidated the rule in Clark Fork Coalition v. Tubbs, 2016 MT 229, 384 Mont. 503, 380 P.3d 771, and the plaintiffs were granted fees under the private attorney general doctrine. The Department appealed. The Supreme Court held that the plaintiffs were not entitled to attorney fees under the private attorney general doctrine because the decision in the underlying case was statute-based and did not litigate constitutional interests. The District Court abused its discretion in granting plaintiffs to recover fees. Clark Fork Coalition v. Tubbs, 2017 MT 184, 388 Mont. 205, 399 P.3d 295.

*Definition of "Combined Appropriation" Invalid — Reinstatement of Former Administrative Rule Proper — Direction to Agency to Formulate New Rule Consistent With Statute Improper:* The plaintiffs challenged the validity of an administrative rule defining the term "combined appropriation". The rule, which was issued by the Department of Natural Resources and Conservation (DNRC), defined a combined appropriation as "two or more groundwater developments, that are physically manifold into the same system". The plaintiffs contended that the definition was inconsistent with 85-2-306. The District Court agreed and reinstated an earlier rule providing that a groundwater development need not have the same physical connection to be considered a combined appropriation and directed the DNRC to formulate a new administrative rule consistent with the District Court's order. On appeal by intervening well drillers, the Supreme Court affirmed, holding that the administrative rule was inconsistent with the plain language of 85-2-306 as well as the stated purpose of the Montana Water Use Act, but also remanded the case to have the District Court remove its mandate to the agency to formulate a new rule. Clark Fork Coalition v. Tubbs, 2016 MT 229, 384 Mont. 503, 380 P.3d 771. See also Clark Fork Coalition v. Tubbs, 2017 MT 184, 388 Mont. 205, 399 P.3d 295.

**Law Review Articles**

Public Water, Private Rights: All Are Not Equally Protected When the State Allows Some to Divert Small Quantities of Ground Water Outside the Permitting System, Sime, 75 Mont. L. Rev. 237 (2014).

Exempt Well Issues in the West, Bracken, 40 Envtl. L. 141 (2010).

**Collateral References**

The Exemption: To Change or Not to Change?, Water Policy Interim Committee (2012).

## 85-2-307. Notice of receipt of application for permit or change in appropriation right — draft preliminary determination — extensions — updated draft preliminary determination — public comments — issuance of preliminary determination.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 2, Ch. 244, L. 2023. Amendment effective January 1, 2024, and terminates June 30, 2031.

*2015 Amendment:* Chapter 52 deleted former (4) that read: "(4) The requirements of subsections (2) and (3) do not apply if the department finds, on the basis of information reasonably available to it, that the appropriation as proposed in the application will not adversely affect the rights of other persons." Amendment effective February 25, 2015.

*2009 Amendment:* Chapter 251 inserted (1) requiring notice of receipt of application for permit; in (2)(a) at beginning substituted "Within 120 days of the receipt" for "Upon receipt"; inserted (2)(a)(i) through (2)(a)(iii) relating to informal meeting, written preliminary determination, and conditions; in (2)(b) at beginning inserted introductory phrase, and near middle after "application" inserted reference to summary of preliminary determination and conditions; inserted (2)(c) requiring compliance with 85-2-310 if application is to be denied; and made minor changes in style. Amendment effective July 1, 2009.

*Applicability:* Section 9, Ch. 251, L. 2009, provided: "[This act] applies to applications received by the department after [the effective date of this act]." Effective July 1, 2009.

*2005 Amendment:* Chapter 70 in (1)(a) near beginning after "permit" inserted "or change in appropriation right"; and made minor changes in style. Amendment effective March 24, 2005.

*Saving Clause:* Section 15, Ch. 70, L. 2005, was a saving clause.

*1993 Amendment:* Chapter 370 at beginning of (1)(a) substituted "correct and complete application" for "proper application". Amendment effective April 16, 1993.

*Severability:* Section 11, Ch. 370, L. 1993, was a severability clause.

*Retroactive Applicability:* Section 12, Ch. 370, L. 1993, provided: "[Sections 1 through 8] apply retroactively, within the meaning of 1-2-109, to all applications and objections pending on [the effective date of this act] [effective April 16, 1993] that are subject to the provisions of Title 85, chapter 2."

*1987 Amendment:* In (1) deleted requirement for publication for 2 consecutive weeks; and in (1)(b) and (2) deleted "last" before "date of publication".

*1983 Amendments:* Chapter 448, in (1)(a), reduced notice from 3 to 2 weeks; and in (2) reduced time of first filing from 30 to 15 days after notice.

Chapter 526, at end of (1)(b)(i), deleted "A notice shall also be served upon"; and inserted (1)(b)(ii) requiring the Department to serve by first-class mail timely notice of an application upon any purchaser under contract for deed of property that may be affected by the proposed appropriation.

*1981 Amendment:* Substituted "first-class" for "certified" before "mail" in the second sentence of (1).

**Case Notes**

*Legal Availability and Adverse Effect — Criteria for Preliminary Determination Satisfied:* The Department of Natural Resources and Conservation (DNRC) rejected an application for a water use permit, and the applicant appealed to the Water Court pursuant to the Montana Administrative Procedure Act. The Water Court found that DNRC had improperly considered certain evidence and acted arbitrarily and capriciously in its consideration of other evidence. On review, the Supreme Court affirmed some of the Water Court's conclusions while reversing others. The Supreme Court concluded that, taking into account its evidentiary and substantive rulings, the administrative record should have been interpreted to indicate no net depletion to the water source and therefore no adverse impact on senior appropriators. Therefore, the Supreme Court ordered that the application be remanded to receive a preliminary determination and move forward in the process to face potential objectors. DeBuff v. Dept. of Natural Resources and Conservation, 2021 MT 68, 403 Mont. 403, 482 P.3d 1183.

*Erroneous Grant of Writ of Mandate After Statement Issued That Statutory Water Permit Criteria Not Satisfied — Remand:* In December 2005, plaintiff filed an application for a water use permit for construction of a municipal water system in a subdivision. In February 2007, the Department of Natural Resources and Conservation (DNRC) issued a document directing that public notice be given of plaintiff's application. At this point in the application process, plaintiff's application was considered correct and complete. Parties objected to the application, but plaintiff settled with those parties. DNRC then sent plaintiff another application review form, and plaintiff provided additional requested information. By August 2007, more than 180 days had elapsed since the application was filed, but DNRC had still not taken action on it. In December 2007, plaintiff filed for a writ of mandate to require DNRC to issue a water use permit. Shortly after the petition for a writ was filed, DNRC issued a statement of opinion stating the plaintiff had failed to satisfy certain criteria under 85-2-311, and moved to quash the petition for a writ. Nevertheless, in May 2008, the District Court concluded that once DNRC made the decision that plaintiff's application was correct and complete and took no further action, the only remaining option was the ministerial option of granting the permit. Therefore, the writ of mandate was issued directing DNRC to grant the permit to plaintiff. DNRC appealed, and the Supreme Court reversed. The District Court erroneously granted the writ of mandate because the writ was issued after DNRC had already issued a statement that plaintiff failed to satisfy the statutory application criteria by a preponderance of the evidence. Because the statement of opinion was issued, even if in error, that action could not be undone by a writ of mandate regardless of the writ's propriety or whether DNRC had statutory or jurisdictional authority to issue the opinion. Additionally, the District Court erred in concluding that DNRC had a legal duty to issue a permit in this case. Once plaintiff's application was correct and complete, DNRC had a clear legal duty to process the application in a timely manner. DNRC failed to process the application and could have been commanded to make a decision one way or the other as soon as the timeframes lapsed, but issuance of the permit does not become a clear legal duty until objections are resolved and the applicant has proven all 85-2-311 criteria by a preponderance of the evidence. As set out in the statement of opinion, plaintiff had not satisfied all the criteria, so DNRC was under no legal duty to issue the permit. Thus, the writ of mandate was reversed and the case was remanded for further proceedings to allow plaintiff to request a hearing with DNRC regarding the application. Bostwick Properties, Inc. v. Dept. of Natural Resources and Conservation, 2009 MT 181, 351 M 26, 208 P3d 868 (2009), following Beasley v. Flathead County Bd. of Adjustment, 2009 MT 120, 350 M 171, 205 P3d 812 (2009). See also Bostwick Properties, Inc. v. Dept. of Natural Resources and Conservation, 2013 MT 48, 369 Mont. 150, 296 P.3d 1154.

## 85-2-308. Objections.

### Compiler's Comments

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 3, Ch. 244, L. 2023. Amendment effective January 1, 2024, and terminates June 30, 2031.

*2009 Amendment:* Chapter 251 in (1)(a) at end substituted "85-2-307(3)" for "85-2-307(2)"; in (2) near end inserted reference to 85-2-407 and 85-2-408; and made minor changes in style. Amendment effective July 1, 2009.

*Applicability:* Section 9, Ch. 251, L. 2009, provided: "[This act] applies to applications received by the department after [the effective date of this act]." Effective July 1, 2009.

*2007 Amendments — Composite Section:* Chapter 213 in (2) near end after "criteria in" inserted "85-2-320, if applicable, and". Amendment effective April 17, 2007.

Chapter 448 in (2) near end after "85-2-402" inserted "and 85-2-436, if applicable". Amendment effective May 8, 2007.

*2005 Amendment:* Chapter 70 in (1)(a) substituted "application under this chapter" for "application for a permit". Amendment effective March 24, 2005.

*Saving Clause:* Section 15, Ch. 70, L. 2005, was a saving clause.

*2003 Amendment:* Chapter 574 in (5) inserted second and third sentences requiring the adoption of rules delineating the components of a correct and complete objection and requiring certain information in an objection related to instream flow water rights for fish, wildlife, and recreation; and in (6) at end after "under" substituted "this section and rules of the department" for "subsection (1), (2), or (4)". Amendment effective October 1, 2003.

*1999 Amendment:* Chapter 422 in (1)(b), (2), and (4) substituted "indicating" for "tending to show"; in (5) in first sentence after "under this chapter shall" deleted "timely" and at end inserted "within the time period stated on the public notice associated with the application" and inserted last two sentences relating to defects and corrections of an objection; inserted (6) relating to when an objection is valid; and made minor changes in style. Amendment effective April 23, 1999.

*Severability:* Section 6, Ch. 422, L. 1999, was a severability clause.

*1993 Amendment:* Chapter 370 inserted (5) requiring objector to timely file correct and complete objection on form prescribed by Department. Amendment effective April 16, 1993.

*Severability:* Section 11, Ch. 370, L. 1993, was a severability clause.

*Retroactive Applicability:* Section 12, Ch. 370, L. 1993, provided: "[Sections 1 through 8] apply retroactively, within the meaning of 1-2-109, to all applications and objections pending on [the effective date of this act] [effective April 16, 1993] that are subject to the provisions of Title 85, chapter 2."

*1991 Amendment:* In (1)(a), after "application", inserted "for a permit"; in (1)(b), after "objection", inserted "to an application for a permit" and after "that" substituted "one or more of the criteria in 85-2-311 are not met" for "there are no unappropriated waters in the proposed source, that the proposed means of appropriation are inadequate, that the property, water rights, or interests of the objector would be adversely affected by the proposed appropriation, that the proposed use of water is not a beneficial use, or that the proposed use will interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved"; inserted (2) requiring that in an application for change in appropriation rights, an objection must state name and address of objector and state that criteria in 85-2-402 are not met; inserted (3) providing that person has standing to file objection if property, water rights, or interests would be adversely affected by proposed appropriation; inserted (4) requiring that in an application for water reservation, an objection must state name and address of objector and state that criteria in 85-2-316 are not met; and made minor changes in style. Amendment effective July 1, 1991.

*1983 Amendment:* Substituted (2) (see 1983 Session Law) for former text, which read: "The objection must state the name and address of the objector and facts tending to show that there are no unappropriated waters in the proposed source, that the proposed means of appropriation are inadequate, that the property, rights, or interests of the objector would be adversely affected by the proposed appropriation, or the objector may state any other objections to the proposed appropriation he considers pertinent."

**Case Notes**

### DECISIONS UNDER CURRENT LAW

*Erroneous Grant of Writ of Mandate After Statement Issued That Statutory Water Permit Criteria Not Satisfied — Remand:* In December 2005, plaintiff filed an application for a water use permit for construction of a municipal water system in a subdivision. In February 2007, the Department of Natural Resources and Conservation (DNRC) issued a document directing that public notice be given of plaintiff's application. At this point in the application process, plaintiff's application was considered correct and complete. Parties objected to the application, but plaintiff settled with those parties. DNRC then sent plaintiff another application review form, and plaintiff provided additional requested information. By August 2007, more than 180 days had elapsed since the application was filed, but DNRC had still not taken action on it. In December 2007, plaintiff filed for a writ of mandate to require DNRC to issue a water use permit. Shortly after the petition for a writ was filed, DNRC issued a statement of opinion stating the plaintiff had failed to satisfy certain criteria under 85-2-311, and moved to quash the petition for a writ. Nevertheless, in May 2008, the District Court concluded that once DNRC made the decision that plaintiff's application was correct and complete and took no further action, the only remaining option was the ministerial option of granting the permit. Therefore, the writ of mandate was issued directing DNRC to grant the permit to plaintiff. DNRC appealed, and the Supreme Court reversed. The District Court erroneously granted the writ of mandate because the writ was issued after DNRC had already issued a statement that plaintiff failed to satisfy the statutory application criteria by a preponderance of the evidence. Because the statement of opinion was issued, even if in error, that action could not be undone by a writ of mandate regardless of the writ's propriety or whether DNRC had statutory or jurisdictional authority to issue the opinion. Additionally, the District Court erred in concluding that DNRC had a legal duty to issue a permit in this case. Once plaintiff's application was correct and complete, DNRC had a clear legal duty to process the application in a timely manner. DNRC failed to process the application and could have been commanded to make a decision one way or the other as soon as the timeframes lapsed, but issuance of the permit does not become a clear legal duty until objections are resolved and the applicant has proven all 85-2-311 criteria by a preponderance of the evidence. As set out in the statement of opinion, plaintiff had not satisfied all the criteria, so DNRC was under no legal duty to issue the permit. Thus, the writ of mandate was reversed and the case was remanded for further proceedings to allow plaintiff to request a hearing with DNRC regarding the application. Bostwick Properties, Inc. v. Dept. of Natural Resources and Conservation, 2009 MT 181, 351 M 26, 208 P3d 868 (2009), following Beasley v. Flathead County Bd. of Adjustment, 2009 MT 120, 350 M 171, 205 P3d 812 (2009). See also Bostwick Properties, Inc. v. Dept. of Natural Resources and Conservation, 2013 MT 48, 369 Mont. 150, 296 P.3d 1154.

*Exhaustion of Administrative Remedies Not Required When Futile:* The District Court concluded that plaintiffs were required to exhaust administrative remedies before seeking a declaratory judgment in District Court. However, pursuant to DeVoe v. Dept. of Revenue, 263 M 100, 866 P2d 228 (1993), the Supreme Court will not require exhaustion of administrative remedies when the act would be futile. Here, exhaustion of administrative remedies would have required plaintiffs to stand by while defendant processed an application for ground water that did not fall within the exception to the Upper Missouri River basin closure law in 85-2-343. Waiting for applications to be issued before challenging them administratively or judicially would have been ineffective in preventing immediate harm to surface water in the basin and would have deprived plaintiffs of a remedy and required participation in a costly administrative process to object to applications that were expressly prohibited by the basin closure law and defendant's own rules. Thus, the futility exception to the exhaustion requirement relieved plaintiffs from having to exhaust administrative remedies before seeking judicial review, and the District Court was reversed. Mont. Trout Unlimited v. Dept. of Natural Resources and Conservation, 2006 MT 72, 331 M 483, 133 P3d 224 (2006).

*Improper Agency Interpretation of Basin Closure Language:* The Legislature did not define the phrase "immediately or directly connected to surface water" in 85-2-340. The Department of Natural Resources and Conservation interpreted the language to apply to ground water that induced surface water infiltration. However, that definition failed to account for impacts to surface water flow caused by the prestream capture of tributary ground water. The intent of the basin closure law was to protect senior water right holders and surface flows in the Upper Missouri River basin and other basins from reduced surface flows, and the Department's partial definition as it related to ground water was in contravention of legislative intent and did not provide sufficient protection to reasonably effectuate the purpose of the basin closure law. Mont. Trout Unlimited v. Dept. of Natural Resources and Conservation, 2006 MT 72, 331 M 483, 133 P3d 224 (2006).

### DECISIONS UNDER FORMER LAW

*Standing to Challenge Award of Water Right:* A party has standing to challenge a water right only if it conflicts with those granted to him. Thus, he has no standing to challenge a right to water from a source in which he has no water right. However, he may challenge a water right from a source from which he has a water right whether the challenged right is prior or subsequent to his own. Holmstrom Land Co., Inc. v. Newlan Creek Water District, 185 M 409, 605 P2d 1060, 36 St. Rep. 1403 (1979). Rehearing denied, 185 M 409, 605 P2d 1060, 37 St. Rep. 295 (1980). (See 1991 amendment.)

## 85-2-309. Hearings on objections — jurisdiction.

### Compiler's Comments

*2009 Amendment:* Chapter 251 in (1) near beginning after "permit" inserted "under 85-2-311" and substituted "or change in appropriation right" for "or change approval", increased period for hearing from 60 days to 90 days, and inserted third sentence allowing extension of 90-day period. Amendment effective July 1, 2009.

*Applicability:* Section 9, Ch. 251, L. 2009, provided: "[This act] applies to applications received by the department after [the effective date of this act]." Effective July 1, 2009.

*1999 Amendment:* Chapter 422 in (1) in first sentence substituted "hold a contested case hearing, pursuant to Title 2, chapter 4, part 6" for "hold a public hearing" and substituted reference to service by first-class mail for reference to service by certified mail; and made minor changes in style. Amendment effective April 23, 1999.

*Severability:* Section 6, Ch. 422, L. 1999, was a severability clause.

*1997 Amendment:* Chapter 497 in (2)(a) inserted second sentence concerning priority of certified controversies; and made minor changes in style. Amendment effective May 1, 1997.

*Saving Clause:* Section 22, Ch. 497, L. 1997, was a saving clause.

*Severability:* Section 23, Ch. 497, L. 1997, was a severability clause.

*1985 Amendment:* In (1), in first sentence, after "permit", inserted "or change approval under 85-2-402" and after "valid objection", deleted "to the issuance of the permit" and at end of first sentence inserted final clause concerning certification to District Court; and inserted (2) and (3) relating to Department's authority to certify to the District Court at any time prior to commencement or before conclusion of a hearing on objections to an application for a permit or change in appropriation right approval all factual and legal issues involving the adjudication or determination of the water rights at issue in the hearing.

*Applicability:* Section 7, Ch. 596, L. 1985, provided: "This act applies to all permit applications and changes in appropriation right applications filed and pending with the department on the effective date of this act [April 17, 1985] and upon which a proposal for a decision has not been issued by the department."

### Case Notes

*Exhaustion of Administrative Remedies Not Required When Futile:* The District Court concluded that plaintiffs were required to exhaust administrative remedies before seeking a declaratory judgment in District Court. However, pursuant to DeVoe v. Dept. of Revenue, 263 M 100, 866 P2d 228 (1993), the Supreme Court will not require exhaustion of administrative remedies when the act would be futile. Here, exhaustion of administrative remedies would have required plaintiffs to stand by while defendant processed an application for ground water that did not fall within the exception to the Upper Missouri River basin closure law in 85-2-343. Waiting for applications to be issued before challenging them administratively or judicially would have been ineffective in preventing immediate harm to surface water in the basin and would have deprived plaintiffs of a remedy and required participation in a costly administrative process to object to applications that were expressly prohibited by the basin closure law and defendant's own rules. Thus, the futility exception to the exhaustion requirement relieved plaintiffs from having to exhaust administrative remedies before seeking judicial review, and the District Court was reversed. Mont. Trout Unlimited v. Dept. of Natural Resources and Conservation, 2006 MT 72, 331 M 483, 133 P3d 224 (2006).

*Improper Agency Interpretation of Basin Closure Language:* The Legislature did not define the phrase "immediately or directly connected to surface water" in 85-2-340. The Department of Natural Resources and Conservation interpreted the language to apply to ground water that induced surface water infiltration. However, that definition failed to account for impacts to surface water flow caused by the prestream capture of tributary ground water. The intent of the basin closure law was to protect senior water right holders and surface flows in the Upper Missouri River basin and other basins from reduced surface flows, and the Department's partial definition as it related to ground water was in contravention of legislative intent and did not provide sufficient protection to reasonably effectuate the purpose of the basin closure law. Mont. Trout Unlimited v. Dept. of Natural Resources and Conservation, 2006 MT 72, 331 M 483, 133 P3d 224 (2006).

*Failure to Participate in Water Court Hearing — Attorney Fees Assessed as Sanction for Defense of Unreasonable Appeal:* Despite warnings from the Water Court of the consequences, plaintiffs chose not to participate in a Water Court hearing, thereby creating no record of their issues and preserving none of their arguments for appeal. They appealed anyway, contending that the Water Court's findings were in error. The Supreme Court first found that the findings and conclusions were correct, then sanctioned plaintiffs pursuant to former Rule 32, M.R.App.P. (now superseded), finding that defendant was entitled to attorney fees incurred in defending an appeal that was taken without any substantial or reasonable grounds, that delayed the case, and that wasted the resources of defendant and the Supreme Court. Swinger v. Collins, 1999 MT 202, 295 M 447, 984 P2d 151, 56 St. Rep. 787 (1999).

## 85-2-310. Action on application for permit or change in appropriation right.

### Compiler's Comments

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 4, Ch. 244, L. 2023. Amendment effective January 1, 2024, and terminates June 30, 2031.

*2013 Amendment:* Chapter 335 in (2) in two places substituted "permit or change in appropriation right" for "application"; in (7)(a) substituted current language for "Except as provided in subsection (6), an application may not be denied or approved in a modified form or upon terms, conditions, or limitations specified by the department unless the applicant is first granted an opportunity to be heard. If an objection is not filed against the application but the department is of the opinion that the application should be denied or approved in a modified form or upon terms, conditions, or limitations specified by it, the department shall prepare a statement of its opinion and its reasons for the opinion"; in (7)(b) substituted "notice of a preliminary determination to grant a permit or change in appropriation right in a modified form" for "a statement of its opinion", after "hearing" inserted "pursuant to 2-4-604 to show cause by a preponderance of the evidence as to why the permit or change in appropriation right should not be preliminarily determined to be granted in the modified form", and substituted "the permit or change in appropriation right will be preliminarily determined to be granted as modified" for "the application will be modified in a specified manner or denied"; and made minor changes in style. Amendment effective October 1, 2013.

*2011 Amendment:* Chapter 29 in (9)(c)(v) at beginning inserted exception clause; and inserted (10) regarding water marketing for the purpose of aquifer recharge or mitigation. Amendment effective October 1, 2011.

*2009 Amendment:* Chapter 251 deleted former (1) that read: "(1) The department shall grant, deny, or condition an application for a permit or change in appropriation right in whole or in part within 120 days after the last date of publication of the notice of application if no objections have been received and within 180 days if a hearing is held or objections have been received. However, in either case the time may be extended upon agreement of the applicant or, in those cases where an environmental impact statement must be prepared or in other extraordinary cases, may be extended by not more than 60 days upon order of the department. If the department orders the time extended, it shall serve a notice of the extension and the reasons for the extension by first-class mail upon the applicant and each person who has filed an objection as provided by 85-2-308"; inserted (1)(a) requiring hearing if department proposes to deny application; inserted (1)(b)(i) and (1)(b)(ii) relating to change of hearing examiner on request of applicant; inserted (2) relating to proposal to grant application after hearing on proposal to deny application; inserted (3) relating to grant of permit or change in appropriation right when there are no valid objections or objections are unconditionally withdrawn; inserted (4) relating to grant of permit or change in appropriation right after objections withdrawn with conditions; inserted (5) requiring grant or denial of permit within 90 days after administrative record closed; in (9)(c)(iv) substituted "(9)(c)(iii)" for "(4)(c)(iii)"; and made minor changes in style. Amendment effective July 1, 2009.

*Applicability:* Section 9, Ch. 251, L. 2009, provided: "[This act] applies to applications received by the department after [the effective date of this act]." Effective July 1, 2009.

*2007 Amendment:* Chapter 213 inserted (2) providing that if an application is to appropriate water with a point of diversion, conveyance, or place of use on national forest system lands, any application approved by the department is subject to any written special use authorization required by federal law; in (3) at beginning of first sentence inserted exception clause; and made minor changes in style. Amendment effective April 17, 2007.

*2005 Amendments — Composite Section:* Chapter 70 in (1) in first sentence near beginning after "permit" inserted "or change in appropriation right" and in second sentence after "extraordinary cases" inserted "may be extended by"; in (3) in first sentence near beginning after "permit" inserted "or change in appropriation right" and in second sentence near middle inserted "for a permit application"; and made minor changes in style. Amendment effective March 24, 2005.

Chapter 337 in (4)(d) after "statement" substituted "costs or fees" for "fee"; and made minor changes in style. Amendment effective April 21, 2005.

*Saving Clause:* Section 15, Ch. 70, L. 2005, was a saving clause.

*Applicability:* Section 22, Ch. 337, L. 2005, provided: "[This act] applies to environmental impact statements on which the agency responsible for preparation commenced preparation after December 31, 2004."

*1999 Amendment:* Chapter 422 in (1) and (2) substituted references to service by first-class mail for references to service by certified mail; and made minor changes in style. Amendment effective April 23, 1999.

*Severability:* Section 6, Ch. 422, L. 1999, was a severability clause.

*1991 Amendment:* In (4)(c)(iii), in second sentence after "a reasonable time line", deleted "not to exceed 10 years from the time of issuance of a permit". Amendment effective July 1, 1991.

*1987 Amendment:* In (4)(a)(iii), in first sentence after "project plan", deleted "including, but not limited to, a reasonable time line for the completion of the project and the actual application of the water to a beneficial use, which may not exceed 10 years from the date of application, detailing", inserted "describing", and inserted last sentence concerning time line.

*1985 Amendment — Applicability:* Inserted (4) listing criteria under which the Department must find that an application filed after July 1, 1973, lacks good faith or shows no bona fide intent to appropriate water for a beneficial use.

Section 3, Ch. 399, L. 1985, read: "This act applies retroactively, within the meaning of 1-2-109, to all applications filed after July 1, 1973."

*Statement of Intent:* The statement of intent attached to Ch. 399, L. 1985, provided: "A statement of intent is desirable for this bill because it authorizes the board of natural resources and conservation [functions now transferred to department of natural resources and conservation] to make rules on the new material enacted in the bill. The rules would implement section 1 [85-2-310(4)] of the bill, which establishes criteria for the department of natural resources and conservation to reject an application for a beneficial water use permit that is not in good faith or does not show a bona fide intent to appropriate water.

The intent is to adopt those rules necessary to implement the criteria listed in section 1 [85-2-310(4)]. Because the criteria are specific, the rulemaking authority would be limited to adopting rules:

(1) defining a proposed place of use;
(2) prescribing the contents of a detailed project plan and of a general project plan;
(3) defining reasonable time lines, not to exceed 10 years, for completion of projects; and
(4) prescribing the detailed information to implement criteria relative to applications for water use above that amount of water which will be used solely by the applicant."

*1985 Applicability:* Section 3, Ch. 399, L. 1985, read: "This act applies retroactively, within the meaning of 1-2-109, to all applications filed after July 1, 1973."

*1981 Amendment:* Substituted "objections have been received" for "hearing is held" after "if no" in the first sentence of (1); inserted "or objections have been received" after "if a hearing is held" at the end of the first sentence of (1).

*1981 Applicability:* Subsection (2), sec. 7, Ch. 357, L. 1981, provided: "Subsection (1) of section 1 [sec. 1, Ch. 357, L. 1981, amending 85-2-306], section 3 [sec. 3, Ch. 357, L. 1981, amending 85-2-310], and section 4 [sec. 4, Ch. 357, L. 1981, amending 85-2-311] apply to notices of completion and applications pending before the department and to those filed with the department after April 14, 1981."

**Case Notes**

*Erroneous Grant of Writ of Mandate After Statement Issued That Statutory Water Permit Criteria Not Satisfied — Remand:* In December 2005, plaintiff filed an application for a water use permit for construction of a municipal water system in a subdivision. In February 2007, the Department of Natural Resources and Conservation (DNRC) issued a document directing that public notice be given of plaintiff's application. At this point in the application process, plaintiff's application was considered correct and complete. Parties objected to the application, but plaintiff settled with those parties. DNRC then sent plaintiff another application review form, and plaintiff provided additional requested information. By August 2007, more than 180 days had elapsed since the application was filed, but DNRC had still not taken action on it. In December 2007, plaintiff filed for a writ of mandate to require DNRC to issue a water use permit. Shortly after the petition for a writ was filed, DNRC issued a statement of opinion stating the plaintiff had failed to satisfy certain criteria under 85-2-311, and moved to quash the petition for a writ. Nevertheless, in May 2008, the District Court concluded that once DNRC made the decision that plaintiff's application was correct and complete and took no further action, the only remaining option was the ministerial option of granting the permit. Therefore, the writ of mandate was issued directing DNRC to grant the permit to plaintiff. DNRC appealed, and the Supreme Court reversed. The District Court erroneously granted the writ of mandate because the writ was issued after DNRC had already issued a statement that plaintiff failed to satisfy the statutory application criteria by a preponderance of the evidence. Because the statement of opinion was issued, even if in error, that action could not be undone by a writ of mandate regardless of the writ's propriety or whether DNRC had statutory or jurisdictional authority to issue the opinion. Additionally, the District Court erred in concluding that DNRC had a legal duty to issue a permit in this case. Once plaintiff's application was correct and complete, DNRC had a clear legal duty to process the application in a timely manner. DNRC failed to process the application and could have been commanded to make a decision one way or the other as soon as the timeframes lapsed, but issuance of the permit does not become a clear legal duty until objections are resolved and the applicant has proven all 85-2-311 criteria by a preponderance of the evidence. As set out in the statement of opinion, plaintiff had not satisfied all the criteria, so DNRC was under no legal duty to issue the permit. Thus, the writ of mandate was reversed and the case was remanded for further proceedings to allow plaintiff to request a hearing with DNRC regarding the application. Bostwick Properties, Inc. v. Dept. of Natural Resources and Conservation, 2009 MT 181, 351 M 26, 208 P3d 868 (2009), following Beasley v. Flathead County Bd. of Adjustment, 2009 MT 120, 350 M 171, 205 P3d 812 (2009). See also Bostwick Properties, Inc. v. Dept. of Natural Resources and Conservation, 2013 MT 48, 369 Mont. 150, 296 P.3d 1154.

*No Injunction for Ground Water Pumping Violation When Water Use Permit Granted — Request for Attorney Fees Moot:* Defendant water and wastewater system operator was granted a provisional permit to pump ground water to service various businesses and residences in a water district, conditioned upon final state approval. However, defendant began pumping ground water before final approval was granted, and plaintiffs sought an injunction to stop the pumping and sought attorney fees in connection with the request for injunctive relief. Defendant moved for summary dismissal on grounds that plaintiffs did not have standing to enforce the Montana Water Use Act. The District Court agreed and dismissed plaintiffs' complaint, and plaintiffs appealed. About 2 weeks before the appeal was filed, the state granted final approval of defendant's permit. The Supreme Court held that issuance of the final permit rendered moot plaintiffs' request for injunctive relief and for attorney fees as well, including attorney fees under the private attorney general doctrine. The District Court was affirmed. Faust v. Util. Solutions, LLC, 2007 MT 326, 340 M 183, 173 P3d 1183 (2007).

### 85-2-311. Criteria for issuance of permit.

**Compiler's Comments**

*2021 Amendment:* Chapter 317 in (1)(a)(ii)(B) near beginning, in (1)(a)(ii)(C) in middle and near end, and in (3)(b)(i) near beginning substituted "existing legal demands of water rights" for "existing legal demands"; in (3)(b)(i) in middle substituted "projected legal demands of water rights" for "projected demands"; and in (4)(c)(iv) at beginning substituted "existing legal demands of water rights" for "demands". Amendment effective April 30, 2021.

*2019 Amendment:* Chapter 38 in (9) deleted former last sentence that read: "However, the department shall determine if water is legally available to satisfy the proposed use." Amendment effective October 1, 2019.

*Preamble:* The preamble attached to Ch. 38, L. 2019, provided: "WHEREAS, the determination of legal availability is a critical analysis when determining if there is sufficient water for new beneficial use; and

WHEREAS, the determination of legal availability is a test that is conducted independent of the test to determine if a new use will cause adverse effect; and

WHEREAS, the analysis for determining legal availability is provided in section 85-2-311(1)(a)(ii), MCA; and

WHEREAS, it is redundant to further state that the department must conduct a legal availability analysis in section 85-2-311(9), MCA; and

WHEREAS, the Montana Legislature finds that removing the statement that the department conduct a legal availability analysis pursuant to section 85-2-311(9), MCA, simplifies and clarifies the requirement for legal availability analysis pursuant to section 85-2-311(1)(a)(ii), MCA."

*2017 Amendment:* Chapter 243 in (1)(b) inserted last sentence providing that applicant is not required to prove lack of adverse effect in connection with permit application; and inserted (9) regarding the department not conducting adverse effects analysis and the department determination regarding whether water is legally available. Amendment effective October 1, 2017, and terminates September 30, 2023.

*2013 Amendment:* Chapter 335 in (8) inserted "85-2-319, 85-2-321" and after "85-2-344" deleted "or during the period of closure for any basin that is administratively closed pursuant to 85-2-319". Amendment effective October 1, 2013.

*2007 Amendments — Composite Section:* Chapter 213 in (1)(e) at end after "beneficial use" inserted "or if the proposed use has a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the permit"; and made minor changes in style. Amendment effective April 17, 2007.

Chapter 391 in (5) at beginning inserted "Subject to 85-2-360"; inserted (8) concerning application for ground water in closed basin; and made minor changes in style. Amendment effective May 3, 2007.

*Preamble:* The preamble attached to Ch. 391, L. 2007, provided: "WHEREAS, it is the policy of this state to encourage the wise use of the state's water resources by making them available for appropriation and to provide wise utilization, development, and conservation of the water of the state for the maximum benefit of its people with the least possible degradation of the state's natural aquatic ecosystems; and

WHEREAS, there has been confusion regarding ground water issues in closed basins and the Department of Natural Resources and Conservation needs guidance from the Legislature on how to proceed; and

WHEREAS, the basin closure laws were passed to protect senior appropriators while the state water adjudication is ongoing; and

WHEREAS, ground water development in closed basins should be able to proceed as long as the applicant collects the necessary scientific information to determine if there will be an adverse effect on a prior appropriator and takes the necessary actions to mitigate or prevent any adverse effects on a prior appropriator; and

WHEREAS, it is critical that the Legislature develop state water policies in a way that protects the prior appropriation doctrine while at the same time protecting the quality of Montana's water and the ability to appropriate water consistent with section 85-1-101, MCA, and Article IX, section 3, of the Montana Constitution; and

WHEREAS, augmentation is statutorily authorized for the Clark Fork River Basin only; and

WHEREAS, the Department of Natural Resources and Conservation has developed administrative rules and applied augmentation through these administrative rules to all basins even though not specifically statutorily authorized; and

WHEREAS, administrative rules and rulemaking must comply with section 2-4-305, MCA, and may not engraft material not contemplated by the Legislature; and

WHEREAS, this bill provides definitions and a new procedure for mitigation and aquifer recharge."

*Severability:* Section 29, Ch. 391, L. 2007, was a severability clause.

*Applicability:* Section 31, Ch. 391, L. 2007, provided: "[This act] applies to applications for an appropriation right in a closed basin filed on or after [the effective date of this act]." Effective May 3, 2007.

*1997 Amendment:* Chapter 497 in (1) inserted first, second, and third sentences concerning issuance of permit before adjudication of source of supply, lack of presumption that applicant cannot meet criteria, and alteration of terms and conditions of existing right; in (1)(a)(i) substituted "is water physically available" for "are unappropriated waters in the source of supply"; deleted former (1)(a)(i) that read: "(i) at times when the water can be put to the use proposed by the applicant"; deleted (1)(a)(iii) that read: "(iii) during the period in which the applicant seeks to appropriate, in the amount requested and that is reasonably available"; inserted (1)(a)(ii) concerning legal availability of water; in (1)(b) inserted "under an existing water right, a certificate, a permit, or a state water reservation" and inserted "In this subsection (1)(b), adverse effect must be determined based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied"; deleted former (1)(e) that read: "(e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved"; deleted former (3)(b) that read: "(b) the rights of a prior appropriator will not be adversely affected"; in (4)(a), near middle of first sentence, inserted "federal non-Indian and Indian"; adjusted subsection references; and made minor changes in style. Amendment effective May 1, 1997.

*1997 Statement of Intent:* The statement of intent attached to Ch. 497, L. 1997, provided: "The legislature intends that the Montana Supreme Court's decision in In the Matter of the Application for Beneficial Water Use Permit Nos. 66459-76L, Ciotti, 64988-g76L, Starner; and Application for Change of Appropriation Water Right No. G15152-s761, Pope, 53 St. Rep. 777 at 784, 923 P.2d 1073, be negated by the passage and approval of this bill. The legislature further intends that the portion of the district court decision in United States v. DNRC (1st Judicial District, Montana, June 15, 1987), No. 50612, (see also the concurring opinion in the Montana Supreme Court's decision in In the Matter of the Application for Beneficial Water Use Permit Nos. 66459-76L Ciotti, 64988-g76L, Starner; and Application for Change of Appropriation Water Right No. G15152-s761, Pope, 53 St. Rep. 777 at 784, 923 P.2d 1073), determining that in the absence of a quantification of existing water rights, the department of natural resources and conservation does not have the authority to issue a permit for a new water application when questions of senior conflicting claims are raised, be negated by the passage and approval of this bill, specifically by the passage and approval of the amendments to 85-2-311. A statement of intent is desired for this bill in order to provide guidance to the department under 85-2-311 concerning implementation and interpretation of the physical availability of water and reasonable legal availability of water criteria. To find that water is available for the issuance of a permit, the department shall require a three-step analysis involving the following factors: identify physical water availability, identify existing legal demands on the source of supply, and compare and analyze the physical water supply at the proposed point of diversion with the existing legal demands on the source of supply."*Saving Clause:* Section 22, Ch. 497, L. 1997, was a saving clause.

*Severability:* Section 23, Ch. 497, L. 1997, was a severability clause.

*1995 Amendment:* Chapter 418 in (2), in third sentence, substituted "department of environmental quality" for "department of health and environmental sciences"; in (5) substituted "U.S. natural resources conservation service" for "U.S. soil conservation service"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1993 Amendments:* Chapter 370 near beginning of (1) and (5) substituted "preponderance of evidence" for "substantial credible evidence"; and in (5), near beginning after "applicant", inserted "in addition to other evidence demonstrating that the criteria of subsection (1) have been met", before "hydrologic" deleted "independent", after "including" inserted "but not limited to", after "information developed by the" inserted "applicant, the", and at end, after "studies", deleted "demonstrating that the criteria are met". Amendment effective April 16, 1993.

Chapter 460 in (1), near beginning, substituted "subsections (3) and (4)" for "subsections (2) and (3)" and substituted "preponderance of evidence" for "substantial credible evidence"; inserted (1)(g) concerning water quality, (1)(h) concerning classification of water, and (1)(i) concerning effluent limitations; inserted (2) requiring that a valid objection be made before an applicant needs to prove that the permit criteria have been met; in (4), near end, substituted "subsection (4)" for "subsection (3)"; in (4)(b)(i) substituted "subsection (1) or (3)" for "subsection (1) or (2)"; in (4)(c) substituted "subsections (4)(b)(ii) and (4)(b)(iii)" for "subsections (3)(b)(ii) and

(3)(b)(iii)"; near beginning of (5) substituted "preponderance of evidence" for "substantial credible evidence"; inserted (7) allowing the Department to adopt rules; and made minor changes in style. Amendment effective April 21, 1993.

*1993 Statement of Intent:* The statement of intent attached to Ch. 460, L. 1993, provided: "A statement of intent is required for this bill because the bill gives the department of natural resources and conservation authority to adopt administrative rules. The bill adds statutory criteria for the department to consider in the processing of an application for a permit, change authorization, controlled ground water area, or basin closure. In adopting rules implementing this bill and in interpreting the new statutory language, it is the intent of the legislature that the department and board of natural resources and conservation [functions now transferred to department of natural resources and conservation] should assess the magnitude, character, duration, and geographical extent of the projected effects on the uses of water as classified and utilize this assessment in a practical manner."

*Severability:* Section 11, Ch. 370, L. 1993, was a severability clause.

Section 7, Ch. 460, L. 1993, was a severability clause.

*Retroactive Applicability:* Section 12, Ch. 370, L. 1993, provided: "[Sections 1 through 8] apply retroactively, within the meaning of 1-2-109, to all applications and objections pending on [the effective date of this act] [effective April 16, 1993] that are subject to the provisions of Title 85, chapter 2."

Section 8, Ch. 460, L. 1993, provided: "[Sections 1 and 3] [85-2-311 and 85-2-402] apply retroactively, within the meaning of 1-2-109, to all applications for a permit or change in appropriation right that the department has not noticed out for objection as of [the effective date of this act]." Effective April 21, 1993.

*1989 Amendments:* Chapter 432 at end of (1)(a) inserted "at the proposed point of diversion"; near end of (1)(a)(iii), before "available", inserted "reasonably"; inserted (1)(f) relating to possessory interest; and made minor changes in phraseology. Amendment effective April 4, 1989.

Chapter 495 in (1) substituted "subsections (2) and (3)" for "subsections (2) through (4)"; inserted (4) relating to evidence necessary to meet the substantial credible evidence standard; and made minor changes in phraseology. Amendment effective April 11, 1989.

*1985 Amendment:* In (1) near beginning, after "(2)", changed "and (3)" to "through (4)"; in (2) reduced the threshold for issuance of a permit under this subsection from 10,000 acre-feet or 15 cubic feet per second to 4,000 acre-feet and 5.5 cubic feet per second and substituted "the applicant proves by clear and convincing evidence that" for "it affirmatively finds"; in (2)(b) at beginning, deleted "the applicant has proven by clear and convincing evidence that"; after (2)(c)(ii), deleted former (2)(a)(iii)(C) that read: "the economic feasibility of the project"; in (2)(c)(iii) after "quality", deleted "and potability"; inserted (2)(c)(iv) prohibiting the Department from issuing a permit for an appropriation of 4,000 or more acre-feet of water per year and 5.5 or more cubic feet per second of water unless the applicant proves that, based on the effects on the quantity and quality of water for existing beneficial uses in the supply source, the proposed appropriation is a reasonable use; deleted former (2)(b) that read: "A permit for an appropriation for a diversion for a consumptive use of 10,000 or more acre-feet of water a year or 15 or more cubic feet per second of water under this subsection may not be issued unless the department petitions the legislature and the legislature affirms the findings of the department"; inserted (3) establishing criteria to allow the out-of-state transportation and use of public water; and in (4) inserted "use" after "impoundment" three times and after "impound" once, and in first sentence at end, changed "null and void" to "invalid".

*1985 Applicability:* Section 27, Ch. 573, L. 1985, provided: "This act applies to all permit applications, change in appropriation right applications, water sales and lease applications, and reservation applications filed and pending with the department on July 1, 1985, but upon which a hearing under Title 85, chapter 2, has not yet commenced."

*1983 Amendments:* Chapter 448, in (1)(b) after "the" inserted "water".

Chapter 706 made the following changes: at beginning of (1), inserted "Except as provided in subsections (2) and (3)"; at end of (1), after "if" inserted "the applicant proves by substantial credible evidence that the following criteria are met"; deleted former (6) and (7), which read: "(6) an applicant for an appropriation of 10,000 acre-feet a year or more and 15 cubic feet per second or more proves by clear and convincing evidence that the rights of a prior appropriator will not be adversely affected;

(7) except as provided in subsection (6), the applicant proves by substantial credible evidence the criteria listed in subsections (1) through (5)."; and inserted (2) and (3) requiring the Department to issue a permit to appropriate water if the rights of a prior appropriator will not

be adversely affected and the proposed means of diversion, construction, and operation of the appropriation works are adequate.

*Temporary Changes Made Permanent:* Section 7, Ch. 706, L. 1983, provided that the amendments made by Ch. 706 were to terminate on July 1, 1985. Section 23, Ch. 573, L. 1985, amended sec. 7, Ch. 706, L. 1983, to provide that only one section (Ch. 706, sec. 4), that established the Select Committee on Water Marketing, would terminate on July 1, 1985. Thus, the amendments to this section made by Ch. 706, L. 1983 (set forth below in the 1983 amendment note), are now permanent, except insofar as the section was further amended in 1985.

*1981 Amendment:* Substituted "diversion, construction, and operation of the appropriation works" for "diversion or construction" in (3); substituted "and" for "or" after "a year or more" in (6); added (7) relating to required burden of proof.

*1981 Applicability:* Subsection (2), sec. 7, Ch. 357, L. 1981, provided: "Subsection (1) of section 1 [sec. 1, Ch. 357, L. 1981, amending 85-2-306], section 3 [sec. 3, Ch. 357, L. 1981, amending 85-2-310], and section 4 [sec. 4, Ch. 357, L. 1981, amending 85-2-311] apply to notices of completion and applications pending before the department and to those filed with the department after April 14, 1981."

**Case Notes**

## DECISIONS UNDER CURRENT LAW

*Confidence in Agency's Determination of Legal Availability Undermined by Errors of Law and Process — Final Order Correctly Vacated by District Court.* Flathead Lakers Inc. v. Dept. of Natural Resources and Conservation, 2023 MT 85, 412 Mont. 225, 530 P.3d 769.

*Department's Failure to Acknowledge Evapotranspiration Analysis in Order Rejecting Application Arbitrary and Capricious:* An applicant for a water use permit worked with the Department of Natural Resources and Conservation (DNRC) for years to get the application to correct and complete status and address issues raised by DNRC in various technical reports. At one point during the process, the applicant submitted an evapotranspiration analysis showing that savings from reduced evapotranspiration would bring the net depletion caused by the proposed new use to zero. Although DNRC appeared to endorse or even adopt the evapotranspiration analysis at some points during its back-and-forth with the applicant, its final order rejecting the application made no mention of the analysis. The Water Court reviewed the matter pursuant to the Montana Administrative Procedure Act. It found that DNRC had indicated that the evapotranspiration analysis was going to be an important element of its consideration of the application, that the applicant had worked in good faith to provide all data that DNRC requested, and that DNRC was obligated to, at a minimum, explain why it had not found the analysis persuasive after all. These factors resulted in a finding that DNRC's failure to acknowledge the evapotranspiration analysis was arbitrary and capricious. The Supreme Court affirmed the Water Court's conclusion. DeBuff v. Dept. of Natural Resources and Conservation, 2021 MT 68, 403 Mont. 403, 482 P.3d 1183.

*Department's Reliance on Materials Not in Administrative Record Not Improper — Water Court Reversed:* The Department of Natural Resources and Conservation issued an order denying a permit application. It relied on a map and prior order that were not part of the evidentiary record in its decision. The Water Court found that this reliance caused the proceeding to be based on an unlawful procedure that violated the applicant's right to due process. On appeal, the Supreme Court reversed, finding that the map was appropriately relied on because it was known to, cited by, and endorsed by the applicant's engineers throughout the application process and that the prior order was appropriately considered because it was either a "record of the department" allowed under statute or was judicially cognizable as a prior decision. DeBuff v. Dept. of Natural Resources and Conservation, 2021 MT 68, 403 Mont. 403, 482 P.3d 1183.

*Scope of Water Quality Nondegradation Review for Beneficial Water Use Permit Limited to Objections by Department of Environmental Quality or Local Water Quality District — No Constitutional Violation:* The Department of Natural Resources and Conservation (DNRC) granted a mining company a beneficial water use permit to appropriate groundwater in connection with the first exploratory phase of a proposed mining operation. Environmental groups appealed the granting of the permit, and the District Court reversed, concluding that DNRC had not adequately considered the water quality aspects of the permit application. The Supreme Court reversed, finding that the District Court had erroneously attempted to incorporate the independently applicable nondegradation standards set forth in the Montana Water Quality Act (MWQA) into the Montana Water Use Act (MWUA). Under the MWUA, only the Department of Environmental Quality or a local water quality district is permitted to object to the portion of a permit application related to water quality. The Supreme Court addressed the question of whether this limitation presents a constitutional issue. It concluded that as long as the Legislature provides an adequate remedy for advance environmental review and protection, the remedy need not be contained within the MWUA. In this situation, the water use permit issued under the MWUA would not exempt the proposed use from environmental review and regulation or, in itself, provide authorization to degrade state waters. Rather, the proposed appropriation could only be allowed to proceed if and when it was also approved under the Montana Metal Mine Reclamation Act and incorporated MWQA standards. Therefore, there was no violation of Art. II, sec. 3, Mont. Const., or Art. IX, sec. 1, Mont. Const. Clark Fork Coalition v. Dept. of Natural Resources and Conservation, 2021 MT 44, 403 Mont. 225, 481 P.3d 198.

*Term "Legal Demands" Not Interpreted to Require Consideration of Water Quality Nondegradation Standards:* The Department of Natural Resources and Conservation (DNRC) granted a mining company a beneficial water use permit to appropriate groundwater in connection with the first exploratory phase of a proposed mining operation. Environmental groups appealed the granting of the permit, and the District Court found that the term "legal demands" as formerly used in 85-2-311(1)(a)(ii) required an applicant to demonstrate compliance with applicable water quality standards administered and enforced by the Water Quality Division within the Department of Environmental Quality, including administrative rules that prohibit decreasing the flow of surface waters designated "outstanding resource waters" by more than a certain percentage per month. Accordingly, the District Court reversed the permit grant and remanded to DNRC for additional consideration of the water quality aspects of the permit. The Supreme Court found that, in the context of the Montana Water Use Act (MWUA), the term "legal demands" referred to the total volume of water appropriated or reserved by existing rights holders throughout the total area, both upstream and downstream, that could be potentially affected by the proposed use. It found that the District Court had erroneously attempted to incorporate the independently applicable nondegradation standards set forth in the Montana Water Quality Act into the MWUA. The Supreme Court therefore reversed the District Court and affirmed DNRC's grant of the permit. Clark Fork Coalition v. Dept. of Natural Resources and Conservation, 2021 MT 44, 403 Mont. 225, 481 P.3d 198. Note: the statutory language discussed in this case ("legal demands") was amended to "existing legal demands of water rights" by sec. 1, Ch. 317, L. 2021.

*Inadequate Deficiency Letter — Application Correct and Complete as Matter of Law After Elapsed Time:* A party applied for a permit to pump aquifer water for a bottling plant. The Department of Natural Resources and Conservation (DNRC) issued a deficiency letter that did not identify defects. Then, 180 days later, DNRC notified the party that its application was correct and complete and issued a preliminary determination to grant the application. Objectors then sued in District Court, arguing that DNRC erred by granting a preliminary determination on allegedly incomplete information. The District Court agreed with the objectors and reversed DNRC's decision. On appeal, the Supreme Court reversed the District Court on the grounds that, after 180 days elapsed without an identification of deficiencies, the application became correct and complete as a matter of law. Flathead Lakers Inc. v. Dept. of Natural Resources and Conservation, 2020 MT 132, 400 Mont. 170, 464 P.3d 396.

*Mitigation Plan Properly Required When Net Depletion of Surface Water Found:* The plaintiff applied to the Department of Natural Resources and Conservation (DNRC) for a ground water permit. The District Court determined that the plaintiff's proposed usage would have resulted in a net depletion of surface water, requiring that the plaintiff mitigate any net depletion of water. The plaintiff appealed the District Court's decision, arguing that its use would not result in a net depletion of surface water; therefore, no mitigation plan was necessary. The plaintiff noted its plan to pave roads and parking lots would result in adequate runoff to refill any surface water depleted by its use, but the Supreme Court found that under 85-2-361, the Legislature intended to consider only factors regarding appropriated water, rather than other water used to replace lost water. The plaintiff also argued that its use of ground water could not be proven to adversely affect surface or ground water and senior appropriators, but the court noted that the plaintiff was required under 85-2-311 to show its water usage would result in no adverse effects. The plaintiff argued that any senior water rights holders could force it to stop using water, but because adverse effects were difficult to prove for the plaintiff, senior water rights holders would find it equally difficult to defend their rights, and under 85-2-311, the applicant had the clear burden to prove the lack of adverse effect. Last, the plaintiff noted that its proposed de minimis usage could not affect senior water rights, but 85-2-360 creates no de minimis exception, and during annual irrigation periods, all water is already appropriated, resulting in junior rights holders generally being cut off because of a lack of water. Hence, because the District Court properly found the proposed usage would have resulted in a net depletion of surface water, the mitigation requirement was appropriate. Bostwick Properties, Inc. v. Dept. of Natural Resources and Conservation, 2013 MT 48, 369 Mont. 150, 296 P.3d 1154.

*Mitigation Proposal Adequate as Matter of Law Although Plan Did Not Include Mitigation During Nonirrigation Season:* The plaintiff applied to the Department of Natural Resources and Conservation (DNRC) for a ground water permit. The District Court determined the plaintiff's proposed usage would have resulted in a net depletion of surface water, requiring that the plaintiff mitigate any net depletion of water. However, the District Court further found that as a matter of law, the plaintiff's mitigation proposal was adequate. The plaintiff's mitigation plan included the acquisition of a senior water right for irrigation seasons only. During nonirrigation seasons, the District Court found, the plaintiff's water usage would affect only the Department of Fish, Wildlife, and Parks (FWP), which stated that it would face no adverse effects because of the mitigation plan. Although DNRC could properly apply the criteria under this section, the District Court properly found that because of the plaintiff's acquisition of a senior water right during the irrigation season, FWP's acknowledgment that it would not be affected by the mitigation plan during the nonirrigation season, and the nature of the water flow in the nonirrigation season, the plaintiff's mitigation plan was adequate as a matter of law. Bostwick Properties, Inc. v. Dept. of Natural Resources and Conservation, 2013 MT 48, 369 Mont. 150, 296 P.3d 1154.

*Erroneous Grant of Writ of Mandate After Statement Issued That Statutory Water Permit Criteria Not Satisfied — Remand:* In December 2005, plaintiff filed an application for a water use permit for construction of a municipal water system in a subdivision. In February 2007, the Department of Natural Resources and Conservation (DNRC) issued a document directing that public notice be given of plaintiff's application. At this point in the application process, plaintiff's application was considered correct and complete. Parties objected to the application, but plaintiff settled with those parties. DNRC then sent plaintiff another application review form, and plaintiff provided additional requested information. By August 2007, more than 180 days had elapsed since the application was filed, but DNRC had still not taken action on it. In December 2007, plaintiff filed for a writ of mandate to require DNRC to issue a water use permit. Shortly after the petition for a writ was filed, DNRC issued a statement of opinion stating the plaintiff had failed to satisfy certain criteria under 85-2-311, and moved to quash the petition for a writ. Nevertheless, in May 2008, the District Court concluded that once DNRC made the decision that plaintiff's application was correct and complete and took no further action, the only remaining option was the ministerial option of granting the permit. Therefore, the writ of mandate was issued directing DNRC to grant the permit to plaintiff. DNRC appealed, and the Supreme Court reversed. The District Court erroneously granted the writ of mandate because the writ was issued after DNRC had already issued a statement that plaintiff failed to satisfy the statutory application criteria by a preponderance of the evidence. Because the statement of opinion was issued, even if in error, that action could not be undone by a writ of mandate regardless of the writ's propriety or whether DNRC had statutory or jurisdictional authority to issue the opinion. Additionally, the District Court erred in concluding that DNRC had a legal duty to issue a permit in this case. Once plaintiff's application was correct and complete, DNRC had a clear legal duty to process the application in a timely manner. DNRC failed to process the application and could have been commanded to make a decision one way or the other as soon as the timeframes lapsed, but issuance of the permit does not become a clear legal duty until objections are resolved and the applicant has proven all 85-2-311 criteria by a preponderance of the evidence. As set out in the statement of opinion, plaintiff had not satisfied all the criteria, so DNRC was under no legal duty to issue the permit. Thus, the writ of mandate was reversed and the case was remanded for further proceedings to allow plaintiff to request a hearing with DNRC regarding the application. Bostwick Properties, Inc. v. Dept. of Natural Resources and Conservation, 2009 MT 181, 351 M 26, 208 P3d 868 (2009), following Beasley v. Flathead County Bd. of Adjustment, 2009 MT 120, 350 M 171, 205 P3d 812 (2009). See also Bostwick Properties, Inc. v. Dept. of Natural Resources and Conservation, 2013 MT 48, 369 Mont. 150, 296 P.3d 1154.

*Agency Prerogative to Repeal Administrative Rules as Long as Statute Not Violated — Repeal of Administrative Definition of Municipal Use in Water Use Act:* Although the term "municipal use" is used repeatedly in the Water Use Act, the term was not statutorily defined. In 2005, the Department of Natural Resources and Conservation adopted ARM 36.12.101 that defined municipal use as water appropriated by and provided for those in and around a municipality or unincorporated town. Under the rule, only a municipality or unincorporated town arguably qualified as an acceptable appropriator, when previously it was only necessary that water be appropriated for those in a municipality or unincorporated area. About 1 year after the rule was adopted, the Department sought to repeal the rule because the definition was not in keeping with the historical interpretation of the term by the Department and the Montana Water Court. Following repeal, plaintiffs requested that the District Court declare that repeal of the rule was invalid. The District Court held that by repealing the rule: (1) the definition of municipal use was rendered nebulous and unfairly accommodating of private developers' applications for water use permits; (2) the purpose of the basin closure law to protect and preserve existing water rights would be undermined, potentially threatening senior water rights in an already overappropriated basin; and (3) legislative intent was contravened and plaintiffs' water rights were placed in jeopardy. Plaintiffs' request was granted and repeal of the rule was declared invalid. On appeal, the Supreme Court reversed. The court first determined that the issue was justiciable because it continued to present a controversy concerning the nature of water rights applications and because plaintiffs had a statutory right to challenge the repeal of the rule under 2-4-506, although plaintiffs had the burden to show that the repeal interfered with or impaired their legal rights or privileges or that repeal was implemented with an arbitrary or capricious disregard for the purpose of the implementing legislation as evidenced by the documented legislative intent. Plaintiffs did not meet their burden. The rule was not in effect long enough for plaintiffs to demonstrate that their rights or privileges were impaired or threatened by the repeal, and private entities had previously been granted municipal use permits. Additionally, plaintiffs failed to show that the repeal was arbitrary or capricious. It was the agency's prerogative to enact rules to aid in the permitting process and to repeal rules that were not of assistance as long as the agency does not violate 2-4-506. Lohmeier v. St., 2008 MT 307, 346 M 23, 192 P3d 1137 (2008).

*Exhaustion of Administrative Remedies Not Required When Futile:* The District Court concluded that plaintiffs were required to exhaust administrative remedies before seeking a declaratory judgment in District Court. However, pursuant to DeVoe v. Dept. of Revenue, 263 M 100, 866 P2d 228 (1993), the Supreme Court will not require exhaustion of administrative remedies when the act would be futile. Here, exhaustion of administrative remedies would have required plaintiffs to stand by while defendant processed an application for ground water that did not fall within the exception to the Upper Missouri River basin closure law in 85-2-343. Waiting for applications to be issued before challenging them administratively or judicially would have been ineffective in preventing immediate harm to surface water in the basin and would have deprived plaintiffs of a remedy and required participation in a costly administrative process to object to applications that were expressly prohibited by the basin closure law and defendant's own rules. Thus, the futility exception to the exhaustion requirement relieved plaintiffs from having to exhaust administrative remedies before seeking judicial review, and the District Court was reversed. Mont. Trout Unlimited v. Dept. of Natural Resources and Conservation, 2006 MT 72, 331 M 483, 133 P3d 224 (2006).

*Improper Agency Interpretation of Basin Closure Language:* The Legislature did not define the phrase "immediately or directly connected to surface water" in 85-2-340. The Department of Natural Resources and Conservation interpreted the language to apply to ground water that induced surface water infiltration. However, that definition failed to account for impacts to surface water flow caused by the prestream capture of tributary ground water. The intent of the basin closure law was to protect senior water right holders and surface flows in the Upper Missouri River basin and other basins from reduced surface flows, and the Department's partial definition as it related to ground water was in contravention of legislative intent and did not provide sufficient protection to reasonably effectuate the purpose of the basin closure law. Mont. Trout Unlimited v. Dept. of Natural Resources and Conservation, 2006 MT 72, 331 M 483, 133 P3d 224 (2006).

*Water Appropriation Application Amendments So Significant as to Constitute New Appropriations — Original Applications Considered Shams — New Applications Barred by Subbasin Closure:* Just 10 days before the Legislature closed the Bitterroot River subbasin to new water appropriations in 1999, defendants submitted four appropriation applications to develop ponds on their property for the beneficial use of wildlife. All four applications were subsequently amended to variously revise volume and flow rates, proposed pond depth, points and means of diversion, place of use, and beneficial uses. Numerous parties objected to the proposed appropriations, including plaintiff, which moved to terminate the applications on grounds that the amendments were submitted in bad faith and were new applications and that deficiencies in the applications were not cured within the statutory time limit. A hearings examiner denied the motion to terminate the applications, but nevertheless denied the applications on numerous grounds. Defendants filed exceptions to the hearings examiner's decision, and the Department of Natural Resources and Conservation reversed the hearings examiner and granted all four applications. Plaintiff petitioned the District Court for review, and the court concluded that the Department erred in accepting and processing the amended applications after the subbasin closure and in other ways and denied the applications. On appeal, the Supreme Court affirmed. The amendments to the applications were not mere refinements, but constituted changes so significant that the amended applications bore such little resemblance to the original applications as to be considered shams. The nature and extent of the changes could be consistent only with new applications with new priority dates, which were prohibited by the subbasin closure. The Supreme Court noted that to hold otherwise would establish a precedent allowing a prospective appropriator to file a deficient application and later amend the application without penalty, thereby gaining an advantage over other appropriators and circumventing other restrictions associated with a subbasin closure. Bitterroot River Protective Ass'n, Inc. v. Siebel, 2005 MT 60, 326 M 241, 108 P3d 518 (2005).

*Issuance of Permits for Ground Water on Indian Reservations Precluded Until Tribes' Federally Reserved Water Rights Defined and Quantified:* The Department of Natural Resources and Conservation (DNRC) granted a permit for the use of ground water on the Flathead Indian Reservation. Despite prior holdings in In re Application for Beneficial Water Use Permit, 278 M 50, 923 P2d 1073 (1996), and Confederated Salish & Kootenai Tribes v. Clinch, 1999 MT 342, 297 M 448, 992 P2d 244 (1999), that the state does not have jurisdiction to issue new use permits prior to formal adjudication of the tribes' reserved water rights, DNRC contended that this case was distinguishable because the tribes' federally reserved water right concerning ground water is legally uncertain. However, the only federal authority cited by either party, Tweedy v. Tex. Co., 286 F. Supp. 383 (D.C. Mont. 1968), supported the conclusion that there is no distinction between surface water and ground water for purposes of determining what water rights are reserved because those rights are necessary to the purpose of an Indian reservation. Further, neither of the prior state cases excluded ground water. The tribes contended that as a sovereign nation, they should not be required to defend their water rights in piecemeal fashion before a hostile forum and that pursuant to this section and the prior case law, the ground water permit was illegal. The Supreme Court agreed with the tribes and vacated the permit, finding no reason to limit the scope of the prior holdings by excluding ground water from the tribes' federally reserved water rights in this case. Two statutory methods for comprehensively adjudicating Indian reserved water rights already exist—a general inter sese adjudication or negotiations with the Montana Reserved Water Rights Compact Commission. Therefore, the tribes should not be required to defend their water rights by participating in the DNRC hearings process. Thus, DNRC cannot determine whether water is available on the Flathead Reservation, whether surface water or ground water, because DNRC cannot determine whether the issuance of permits would affect existing water rights until the tribes' preeminent water rights are defined and quantified. Confederated Salish & Kootenai Tribes v. Stults, 2002 MT 280, 312 M 420, 59 P3d 1093 (2002).

*Quantification of Tribal Water Rights Required — 1997 Amendment Unconstitutional:* In an effort to avoid the result created by In re Application for Beneficial Water Use Permit, 278 M 50, 923 P2d 1073, 53 St. Rep. 777 (1996), the 1997 Legislature passed Senate Bill No. 97, which substantively eliminated the former protection of Indian reserved water rights provided by this section. The state conceded that the protection of existing water rights in Art. IX, sec. 3, Mont. Const., includes water rights reserved for Indian reservations and contended that those rights were not affected by Senate Bill No. 97, but rather that those rights would be considered in that part of the analysis requiring that water be legally available. The state also pointed out the provisional nature of any water use permit and alleged that there were some uses that would not diminish instream flow and that use permits could thus be issued without affecting reserved Indian water rights, regardless of the quantification of those rights. However, under State ex rel. Greely v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 219 M 76, 712 P2d 754 (1985), it was found that Indian reserved water rights are owned by the Indians, and because that ownership interest exists under federal law and does not depend on the use of the water, the Supreme Court was not persuaded that the state's permitting process might allow uses of Indian reserved water that in the long term might not diminish instream flows. The provisional nature of permits was not determinative either because use of water that may have been reserved by federal law for the tribes was no less impermissible simply because it was temporary and subject to termination following final quantification of the tribes' rights by adjudication or negotiation. Under the 1997 amendments, permits are still limited to water that is "legally available", but that phrase is not defined. Construing the phrase in a manner that sustains its constitutional validity, the Supreme Court interpreted "legally available" to mean that there is water available that, among other things, has not been federally reserved for Indian tribes. Therefore, as in In re Application for Beneficial Water Use Permit, the state cannot determine whether water is legally available on the Flathead Reservation because it cannot determine whether the issuance of permits would affect existing water rights until the tribes' rights are quantified by a compact negotiation under 85-2-702 or by a general inter sese water rights adjudication. To allow the issuance of water use permits on the reservation prior to quantification of the tribes' pervasive reserved right would require use of water that might belong to the tribes, in violation of Art. IX, sec. 3, Mont. Const., which protects existing water rights whether adjudicated or not. Confederated Salish & Kootenai Tribes v. Clinch, 1999 MT 342, 297 M 448, 992 P2d 244, 56 St. Rep. 1356 (1999).

*State May Not Grant Water Use Permits on Indian Lands When Reserved Tribal Rights Not Quantified:* The Confederated Salish and Kootenai Tribes of the Flathead Reservation objected to the Department of Natural Resources and Conservation (DNRC) issuing new water use permits to nontribal members owning land in fee on the reservation. The tribes argued that this section clearly states that an applicant for a water use permit has to demonstrate that the proposed use will not unreasonably interfere with a planned use for which the water has been reserved and that such a showing cannot be made by an applicant until the tribes reserved rights are quantified by a compact negotiated with the state pursuant to 85-2-702. The Supreme Court held that this section does include Indian reserved water rights and that an applicant cannot show that there will be no adverse impact on tribal rights until those rights have been quantified by a negotiated compact with the state. Therefore, DNRC does not have jurisdiction to issue new use permits prior to formal adjudication of the tribes' reserved water rights. (See 1997 amendment.) In re Application for Beneficial Water Use Permit, 278 M 50, 923 P2d 1073, 53 St. Rep. 777 (1996), followed in Confederated Salish & Kootenai Tribes v. Clinch, 1999 MT 342, 297 M 448, 992 P2d 244, 56 St. Rep. 1356 (1999). See also State ex rel. Greely v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 219 M 76, 712 P2d 754 (1985).

*Beneficial Impoundment:* Counterclaim against petition of irrigation district for additional appropriation of water was properly denied where evidence was uncontradicted that water was going to waste and that impoundment would be beneficial. Sunset Irrigation District v. Ailport, 166 M 11, 531 P2d 1349 (1974).

## DECISIONS UNDER FORMER LAW

*Annotator's Note:* For decisions under former law pertaining to the appropriation doctrine, see the annotations under Title 85, ch. 2, part 2.

## 85-2-312. Terms of permit.

### Compiler's Comments

*2015 Amendment:* Chapter 192 in (4)(a) at end substituted "expires" for "is void upon lapse of the time limit"; inserted (4)(b), (4)(c), (4)(d), and (4)(e) concerning expired permits and reinstatements; in (5) inserted last sentence concerning retention period of expired permits in the record system; and made minor changes in style. Amendment effective April 8, 2015.

*2007 Amendment:* Chapter 213 in (1)(a) near middle of third sentence after "85-2-311" inserted "and subject to subsection (1)(b)"; inserted (1)(b) providing that if the permit is to use water with a point of diversion, conveyance, or place of use on national forest system lands, the permit is subject to any written special use authorization required by federal law; in (3) at beginning of second sentence after "If" substituted "commencement of the appropriation works, completion of construction, or the actual application of water to the proposed beneficial use" for "a permit"; and made minor changes in style. Amendment effective April 17, 2007.

*1999 Amendment:* Chapter 422 in (3) deleted next to last sentence that read: "The department may not accept a request for extension of time that is filed less than 30 days prior to the time limit specified in the permit"; and made minor changes in style. Amendment effective April 23, 1999.

*Severability:* Section 6, Ch. 422, L. 1999, was a severability clause.

*1993 Amendment:* Chapter 370 substituted language in (3) providing requirement that Department establish process for extension of time limits for commencing appropriation works, for completion of construction, and for application of water to proposed use, prohibiting acceptance by Department of request for time extension if filed less than 30 days prior to time limit in permit, and specifying that permits not completed within time limit or extension are void upon lapse of time limit for former text that read: "The department may, upon a showing of good cause, extend time limits specified in the permit for commencement of the appropriation works, completion of construction, and actual application of the water to the proposed beneficial use. All requests for extensions of time must be by affidavit and must be filed with the department prior to the expiration of the time limit specified in the permit or any previously authorized extension of time. The department may issue an order temporarily extending the time limit specified in the permit for 120 days or until the department has completed its action under this section, whichever is greater. Upon receipt of a proper request for extension of time, the department shall prepare a notice containing the facts pertinent to the request for extension of time and shall publish the notice in a newspaper of general circulation in the area of the source. The department may serve notice by first-class mail upon any public agency or other person the department determines may be interested in or affected by the request for extension of time. The department shall hold a hearing on the request for extension of time on its own motion or if requested by an interested party. The department may grant the extension of time in the absence of a hearing if no requests for a hearing are received and the extension of time is granted as requested, or the department may grant the extension of time in a modified form by following the process established in 85-2-310(2). Subsequent extensions of time may be made in the same manner." Amendment effective April 16, 1993.

*1993 Statement of Intent:* The statement of intent attached to Ch. 370, L. 1993, provided: "A statement of intent is required for this bill because 85-2-312 grants the department of natural resources and conservation rulemaking authority to establish a procedure for extending time limits for completing work under a water use permit. The legislature intends that the department provide necessary procedural and substantive safeguards to protect existing water users and permitholders from adverse impacts that may be caused by extending time limits for perfecting new water uses."

*Severability:* Section 11, Ch. 370, L. 1993, was a severability clause.

*1991 Amendment:* Deleted (5) that read: "(5) The department shall provide to the county clerk and recorder of the county wherein the point of diversion or place of use is located quarterly reports and an annual summary report of all water right permits, certificates, and change approvals issued by the department within the county". Amendment effective July 1, 1991.

*1987 Amendment:* In (2), at beginning, substituted "The department shall specify in the permit or in any authorized extension of time provided in subsection (3), the time limits" for "The department may limit the time", deleted last sentence that read: "For good cause shown by the permittee, the department may in its discretion reasonably extend time limits", and inserted last sentence concerning required Department considerations in issuing permit or authorized extension of time; and inserted (3) relating to grant of extension of time for commencement of appropriation works.

*1985 Amendment:* In (1) in third sentence, at beginning changed "It" to "The department" and after "necessary", substituted "to satisfy the criteria listed in 85-2-311" for "to protect the rights of other appropriators".

*1983 Amendment:* In (3), after "sent to the" substituted "permittee" for "county clerk and recorder in the county where the point of diversion or place of use is located for recordation"; deleted last sentence of (3), which read: "After recordation, the clerk and recorder shall send the permit to the permittee."; and inserted (4) requiring that the Department provide to the County Clerk and Recorder of a county where the diversion point or place of use is located quarterly and annual reports of all water rights permits, certificates, and change approvals issued by the Department within the county.

**Case Notes**

*Department Authorized to Condition Permits:* The Department of Natural Resources and Conservation has authority to grant conditional use permits under 85-2-312 when restrictions are necessary to protect the rights of prior appropriators or are used to impose time limits to perfect a water right under the permit. Mont. Power Co. v. Carey, 211 M 91, 685 P2d 336, 41 St. Rep. 1233 (1984). (Annotator's note: Chapter 573, L. 1985, amended this section to provide that the Department may restrict permits when necessary to satisfy the criteria in 85-2-311).

*Permit Conditions Supported by Substantial Credible Evidence:* In a proceeding for a permit, the Department of Natural Resources and Conservation granted the permit but reduced both the quantity of water to be appropriated and the time period during which the water could be appropriated. The Supreme Court upheld these restrictions based on a review of substantial expert testimony which indicated that the water supply was inadequate to sustain the proposed appropriations, along with existing senior rights, without the restrictions imposed by the Department. Mont. Power Co. v. Carey, 211 M 91, 685 P2d 336, 41 St. Rep. 1233 (1984).

### 85-2-313. Provisional permit.

**Compiler's Comments**

*1997 Amendment:* Chapter 497 in second sentence, at beginning, inserted "Upon petition", inserted "or revoked by the department following a show cause hearing", and substituted "in which it is determined that reduction, modification, or revocation is" for "where" and inserted third sentence concerning determination of legal availability on consideration of final decree; and made minor changes in style. Amendment effective May 1, 1997.

*Saving Clause:* Section 22, Ch. 497, L. 1997, was a saving clause.

*Severability:* Section 23, Ch. 497, L. 1997, was a severability clause.

**Case Notes**

*No Injunction for Ground Water Pumping Violation When Water Use Permit Granted — Request for Attorney Fees Moot:* Defendant water and wastewater system operator was granted a provisional permit to pump ground water to service various businesses and residences in a water district, conditioned upon final state approval. However, defendant began pumping ground water before final approval was granted, and plaintiffs sought an injunction to stop the pumping and sought attorney fees in connection with the request for injunctive relief. Defendant moved for summary dismissal on grounds that plaintiffs did not have standing to enforce the Montana Water Use Act. The District Court agreed and dismissed plaintiffs' complaint, and plaintiffs appealed. About 2 weeks before the appeal was filed, the state granted final approval of defendant's permit. The Supreme Court held that issuance of the final permit rendered moot plaintiffs' request for injunctive relief and for attorney fees as well, including attorney fees under the private attorney general doctrine. The District Court was affirmed. Faust v. Util. Solutions, LLC, 2007 MT 326, 340 M 183, 173 P3d 1183 (2007).

### 85-2-314. Revocation or modification of permit or change in appropriation right.

**Compiler's Comments**

*2013 Amendment:* Chapter 335 inserted (2) regarding petition to modify or remove condition of approval; and made minor changes in style. Amendment effective October 1, 2013.

*2005 Amendment:* Chapter 70 in four places inserted "or change in appropriation right" and in two places inserted reference to the holder of the change in appropriation right; and made minor changes in style. Amendment effective March 24, 2005.

*Saving Clause:* Section 15, Ch. 70, L. 2005, was a saving clause.

*1983 Amendment:* Near end of section after "should not be" inserted "modified or"; after "may" inserted "modify or".

**Case Notes**

*Sufficient Probable Cause to Revoke Water Use Permit — Malicious Prosecution Claim Precluded — Summary Judgment Proper:* The Department of Natural Resources and Conservation determined that plaintiff failed to comply with the conditions of a water use permit. After a show cause hearing, the hearings examiner did not issue a decision within the required 90 days, so plaintiff moved for dismissal with prejudice. The Department did not oppose dismissal but argued that it should be without prejudice because plaintiff was still in violation of the permit conditions. The hearings officer agreed and dismissed the revocation action without prejudice. Plaintiff then sued the Department for malicious prosecution. The Department moved for summary judgment, and the District Court granted the motion on grounds that plaintiff did not raise any genuine issues of material fact as to one of the elements of the malicious prosecution claim and on grounds that the Department was immune from suit because its actions were quasi-judicial. Plaintiff appealed. The Supreme Court concluded that, as a matter of law, there was probable cause for the Department to revoke plaintiff's water use permit under 85-2-314 for not following the permit conditions and that because plaintiff could not prove a lack of probable cause for the Department's actions, the malicious prosecution claim failed and summary judgment was proper. Because the claim was properly summarily dismissed on administrative grounds, the Supreme Court never reached the issue of prosecutorial and quasi-judicial immunity. Blacktail Mtn. Ranch Co., LLC v. Dept. of Natural Resources & Conservation, 2009 MT 345, 353 M 149, 220 P3d 388 (2009), applying the elements of malicious prosecution set out in Plouffe v. Dept. of Public Health and Human Services, 2002 MT 64, 309 M 184, 45 P3d 10 (2002).

*Quantification of Tribal Water Rights Required — 1997 Amendment Unconstitutional:* In an effort to avoid the result created by In re Application for Beneficial Water Use Permit, 278 M 50, 923 P2d 1073, 53 St. Rep. 777 (1996), the 1997 Legislature passed Senate Bill No. 97, which substantively eliminated the former protection of Indian reserved water rights provided by 85-2-311. The state conceded that the protection of existing water rights in Art. IX, sec. 3, Mont. Const., includes water rights reserved for Indian reservations and contended that those rights were not affected by Senate Bill No. 97, but rather that those rights would be considered in that part of the analysis requiring that water be legally available. The state also pointed out the provisional nature of any water use permit and alleged that there were some uses that would not diminish instream flow and that use permits could thus be issued without affecting reserved Indian water rights, regardless of the quantification of those rights. However, under State ex rel. Greely v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 219 M 76, 712 P2d 754 (1985), it was found that Indian reserved water rights are owned by the Indians, and because that ownership interest exists under federal law and does not depend on the use of the water, the Supreme Court was not persuaded that the state's permitting process might allow uses of Indian reserved water that in the long term might not diminish instream flows. The provisional nature of permits was not determinative either because use of water that may have been reserved by federal law for the tribes was no less impermissible simply because it was temporary and subject to termination following final quantification of the tribes' rights by adjudication or negotiation. Under the 1997 amendments, permits are still limited to water that is "legally available", but that phrase is not defined. Construing the phrase in a manner that sustains its constitutional validity, the Supreme Court interpreted "legally available" to mean that there is water available that, among other things, has not been federally reserved for Indian tribes. Therefore, as in In re Application for Beneficial Water Use Permit, the state cannot determine whether water is legally available on the Flathead Reservation because it cannot determine whether the issuance of permits would affect existing water rights until the tribes' rights are quantified by a compact negotiation under 85-2-702 or by a general inter sese water rights adjudication. To allow the issuance of water use permits on the reservation prior to quantification of the tribes' pervasive reserved right would require use of water that might belong to the tribes, in violation of Art. IX, sec. 3, Mont. Const., which protects existing water rights whether adjudicated or not. Confederated Salish & Kootenai Tribes v. Clinch, 1999 MT 342, 297 M 448, 992 P2d 244, 56 St. Rep. 1356 (1999).

## 85-2-315. Certificate of water right.

### Compiler's Comments

*1993 Amendment:* Chapter 370 in first sentence, at end before "completed", deleted "properly", in second sentence, at end, substituted "was completed" for "has been properly completed in substantial accordance with the terms and conditions of the permit" and in third sentence, near beginning after "department", inserted "shall review the certified statement and"; and made minor changes in style. Amendment effective April 16, 1993.

*Severability:* Section 11, Ch. 370, L. 1993, was a severability clause.

*1991 Amendment:* Inserted second sentence requiring notification to contain certified statement by person with experience in design, construction, or operation of appropriation works that appropriation has been properly completed in accordance with permit; and deleted (2) that read: "(2) The department shall provide to the county clerk and recorder of the county wherein the point of diversion or place of use is located quarterly reports and an annual summary report of all certificates of water right issued by the department within the county". Amendment effective July 1, 1991.

*Applicability:* Section 14, Ch. 805, L. 1991, provided: "[Sections 7 and 8] [85-2-315 and 85-2-317], concerning certification by a person with experience in the design, construction, or operation of appropriation works, apply to all permits and change approvals issued after [the effective date of this act] [effective July 1, 1991]."

*1983 Amendment:* In (1), after "sent to the" substituted "permittee" for "county clerk and recorder in the county wherein the point of diversion or place of use is located for recordation"; deleted last sentence of (1), which read: "After recordation, the clerk and recorder shall send the certificate to the appropriator."; substituted (2) (see 1983 Session Law) for former text, which read: "Except as provided in 85-2-313, a certificate of water right in a particular source may not be issued prior to a general determination under part 2 of this chapter of existing rights in that source."

## 85-2-316. State reservation of waters.

### Compiler's Comments

*2021 Amendment:* See 2021 Session Law for amendment made by sec. 120, Ch. 261, L. 2021. Amendment effective April 20, 2021.

*2017 Amendment:* Chapter 121 in (10)(b) deleted former first sentence that read: "An existing state water reservation subject to the review in subsection (10)(a) that was not reviewed in the 10 years prior to April 23, 2015, must be reviewed by July 1, 2016" and substituted "September 15, 2026" for "September 15, 2016"; and made minor changes in style. Amendment effective October 1, 2017.

*2015 Amendment:* Chapter 281 inserted (6)(a) concerning issuance of a state water reservation; in (10)(a) deleted former first sentence that read: "Upon issuing a state water reservation for the purpose of maintaining a minimum flow, level, or quality of water, the appropriation of water is complete", after "Except" inserted "for a reservation provided in subsection (6) or a reservation", and after "shall" deleted "periodically but"; inserted (10)(b) concerning reviews; in (10)(c) at beginning inserted "Following a review pursuant to this subsection (10), at the request of the entity holding a water reservation or" and after "the department may" substituted (10)(c)(i), (10)(c)(ii), and (10)(c)(iii) for "extend, revoke, or modify the reservation"; and made minor changes in style. Amendment effective April 23, 2015.

*2007 Amendment:* Chapter 213 inserted (3)(a) requiring rulemaking; inserted (3)(b) requiring submission of a correct and complete application; inserted (3)(c) regarding the application form; in (3)(d) near middle of fourth sentence after "environmental" substituted "analysis" for "impact statement"; in (4)(a) at beginning of introductory clause inserted exception clause and after "department" substituted "shall issue a state water reservation if" for "may not adopt an order reserving water unless"; in (4)(b) near middle of introductory clause after "department" substituted "shall issue a water reservation for withdrawal and transport for use outside the state if" for "may not adopt an order reserving water for withdrawal and transport for use outside the state unless"; in (6) in second sentence after "streams" substituted "are not subject to the limit under this subsection" for "may be allocated at the discretion of the department"; in (7) substituted "A state water reservation issued under this section has a priority of appropriation dating from the filing of a correct and complete application with the department" for "After the adoption of an order reserving waters, the department may reject an application and refuse a permit for the appropriation of reserved waters or may issue the permit subject to terms and conditions that it considers necessary for the protection of the objectives of the reservation"; deleted former (9) that read: "(9) Except as provided in 85-2-331, the priority of appropriation of a state water reservation and the relative priority of the reservation to permits with a later priority of appropriation must be determined according to this subsection (9), as follows:

(a) A state water reservation under this section has a priority of appropriation dating from the filing with the department of a notice of intention to apply for a state water reservation in a basin in which no other notice of intention to apply is currently pending. The notice of intention to apply must specify the basin in which the applicant is seeking a state water reservation.

(b) Upon receiving a notice of intention to apply for a state water reservation, the department shall identify all potential state water reservation applicants in the basin specified in the notice and notify each potential applicant of the opportunity to submit an application and to receive a state water reservation with the priority of appropriation as described in subsection (9)(a).

(c) To receive the priority of appropriation described in subsection (9)(a), the applicant shall submit a correct and complete state water reservation application within 1 year after the filing of the notice of intention to apply. Upon a showing of good cause, the department may extend the time for preparing the application.

(d) The department may by order subordinate a state water reservation to a permit or a certificate for ground water development issued pursuant to this part if:

(i) the permit application or the notice of completion of ground water development was accepted by the department before the date of the order granting the reservation;

(ii) the effect of subordinating the reservation to one or more permits or certificates for ground water development does not interfere substantially with the purpose of the reservation; and

(iii) in the case of a certificate for ground water development, the reservant consents to the subordination.

(e) The department shall by order establish the relative priority of state water reservations approved under this section that have the same day of priority. A state water reservation may not adversely affect any rights in existence at that time"; inserted (9) providing that a state water reservation may not adversely affect any rights in existence at that time and allowing the department to issue a state water reservation subject to terms, conditions, restrictions, and limitations; in (10) at beginning inserted "Upon issuing a state water reservation for the purpose of maintaining a minimum flow, level, or quality of water, the appropriation of water is complete.

Except as provided in 85-20-1401"; in (11) at beginning of first sentence inserted exception clause; and made minor changes in style. Amendment effective April 17, 2007.

*2005 Amendment:* Chapter 70 in (13) in third sentence near beginning substituted "water right ownership update form" for "water right transfer certificate". Amendment effective March 24, 2005.

*Saving Clause:* Section 15, Ch. 70, L. 2005, was a saving clause.

*1997 Amendments:* Chapter 330 in (9)(d), after "permit", inserted "or a certificate for ground water development"; in (9)(d)(i), after "application", inserted "or the notice of completion of ground water development"; in (9)(d)(ii), after "permits", inserted "or certificates for ground water development"; inserted (9)(d)(iii) relating to consent to subordination of ground water development; and made minor changes in style. Amendment effective April 21, 1997.

Chapter 497 throughout section, in 16 places before reference to reservation, inserted "state water" and in 7 places, before "water reservation", inserted "state"; in (1), near middle, substituted "acquire a state water reservation" for "reserve waters"; in (11), in second sentence near beginning after "Reallocation of", deleted "reserved" and after "water" inserted "reserved pursuant to a state water reservation"; and made minor changes in style. Amendment effective May 1, 1997.

*Saving Clause:* Section 22, Ch. 497, L. 1997, was a saving clause.

*Severability:* Section 23, Ch. 497, L. 1997, was a severability clause.

*1995 Amendment:* Chapter 418 in (1), in two places, (3), (4)(a), in two places, (4)(b), (4)(c), (5), (6), in two places, (8)(a), (9)(c), (9)(d), (9)(e), (10), in two places, (11), in four places, (13), and (14) substituted "department" for "board"; in (7), after "may", deleted "with the approval of the board"; in (12), in second sentence after "change", deleted "the board, upon notification by" and after "department" deleted "of its approval"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1993 Amendment:* Chapter 370 at beginning of (3) substituted "a correct and complete application" for "an application"; in (4)(a) and (5), after "board", inserted "by a preponderance of evidence"; and at end of second sentence in (8)(b), after "agricultural purposes", substituted "describing how the reserved water was put to use" for "that the reserved water has been put to use in substantial accordance with the terms and conditions of the authorization to use reserved water". Amendment effective April 16, 1993.

*Severability:* Section 11, Ch. 370, L. 1993, was a severability clause.

*Retroactive Applicability:* Section 12, Ch. 370, L. 1993, provided: "[Sections 1 through 8] apply retroactively, within the meaning of 1-2-109, to all applications and objections pending on [the effective date of this act] [effective April 16, 1993] that are subject to the provisions of Title 85, chapter 2."

*1991 Amendment:* In (8)(a), at end of first sentence after "approved use", inserted "and issue the applicant an authorization for the use"; inserted (8)(b) relating to notification of use of water and inspection for compliance with authorization; in (10) inserted last sentence relating to appropriation of undeveloped water; inserted (12) relating to approval of changes in reservations of water; and inserted (13) relating to transfers of water reservations. Amendment effective April 20, 1991.

*Retroactive Applicability:* Section 2, Ch. 515, L. 1991, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to all reservations of waters granted pursuant to 85-2-316."

*1989 Amendment:* Substituted (9) relating to determination of priority of appropriation of a water reservation and relative priority of the reservation to permits with a later priority for former (9) that read: "(9) A reservation under this section shall date from the date the order reserving the water is adopted by the board and shall not adversely affect any rights in existence at that time"; and made minor changes in phraseology and punctuation.

*1989 Statement of Intent:* The statement of intent attached to Ch. 389, L. 1989, provided: "A statement of intent is required for this bill to guide the board of natural resources and conservation [functions now transferred to department of natural resources and conservation] in the subordination of water reservations to junior water use permits. The legislature intends that the board amend the rules governing water reservations to clarify the procedure by which subordination, if necessary, will be undertaken and to ensure that any subordination occurs in a manner that results in a clear order of priority among all permits and reservations for use in the administration of water rights associated with the specific water source.

In amending the rules, the board should make clear that the matter of subordination may be considered only after a final decision has been made on all applications for water reservations from a specific water source. If the board determines that subordination should be considered, it may request that the department of natural resources and conservation prepare an analysis concerning the potential for subordination to interfere with the purpose of the reservation and the level at which substantial interference with the reservation would occur. Once the department's analysis is completed, all affected reservants, permitholders, and other interests are to be provided legal notice and the opportunity to appear before the board to present testimony and other evidence concerning subordination. Any board decision on the matter of subordination should be written as an order that includes findings of fact and conclusions of law.

After determining the level at which substantial interference with the purpose of a reservation would occur, the board may subordinate a reservation only to permits that in cumulative effect and in order of priority would not exceed the established level of interference. The board should consider priority dates in deciding which reservations are to be subordinated to which permits in order to avoid confusion about the priority of right to water among permits, between permits and reservations, and among reservations. For example, a reservation with a July 1, 1985, priority date should not be subordinated to a permit with a July 1, 1988, priority date without the reservation also being subordinated to a permit with a June 30, 1987, priority date. Also, a senior water reservation should not be subordinated to a permit without all junior reservations affected also being subordinated to the permit."

*Applicability:* Section 3, Ch. 389, L. 1989, provided: "[This act] does not apply to existing water reservations or to water reservation applications filed with the department of natural resources and conservation before October 1, 1989."

*1987 Amendment:* In (2)(a), at end of introductory clause, substituted "basin where it is reserved, as described by the following basins" for "following river basins"; and inserted (2)(b) relating to water reservation outside a basin of diversion.

*1985 Amendment:* Inserted (2) listing river basins in which water may be reserved only for existing or future beneficial uses; inserted (4)(b) through (4)(d) establishing criteria for reservation of water for withdrawal and transport for use outside the state; inserted (13) requiring the Department to develop an education program on the benefits and procedures for water reservation and provide technical assistance to agencies or political subdivisions applying for water reservation; and inserted (14) exempting reserved water from the state leasing program.

*1985 Applicability:* Section 27, Ch. 573, L. 1985, provided: "This act applies to all permit applications, change in appropriation right applications, water sales and lease applications, and reservation applications filed and pending with the department on July 1, 1985, but upon which a hearing under Title 85, chapter 2, has not yet commenced."

*1981 Amendments:* Chapter 186 in (7) inserted "when requested by the districts" before "for rendering technical and administrative assistance", inserted "preparation and" before "processing of such applications", and added last two sentences requiring the Department to complete requested feasibility study and the Board to extend to a conservation district the time allowed to develop plan identifying projects utilizing water reservation.

Chapter 357 added the last sentence of (2) requiring an applicant to pay a reasonable proportion of the Department's cost of preparing environmental impact statement unless payment is waived by the Department.

*1981 Applicability:* Subsection (3), sec. 7, Ch. 357, L. 1981, provided: "Section 6 [sec. 6, Ch. 357, L. 1981, amending 85-2-316] applies to applications pending before the board on April 14, 1981, as well as applications filed with the board after April 14, 1981."

**Law Review Articles**

How the West Is Won: Advancing Water Law for Watershed Health, Ziemer, 42 Pub. Land & Resources L. Rev. 81 (2020).

Commerce Clause Scrutiny of Montana's Water Export Statutes, Eaton, 7 Pub. Land L. Rev. 97 (1986).

## 85-2-317. Limitation on appropriation of ground water.

**Compiler's Comments**

*1991 Amendment:* Substituted (1) providing that after July 1, 1991, Department may not approve a permit to appropriate ground water in excess of 3,000 acre-feet per year unless criteria in 85-2-311 are met and Legislature affirms decision after public hearings for former (1) that read: "(1) After May 7, 1979, no application for a permit to appropriate ground water in excess of

3,000 acre-feet per year may be granted, except pursuant to an act of the legislature permitting the specific appropriation". Amendment effective July 1, 1991.

*Applicability:* Section 14, Ch. 805, L. 1991, provided: "[Sections 7 and 8] [85-2-315 and 85-2-317], concerning certification by a person with experience in the design, construction, or operation of appropriation works, apply to all permits and change approvals issued after [the effective date of this act] [effective July 1, 1991]."

*Preamble:* The preamble to Ch. 524, L. 1989, provided: "WHEREAS, agricultural and stockwater users in Musselshell County are experiencing water shortages during periods of low flow in the Musselshell River; and

WHEREAS, alternatives for additional water supplies, such as off-stream reservoir storage, would be very costly; and

WHEREAS, abandoned coal mines near Roundup could provide substantial supplemental water; and

WHEREAS, the 50th Montana Legislature authorized the Department of Natural Resources and Conservation to issue an interim permit to the Deadman Basin Water Users Association to appropriate ground water in the mines; and

WHEREAS, the Department of Natural Resources and Conservation is preparing to issue an interim permit to the Deadman Basin Water Users Association for a small test withdrawal, after a thorough review of the project for any environmental effects; and

WHEREAS, the best interests of people in the Roundup area will be served by a credible and technically sound evaluation of whether the coal mines can provide significant supplemental water supplies without significant adverse environmental effects and without harm to other existing appropriators; and

WHEREAS, test appropriations proposed during the summers of 1990 and 1991 will require an interim permit for an amount exceeding 3,000 acre-feet per year, thereby requiring legislative approval pursuant to section 85-2-317, MCA."

*Authorization to Issue Interim Permit to Appropriate Ground Water:* Section 1, Ch. 524, L. 1989, provided: "Pursuant to 85-2-317(1), the department of natural resources and conservation may authorize an interim permit for a period ending no later than September 30, 1991, to the Deadman Basin water users association to appropriate ground water up to 6,000 acre-feet per year from abandoned coal mines in Musselshell County. The application and interim permit are subject to the remaining provisions of Title 85, chapter 2, part 3."

*1987 Permits:* Section 1, Ch. 138, L. 1987, authorized the Department to issue two permits to appropriate ground water exceeding 3,000 acre-feet per year according to application numbers 54092-g43D and 54124-g43D.

*Preamble:* The preamble to Ch. 138, L. 1987, provided: "WHEREAS, hydropower is a beneficial use of water that provides benefits to many Montana citizens; and

WHEREAS, applicants propose to use ground water from an existing well and from a new well located in Carbon County for generating hydropower; and

WHEREAS, the source of water for the wells is the Tensleep formation, a major aquifer with commonly reported flows in excess of 8 cubic feet per second; and

WHEREAS, the applicants and the Department of Fish, Wildlife, and Parks have agreed to a provisional permit under conditions that ensure adequate flows for the nearby Bluewater Fish Hatchery; and

WHEREAS, the Department of Natural Resources and Conservation has reviewed the applications and recommends approval of the application; and

WHEREAS, the ground water applied for exceeds 3,000 acre-feet per year for each well and therefore requires legislative approvals pursuant to section 85-2-317, MCA.

THEREFORE, the Legislature of the State of Montana finds it appropriate to authorize the Department of Natural Resources and Conservation to issue two permits to the applicants for ground water appropriations in excess of 3,000 acre-fee per year."

*Certain Abandoned Mine Workings — Authorization to Issue Permit to Appropriate Ground Water:* Chapter 414, L. 1987, read: "WHEREAS, agricultural and stockwater users in Musselshell County are experiencing water shortages during periods of low flow in the Musselshell River; and

WHEREAS, alternatives for additional water supplies, such as off-stream reservoir storage, would be very costly; and

WHEREAS, abandoned coal mines near Roundup could provide substantial supplemental water; and

WHEREAS, the Deadman Basin Water Users Association has applied to the Department of Natural Resources and Conservation for a permit to appropriate approximately 13,000 acre-feet annually; and

WHEREAS, the use of this water would exceed 3,000 acre-feet per year and therefore requires legislative approval pursuant to 85-2-317, MCA.

THEREFORE, The Legislature of the State of Montana finds it appropriate to authorize the Department of Natural Resources and Conservation to issue a permit to appropriate ground water to the Deadman Basin Water Users Association.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Authorization to issue permit to appropriate ground water. Pursuant to 85-2-317(1), the department of natural resources and conservation may issue an interim permit for a period ending September 30, 1989, to appropriate ground water in excess of 3,000 acre-feet per year to the Deadman Basin water users association according to application number 61478-g40C for the purpose of conducting and evaluating a project to pump ground water from abandoned mine workings along the lower Musselshell River. The application is subject to the remaining provisions of Title 85, chapter 2, part 3.

Section 2. Coordination instruction. If House Bill No. 642, including the section of that bill repealing 85-2-317, is passed and approved, this act is void.

Section 3. Effective date. This act is effective July 1, 1987."

House Bill No. 642 was passed and approved as Ch. 535, L. 1987. As enacted, Ch. 535 did not repeal 85-2-317. Thus, this chapter is not void.

## 85-2-318. Water right appropriation account.

### Compiler's Comments

*1987 Amendment:* After "administering" inserted "and enforcing" and inserted reference to Title 37, chapter 43.

*1983 Amendment:* Substituted reference to state special revenue fund for reference to earmarked revenue fund.

## 85-2-319. Permit action in highly appropriated basins or subbasins.

### Compiler's Comments

*2007 Amendment:* Chapter 213 in (1) near middle after "subbasin" inserted "except as provided in 85-20-1401"; and made minor changes in style. Amendment effective April 17, 2007.

*1995 Amendment:* Chapter 418 in (2), near end of first sentence, and in (2)(d) substituted "department of environmental quality" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1993 Amendment:* Chapter 460 at end of first sentence of (2), after "subbasin", inserted "or upon petition of the department of health and environmental sciences alleging facts under subsection (2)(d)"; inserted (2)(d) clarifying facts that must be alleged in the case of a petition filed by the Department of Health and Environmental Sciences; inserted (5) allowing the Department to adopt rules; and made minor changes in style. Amendment effective April 21, 1993.

*1993 Statement of Intent:* The statement of intent attached to Ch. 460, L. 1993, provided: "A statement of intent is required for this bill because the bill gives the department of natural resources and conservation authority to adopt administrative rules. The bill adds statutory criteria for the department to consider in the processing of an application for a permit, change authorization, controlled ground water area, or basin closure. In adopting rules implementing this bill and in interpreting the new statutory language, it is the intent of the legislature that the department and board of natural resources and conservation [functions now transferred to department of natural resources and conservation] should assess the magnitude, character, duration, and geographical extent of the projected effects on the uses of water as classified and utilize this assessment in a practical manner."

*Severability:* Section 7, Ch. 460, L. 1993, was a severability clause.

*1983 Statement of Intent:* The statement of intent attached to SB 370 (Ch. 448, L. 1983) provided: "A statement of intent is required for this bill because it delegates rulemaking authority to the Department of Natural Resources and Conservation in sections 1 and 17.

The intent is to provide the Department with the authority to adopt rules necessary to reject, modify, or condition water use permit applications in highly appropriated basins or subbasins. A rule may only be adopted under this section upon a petition signed by a certain percentage of water users in the source of supply or by direction of the Legislature. The petition must allege certain facts showing the need for the adoption of a rule. The Department must act on the petition within 60 days by: denying the petition and providing reasons to the petitioners; informing the petitioners that additional study of the allegations is necessary before denying or proceeding with the petition; or initiating the rulemaking proceeding. The rulemaking procedure must follow the notice requirements of the Montana Administrative Procedure Act, and in addition the Department must publish notice of the rulemaking hearing once a week for three successive weeks in a newspaper of general circulation in which the source is located and also serve an individual copy of the notice on any known water right holder in the source of supply according to the Department's records.

This bill also delegates rulemaking authority to the Board of Natural Resources and Conservation [functions now transferred to Department of Natural Resources and Conservation] in section 2.

The intent is to provide the Board with the authority to adopt, through rules, fees to be paid by applicants, petitioners, and others for services provided. Fees could be adopted for: rulemaking hearings to reject, modify, or condition water use permit applications in highly appropriated basins or subbasins; administrative hearings conducted by the Department to settle objections to permit or change applications; costs incurred during the field investigation of a complaint against a permittee and related revocation proceedings; and for costs incurred in the field verification of issued and completed permits and change approvals."

## 85-2-320. Change in appropriation right authorization for instream flow — United States department of agriculture, forest service.

**Compiler's Comments**

*2017 Amendment:* Chapter 243 in (2)(a) near end inserted exception provision for water right identified in written consent to approval; and in (8) at end inserted exception provision for appropriator that filed written consent to approval. Amendment effective October 1, 2017, and terminates September 30, 2023.

*2013 Amendment:* Chapter 335 deleted former (1)(b) that read: "(b) As used in this section, "national forest system lands" has the same meaning as that provided in 85-20-1401, Article I"; and made minor changes in style. Amendment effective October 1, 2013.

*Effective Date:* Section 20, Ch. 213, L. 2007, provided: "[This act] is effective on passage and approval." Approved April 17, 2007.

## 85-2-321. Milk River basin — suspension of action on permits — proposal — priority in adjudication process.

**Compiler's Comments**

*1997 Amendment:* Chapter 497 in (1)(c)(i)(B), near end, inserted "pursuant to this part". Amendment effective May 1, 1997.

*Saving Clause:* Section 22, Ch. 497, L. 1997, was a saving clause.

*Severability:* Section 23, Ch. 497, L. 1997, was a severability clause.

*1985 Amendment:* Inserted (2) requiring that after April 8, 1985, the Chief Water Judge make the issuance of a temporary preliminary decree in the Milk River Basin the highest priority in the adjudication of existing water rights.

*1985 Preamble:* The preamble to Ch. 394, L. 1985, read: "WHEREAS, there has long been in the Milk River Basin a scarcity of water available to meet the needs of all water users; and

WHEREAS, the precipitation in the Milk River Basin during the past 2 years has been even lower than usual; and

WHEREAS, in 1981, the 47th Legislature recognized the growing problem of protection of existing water rights in the Milk River Basin, in view of continuing applications for new water rights, by enacting a law authorizing the Department of Natural Resources and Conservation to suspend action on new permits in the Basin; and

WHEREAS, tension has arisen among certain water users in the Milk River Basin because of uncertainty on the amounts and priorities of individual rights to the scarce water resources; and

WHEREAS, neither a preliminary nor temporary preliminary decree has been issued to date in the Milk River Basin in the Montana Water Court's adjudication of existing water rights; and

WHEREAS, complicated legal issues exist with respect to water rights in the Milk River Basin because of the 1909 Boundary Waters Treaty, the location in the Basin of federal Bureau of Reclamation irrigation projects, and the existence in the Basin of federal reserved water rights claims; and

WHEREAS, in view of these complicated legal issues, it may not be feasible at this time to issue a preliminary decree of water rights in the Milk River Basin; however, a temporary preliminary decree can be issued; and

WHEREAS, the Legislature finds that it is in the interest of water users in the Milk River Basin that the Montana Water Court issue a temporary preliminary decree in the Basin as soon as practicable."

## 85-2-322. Hearing — order.

**Compiler's Comments**

*2005 Amendment:* Chapter 161 in (5) near end substituted "85-2-306" for "85-2-306(3)"; and made minor changes in style. Amendment effective April 7, 2005.

*1987 Amendment:* Near end of (5) changed "85-2-306(2)" to "85-2-306(3)".

## 85-2-329. Definitions.

**Compiler's Comments**

*2019 Amendment:* Chapter 59 deleted definition that read: ""Nonconsumptive use" means a beneficial use of water that does not cause a reduction in the source of supply and in which substantially all of the water returns without delay to the source of supply, causing little or no disruption in stream conditions"; and made minor changes in style. Amendment effective October 1, 2019.

*2007 Amendment:* Chapter 391 deleted definition of ground water that read: ""Ground water" means water that is beneath the land surface or beneath the bed of a stream, lake, reservoir, or other body of surface water and that is not immediately or directly connected to surface water"; and made minor changes in style. Amendment effective May 3, 2007.

*Preamble:* The preamble attached to Ch. 391, L. 2007, provided: "WHEREAS, it is the policy of this state to encourage the wise use of the state's water resources by making them available for appropriation and to provide wise utilization, development, and conservation of the water of the state for the maximum benefit of its people with the least possible degradation of the state's natural aquatic ecosystems; and

WHEREAS, there has been confusion regarding ground water issues in closed basins and the Department of Natural Resources and Conservation needs guidance from the Legislature on how to proceed; and

WHEREAS, the basin closure laws were passed to protect senior appropriators while the state water adjudication is ongoing; and

WHEREAS, ground water development in closed basins should be able to proceed as long as the applicant collects the necessary scientific information to determine if there will be an adverse effect on a prior appropriator and takes the necessary actions to mitigate or prevent any adverse effects on a prior appropriator; and

WHEREAS, it is critical that the Legislature develop state water policies in a way that protects the prior appropriation doctrine while at the same time protecting the quality of Montana's water and the ability to appropriate water consistent with section 85-1-101, MCA, and Article IX, section 3, of the Montana Constitution; and

WHEREAS, augmentation is statutorily authorized for the Clark Fork River Basin only; and

WHEREAS, the Department of Natural Resources and Conservation has developed administrative rules and applied augmentation through these administrative rules to all basins even though not specifically statutorily authorized; and

WHEREAS, administrative rules and rulemaking must comply with section 2-4-305, MCA, and may not engraft material not contemplated by the Legislature; and

WHEREAS, this bill provides definitions and a new procedure for mitigation and aquifer recharge."

*Applicability:* Section 31, Ch. 391, L. 2007, provided: "[This act] applies to applications for an appropriation right in a closed basin filed on or after [the effective date of this act]." Effective May 3, 2007.

*Severability:* Section 29, Ch. 391, L. 2007, was a severability clause.

*1997 Amendment:* Chapter 497 in definition of application, near end before "water reservation", inserted "state". Amendment effective May 1, 1997.

*Saving Clause:* Section 22, Ch. 497, L. 1997, was a saving clause.

*Severability:* Section 23, Ch. 497, L. 1997, was a severability clause.

*Applicability:* Section 4, Ch. 445, L. 1993, provided: "[This act] applies to all applications received by the department of natural resources and conservation after [the effective date of this act]." Effective April 21, 1993.

*Effective Date:* Section 5, Ch. 445, L. 1993, provided: "[This act] is effective on passage and approval." Approved April 21, 1993.

### 85-2-330. Basin closure — exceptions.

**Compiler's Comments**

*2017 Amendment:* Chapter 264 in (2)(e) inserted "including for emergency fire training and emergency fire-related operations"; and made minor changes in style. Amendment effective October 1, 2017.

*2007 Amendment:* Chapter 391 in (1) near middle after "may not" deleted "process or"; in (2)(a) at end inserted "if the applicant complies with the provisions of 85-2-360"; in (2)(c)(i) at end substituted "use from surface water or pursuant to 85-2-306" for "municipal"; inserted (2)(c)(iii) concerning use of surface water by a municipality; inserted (2)(f) concerning response actions related to natural resource restoration; inserted (3) concerning permit issued to conduct remedial actions; inserted (4) concerning change of use authorization; and made minor changes in style. Amendment effective May 3, 2007.

*Preamble:* The preamble attached to Ch. 391, L. 2007, provided: "WHEREAS, it is the policy of this state to encourage the wise use of the state's water resources by making them available for appropriation and to provide wise utilization, development, and conservation of the water of the state for the maximum benefit of its people with the least possible degradation of the state's natural aquatic ecosystems; and

WHEREAS, there has been confusion regarding ground water issues in closed basins and the Department of Natural Resources and Conservation needs guidance from the Legislature on how to proceed; and

WHEREAS, the basin closure laws were passed to protect senior appropriators while the state water adjudication is ongoing; and

WHEREAS, ground water development in closed basins should be able to proceed as long as the applicant collects the necessary scientific information to determine if there will be an adverse effect on a prior appropriator and takes the necessary actions to mitigate or prevent any adverse effects on a prior appropriator; and

WHEREAS, it is critical that the Legislature develop state water policies in a way that protects the prior appropriation doctrine while at the same time protecting the quality of Montana's water and the ability to appropriate water consistent with section 85-1-101, MCA, and Article IX, section 3, of the Montana Constitution; and

WHEREAS, augmentation is statutorily authorized for the Clark Fork River Basin only; and

WHEREAS, the Department of Natural Resources and Conservation has developed administrative rules and applied augmentation through these administrative rules to all basins even though not specifically statutorily authorized; and

WHEREAS, administrative rules and rulemaking must comply with section 2-4-305, MCA, and may not engraft material not contemplated by the Legislature; and

WHEREAS, this bill provides definitions and a new procedure for mitigation and aquifer recharge."

*Severability:* Section 29, Ch. 391, L. 2007, was a severability clause.

*Applicability:* Section 31, Ch. 391, L. 2007, provided: "[This act] applies to applications for an appropriation right in a closed basin filed on or after [the effective date of this act]." Effective May 3, 2007.

*1995 Amendment:* Chapter 418 in (1), after "department", deleted "or the board"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*Applicability:* Section 4, Ch. 445, L. 1993, provided: "[This act] applies to all applications received by the department of natural resources and conservation after [the effective date of this act]." Effective April 21, 1993.

*Effective Date:* Section 5, Ch. 445, L. 1993, provided: "[This act] is effective on passage and approval." Approved April 21, 1993.

### 85-2-331. Reservations within Missouri River basin and Little Missouri River basin.

**Compiler's Comments**

*2007 Amendment:* Chapter 213 in (1) at beginning of introductory clause inserted exception clause; in (3) at beginning of introductory clause inserted exception clause; in (4) at beginning inserted exception clause; and made minor changes in style. Amendment effective April 17, 2007.

*1997 Amendments:* Chapter 330 in (4) inserted third sentence relating to certificates for ground water development; and made minor changes in style. Amendment effective April 21, 1997.

Chapter 497 in (1), near middle of introductory clause, and in (3)(a) and (3)(b), near middle, substituted reference to state water reservations for reference to reservations of water; in (2) and (4), in five places, before reference to reservations, inserted "state water"; and made minor changes in style. Amendment effective May 1, 1997.

*Saving Clause:* Section 22, Ch. 497, L. 1997, was a saving clause.

*Severability:* Section 23, Ch. 497, L. 1997, was a severability clause.

*1995 Amendment:* Chapter 418 in (3)(a), (3)(b), (3)(c), and (4), in three places, substituted "department" for "board"; in (3)(a), at beginning, deleted "Before July 1, 1992"; and in (3)(b), at beginning, deleted "Before December 31, 1994". Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1993 Amendment:* Chapter 303 at beginning of (3)(b), after "December 31", substituted "1994" for "1993"; and made minor changes in style. Amendment effective April 12, 1993.

*1989 Amendment:* In introductory clause of (1) inserted "or in the Little Missouri River basin"; substituted (1)(a) and (1)(b), relating to reservation above and below Fort Peck dam, for end of (1) that read: "July 1, 1989, except that applications for reservation of water below Fort Peck dam must be filed no later than July 1, 1991"; at end of (2) inserted "and the Little Missouri River basin"; at beginning of (3)(a) substituted "July 1, 1992" for "December 31, 1991"; at end of (3)(b) inserted "and in the Little Missouri River basin"; and in (4) inserted "in the Missouri River basin and a priority date of July 1, 1989, in the Little Missouri River basin". Amendment effective March 18, 1989.

*1987 Amendment:* At end of (1) inserted exception for water below Fort Peck Dam; at end of (3)(a) inserted "above Fort Peck dam"; inserted (3)(b) requiring Board before December 31, 1991, to make final determination on applications filed before July 1, 1989, for reservation of water in Missouri River above Fort Peck Dam; inserted (3)(c) requiring Board to determine which applications are above or below Fort Peck Dam; and in (4) inserted second sentence concerning subordination.

*1985 Amendment:* In (1) and (3) changed deadline for filing applications from July 1, 1987, to July 1, 1989; and in (3) changed deadline for final board determination from December 31, 1989, to December 31, 1991.

*Applicability:* Section 27, Ch. 573, L. 1985, provided: "This act applies to all permit applications, change in appropriation right applications, water sales and lease applications, and reservation applications filed and pending with the department on July 1, 1985, but upon which a hearing under Title 85, chapter 2, has not yet commenced."

*Appropriation — Deadline Change:* House Bill 952, L. 1985 (approved May 13, 1985), appropriated funds for water reservations in the upper Missouri River Basin, and changed the deadlines set forth in Ch. 573, L. 1985, for filing applications for water reservations and for action by the Board of Natural Resources & Conservation (functions now transferred to Department of Natural Resources and Conservation) on reservation applications. The preamble to House Bill 952, L. 1985, read: "WHEREAS, the Select Committee on Water Marketing was commissioned by the 1983 Legislature to undertake a study of the advantages and disadvantages of water marketing; and

WHEREAS, the Select Committee in completing its study determined that Montana needs to address broader questions of water policy in order to protect Montana's interests in the allocation and management of state waters; and

WHEREAS, the Select Committee has presented a comprehensive series of recommendations that must be considered as a whole; and

WHEREAS, these recommendations serve to revise Montana's water policy in order to maximize Montana's authority over management of state waters and other natural resources and to conserve water for existing and future beneficial uses by Montanans; and

WHEREAS, many of these recommendations are embodied in House Bill No. 680, which is under consideration by the 49th Legislature, as well as contained in the Select Committee's final report; and

WHEREAS, funds are needed for various agencies of state government to implement these recommendations.

THEREFORE, the Legislature of the State of Montana finds it appropriate to allocate funds for the implementation of the recommendations and to further develop a comprehensive water policy."

## 85-2-335. Definitions.

### Compiler's Comments

*2007 Amendments — Composite Section:* Chapter 142 in definition of Upper Clark Fork River basin near middle after "River" inserted "and the Blackfoot River" and at end substituted "the confluence of the Clark Fork River and the Blackfoot River" for "Milltown dam"; and made minor changes in style. Amendment effective October 1, 2007.

Chapter 391 in introductory clause deleted reference to 85-2-337; and made minor changes in style. Amendment effective May 3, 2007.

*Preamble:* The preamble attached to Ch. 391, L. 2007, provided: "WHEREAS, it is the policy of this state to encourage the wise use of the state's water resources by making them available for appropriation and to provide wise utilization, development, and conservation of the water of the state for the maximum benefit of its people with the least possible degradation of the state's natural aquatic ecosystems; and

WHEREAS, there has been confusion regarding ground water issues in closed basins and the Department of Natural Resources and Conservation needs guidance from the Legislature on how to proceed; and

WHEREAS, the basin closure laws were passed to protect senior appropriators while the state water adjudication is ongoing; and

WHEREAS, ground water development in closed basins should be able to proceed as long as the applicant collects the necessary scientific information to determine if there will be an adverse effect on a prior appropriator and takes the necessary actions to mitigate or prevent any adverse effects on a prior appropriator; and

WHEREAS, it is critical that the Legislature develop state water policies in a way that protects the prior appropriation doctrine while at the same time protecting the quality of Montana's water and the ability to appropriate water consistent with section 85-1-101, MCA, and Article IX, section 3, of the Montana Constitution; and

WHEREAS, augmentation is statutorily authorized for the Clark Fork River Basin only; and

WHEREAS, the Department of Natural Resources and Conservation has developed administrative rules and applied augmentation through these administrative rules to all basins even though not specifically statutorily authorized; and

WHEREAS, administrative rules and rulemaking must comply with section 2-4-305, MCA, and may not engraft material not contemplated by the Legislature; and

WHEREAS, this bill provides definitions and a new procedure for mitigation and aquifer recharge."

*Severability:* Section 29, Ch. 391, L. 2007, was a severability clause.

*Applicability:* Section 31, Ch. 391, L. 2007, provided: "[This act] applies to applications for an appropriation right in a closed basin filed on or after [the effective date of this act]." Effective May 3, 2007.

*1995 Amendment:* Chapter 487 deleted definition of domestic use that read: ""Domestic use" means use of water common to family homes, including use for culinary purposes, washing, drinking water for humans and domestic pets, and irrigation of a lawn or garden of less than 1 acre, not to exceed a total of 3.5 acre-feet per year. The term includes municipal uses for expanded domestic use but does not include commercial or industrial use"; deleted definition of ground water that read: ""Ground water" means any water that is beneath the land surface or beneath the bed of a stream, lake, reservoir, or other body of surface water and that is not a part of that surface water"; and in definition of Upper Clark Fork River basin, at end after "dam", deleted "but does not include the Blackfoot River, designated as subbasin 76F, or Rock Creek, designated as subbasin 76E". Amendment effective April 14, 1995.

*Severability:* Section 11, Ch. 487, L. 1995, was a severability clause.

*Applicability:* Section 12, Ch. 487, L. 1995, provided: "[This act] applies to all applications for changes in appropriation rights, permits, and water reservations received by the department of natural resources and conservation after [the effective date of this act]." Effective April 14, 1995.

*Effective Date:* Section 6, Ch. 741, L. 1991, provided that this section is effective on passage and approval. Approved May 1, 1991.

*Applicability:* Section 7, Ch. 741, L. 1991, provided: "[This act] applies to all applications received by the department of natural resources and conservation after [the effective date of this act] [effective May 1, 1991]."

**85-2-336. Basin closure — exception.**

**Compiler's Comments**

*2007 Amendments — Composite Section:* Chapter 213 inserted (2)(e) providing that subsection (1) does not to apply to an application submitted pursuant to 85-20-1401, Article VI; in (4) at beginning of first sentence inserted exception clause; in (5) at beginning inserted exception clause; and made minor changes in style. Amendment effective April 17, 2007.

Chapter 391 in (1) after "may not" deleted "process or"; in (2)(a) at end inserted "if the applicant complies with the provisions of 85-2-360"; substituted (2)(b) concerning application for permit for aquatic resource activities for former text that read: "an application filed prior to January 1, 2000, for a permit to appropriate water to conduct response actions or remedial actions pursuant to the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, or Title 75, chapter 10, part 7, at sites designated as of January 1, 1994. The total flow rates for all permits issued under this subsection (2)(b) may not exceed 10 cubic feet per second. A permit issued to conduct response actions or remedial actions may not be used for dilution and must be limited to a term not to exceed the necessary time to complete the response or remedial action, and the permit may not be transferred to any person for any purpose other than the designated response or remedial action"; inserted (3) concerning authorization for changing purpose of use; and made minor changes in style. Amendment effective May 3, 2007.

*Preamble:* The preamble attached to Ch. 391, L. 2007, provided: "WHEREAS, it is the policy of this state to encourage the wise use of the state's water resources by making them available for appropriation and to provide wise utilization, development, and conservation of the water of the state for the maximum benefit of its people with the least possible degradation of the state's natural aquatic ecosystems; and

WHEREAS, there has been confusion regarding ground water issues in closed basins and the Department of Natural Resources and Conservation needs guidance from the Legislature on how to proceed; and

WHEREAS, the basin closure laws were passed to protect senior appropriators while the state water adjudication is ongoing; and

WHEREAS, ground water development in closed basins should be able to proceed as long as the applicant collects the necessary scientific information to determine if there will be an adverse effect on a prior appropriator and takes the necessary actions to mitigate or prevent any adverse effects on a prior appropriator; and

WHEREAS, it is critical that the Legislature develop state water policies in a way that protects the prior appropriation doctrine while at the same time protecting the quality of Montana's water and the ability to appropriate water consistent with section 85-1-101, MCA, and Article IX, section 3, of the Montana Constitution; and

WHEREAS, augmentation is statutorily authorized for the Clark Fork River Basin only; and

WHEREAS, the Department of Natural Resources and Conservation has developed administrative rules and applied augmentation through these administrative rules to all basins even though not specifically statutorily authorized; and

WHEREAS, administrative rules and rulemaking must comply with section 2-4-305, MCA, and may not engraft material not contemplated by the Legislature; and

WHEREAS, this bill provides definitions and a new procedure for mitigation and aquifer recharge."

*Severability:* Section 29, Ch. 391, L. 2007, was a severability clause.

*Applicability:* Section 31, Ch. 391, L. 2007, provided: "[This act] applies to applications for an appropriation right in a closed basin filed on or after [the effective date of this act]." Effective May 3, 2007.

*1997 Amendment:* Chapter 497 in (3), in first sentence, near beginning before "water reservations", inserted "state" and in second sentence, near beginning after "filing of a", inserted "state water"; and in (4), near middle, substituted "state water reservations" for "reservations of water". Amendment effective May 1, 1997.

*Saving Clause:* Section 22, Ch. 497, L. 1997, was a saving clause.

*Severability:* Section 23, Ch. 497, L. 1997, was a severability clause.

*1995 Amendments:* Chapter 418 in (4), at beginning, substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 487 in (1), at end, deleted "during the period from May 1, 1991, until June 30, 1995"; in (2)(a), at end, deleted "or water for domestic use"; in (2)(b), at beginning of first sentence after "application", inserted "filed prior to January 1, 2000" and at end, after "part 7", inserted "at sites designated as of January 1, 1994", inserted second sentence limiting total flow rates to 10 cubic feet per second, and in third sentence, after "actions", inserted "may not be used for dilution and"; inserted (2)(c) through (2)(e) excluding applications made for water for stock use, stored water, and power generation; in (3), at end of second sentence, deleted "during the period of the basin closure provided in subsection (1)"; in (4), near middle after "water", deleted "except ground water" and at end deleted "during the period of the basin closure provided in subsection (1)"; and made minor changes in style. Amendment effective April 14, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*Severability:* Section 11, Ch. 487, L. 1995, was a severability clause.

*Applicability:* Section 12, Ch. 487, L. 1995, provided: "[This act] applies to all applications for changes in appropriation rights, permits, and water reservations received by the department of natural resources and conservation after [the effective date of this act]." Effective April 14, 1995.

*Effective Date:* Section 6, Ch. 741, L. 1991, provided that this section is effective on passage and approval. Approved May 1, 1991.

*Applicability:* Section 7, Ch. 741, L. 1991, provided: "[This act] applies to all applications received by the department of natural resources and conservation after [the effective date of this act] [effective May 1, 1991]."

### 85-2-338. Upper Clark Fork River basin steering committee — membership and duties — comprehensive management plan.

**Compiler's Comments**

*2021 Amendment:* See 2021 Session Law for amendment made by sec. 121, Ch. 261, L. 2021. Amendment effective April 20, 2021.

*2005 Amendment:* Chapter 85 deleted former (5)(b) that read: "(b) prepare and submit a report evaluating the Upper Clark Fork River basin instream flow pilot program as provided in 85-2-439"; and made minor changes in style. Amendment effective March 24, 2005.

*1997 Amendment:* Chapter 353 in (1), at beginning of second sentence after "The", inserted "steering committee has 22 members, who must be appointed as follows"; inserted (1)(a) and (1)(b) regarding membership from basin conservation districts and county commissions; in (1)(c), after "appoint the", substituted "remaining 10 committee members and any additional committee members not appointed under subsections (1)(a) and (1)(b) and shall ensure that committee membership includes a balance of affected basin interests and is in conformance with subsection (2)" for "members of the committee, selecting them"; at beginning of (2) inserted "Steering committee members must be selected"; in (2)(a) substituted "agriculture" for "agricultural organizations"; in (2)(i), after "water", substituted "users not otherwise represented" for "user organizations"; inserted (3) regarding length and number of terms; inserted (4) regarding staggering of initial terms; deleted former (2)(b) that read: "(b) make recommendations to the 1997 legislature concerning representation, terms, and the method of appointing members to the steering committee"; and made minor changes in style. Amendment effective April 22, 1997.

*1995 Amendment:* Chapter 487 in (2), in introductory clause after "committee", inserted "consistent with the Upper Clark Fork River basin comprehensive management plan" and after "shall" substituted (2)(a) through (2)(m) regarding Steering Committee duties for former (2)(a) through (2)(e) that read: "complete an Upper Clark Fork River basin comprehensive management plan pursuant to 85-1-203. The plan must:

(a) consider and balance all beneficial uses of the water in the Upper Clark Fork River basin;

(b) include a description of the standards applied, the data relied upon, and the methodology used in preparing the plan;

(c) contain recommendations regarding the Upper Clark Fork River basin closure as provided in 85-2-336;

(d) identify and make recommendations regarding the resolution of water-related issues in the Upper Clark Fork River basin; and

(e) include the Blackfoot River, designated as subbasin 76F, and Rock Creek, designated as subbasin 76E, in any considerations made under subsections (2)(a) through (2)(d)"; deleted (3) that read: "(3) The steering committee shall complete and submit a management plan to the governor and the legislature by December 31, 1994"; and made minor changes in style. Amendment effective April 14, 1995.

*Severability:* Section 11, Ch. 487, L. 1995, was a severability clause.

*Applicability:* Section 12, Ch. 487, L. 1995, provided: "[This act] applies to all applications for changes in appropriation rights, permits, and water reservations received by the department of natural resources and conservation after [the effective date of this act]." Effective April 14, 1995.

*Effective Date:* Section 6, Ch. 741, L. 1991, provided that this section is effective on passage and approval. Approved May 1, 1991.

*Applicability:* Section 7, Ch. 741, L. 1991, provided: "[This act] applies to all applications received by the department of natural resources and conservation after [the effective date of this act] [effective May 1, 1991]."

## 85-2-340. Definitions.

### Compiler's Comments

*2019 Amendment:* Chapter 59 deleted definition that read: ""Nonconsumptive use" means a beneficial use of water that does not cause a reduction in the source of supply and in which substantially all of the water returns without delay to the source of supply, causing little or no disruption in stream conditions". Amendment effective October 1, 2019.

*2007 Amendment:* Chapter 391 substituted definition of ground water for former definition that read: ""Ground water" means water that is beneath the land surface or beneath the bed of a stream, lake, reservoir, or other body of surface water and that is not immediately or directly connected to surface water." Amendment effective May 3, 2007.

*Preamble:* The preamble attached to Ch. 391, L. 2007, provided: "WHEREAS, it is the policy of this state to encourage the wise use of the state's water resources by making them available for appropriation and to provide wise utilization, development, and conservation of the water of the state for the maximum benefit of its people with the least possible degradation of the state's natural aquatic ecosystems; and

WHEREAS, there has been confusion regarding ground water issues in closed basins and the Department of Natural Resources and Conservation needs guidance from the Legislature on how to proceed; and

WHEREAS, the basin closure laws were passed to protect senior appropriators while the state water adjudication is ongoing; and

WHEREAS, ground water development in closed basins should be able to proceed as long as the applicant collects the necessary scientific information to determine if there will be an adverse effect on a prior appropriator and takes the necessary actions to mitigate or prevent any adverse effects on a prior appropriator; and

WHEREAS, it is critical that the Legislature develop state water policies in a way that protects the prior appropriation doctrine while at the same time protecting the quality of Montana's water and the ability to appropriate water consistent with section 85-1-101, MCA, and Article IX, section 3, of the Montana Constitution; and

WHEREAS, augmentation is statutorily authorized for the Clark Fork River Basin only; and

WHEREAS, the Department of Natural Resources and Conservation has developed administrative rules and applied augmentation through these administrative rules to all basins even though not specifically statutorily authorized; and

WHEREAS, administrative rules and rulemaking must comply with section 2-4-305, MCA, and may not engraft material not contemplated by the Legislature; and

WHEREAS, this bill provides definitions and a new procedure for mitigation and aquifer recharge."

*Severability:* Section 29, Ch. 391, L. 2007, was a severability clause.

*Applicability:* Section 31, Ch. 391, L. 2007, provided: "[This act] applies to applications for an appropriation right in a closed basin filed on or after [the effective date of this act]." Effective May 3, 2007.

*1997 Amendment:* Chapter 497 in definition of application, near end before "water reservation", inserted "state". Amendment effective May 1, 1997.

*Saving Clause:* Section 22, Ch. 497, L. 1997, was a saving clause.

*Severability:* Section 23, Ch. 497, L. 1997, was a severability clause.

*Applicability:* Section 4, Ch. 244, L. 1993, provided: "[This act] applies to all applications received by the department of natural resources and conservation after [the effective date of this act]." Effective April 1, 1993.

*Effective Date:* Section 5, Ch. 244, L. 1993, provided: "[This act] is effective on passage and approval." Approved April 1, 1993.

**Case Notes**

*Improper Agency Interpretation of Basin Closure Language:* The Legislature did not define the phrase "immediately or directly connected to surface water" in this section. The Department of Natural Resources and Conservation interpreted the language to apply to ground water that induced surface water infiltration. However, that definition failed to account for impacts to surface water flow caused by the prestream capture of tributary ground water. The intent of the basin closure law was to protect senior water right holders and surface flows in the Upper Missouri River basin and other basins from reduced surface flows, and the Department's partial definition as it related to ground water was in contravention of legislative intent and did not provide sufficient protection to reasonably effectuate the purpose of the basin closure law. Mont. Trout Unlimited v. Dept. of Natural Resources and Conservation, 2006 MT 72, 331 M 483, 133 P3d 224 (2006).

### 85-2-341. Basin closure — exceptions.

**Compiler's Comments**

*2017 Amendment:* Chapter 264 in (2)(f) inserted "including for emergency fire training and emergency fire-related operations"; and made minor changes in style. Amendment effective October 1, 2017.

*2007 Amendments — Composite Section:* Chapter 213 inserted (2)(e) providing that the provisions of subsection (1) do not apply to an application submitted pursuant to 85-20-1401, Article VI; and made minor changes in style. Amendment effective April 17, 2007.

Chapter 391 in (1) near middle after "may not" deleted "process or"; in (2)(a) at end inserted "if the applicant complies with the provisions of 85-2-360"; in (2)(b)(i) substituted "use from surface water or pursuant to 85-2-306" for "municipal"; inserted (2)(b)(iii) concerning use of surface water by municipality; inserted (2)(g) concerning permit to conduct response actions related to natural resource restoration; inserted (3) concerning remedial actions or aquatic resource activities; inserted (4) concerning authorization for changing purpose of use; and made minor changes in style. Amendment effective May 3, 2007.

*Preamble:* The preamble attached to Ch. 391, L. 2007, provided: "WHEREAS, it is the policy of this state to encourage the wise use of the state's water resources by making them available for appropriation and to provide wise utilization, development, and conservation of the water of the state for the maximum benefit of its people with the least possible degradation of the state's natural aquatic ecosystems; and

WHEREAS, there has been confusion regarding ground water issues in closed basins and the Department of Natural Resources and Conservation needs guidance from the Legislature on how to proceed; and

WHEREAS, the basin closure laws were passed to protect senior appropriators while the state water adjudication is ongoing; and

WHEREAS, ground water development in closed basins should be able to proceed as long as the applicant collects the necessary scientific information to determine if there will be an adverse effect on a prior appropriator and takes the necessary actions to mitigate or prevent any adverse effects on a prior appropriator; and

WHEREAS, it is critical that the Legislature develop state water policies in a way that protects the prior appropriation doctrine while at the same time protecting the quality of Montana's water and the ability to appropriate water consistent with section 85-1-101, MCA, and Article IX, section 3, of the Montana Constitution; and

WHEREAS, augmentation is statutorily authorized for the Clark Fork River Basin only; and

WHEREAS, the Department of Natural Resources and Conservation has developed administrative rules and applied augmentation through these administrative rules to all basins even though not specifically statutorily authorized; and

WHEREAS, administrative rules and rulemaking must comply with section 2-4-305, MCA, and may not engraft material not contemplated by the Legislature; and

WHEREAS, this bill provides definitions and a new procedure for mitigation and aquifer recharge."

*Severability:* Section 29, Ch. 391, L. 2007, was a severability clause.

*Applicability:* Section 31, Ch. 391, L. 2007, provided: "[This act] applies to applications for an appropriation right in a closed basin filed on or after [the effective date of this act]." Effective May 3, 2007.

*1997 Amendment:* Chapter 497 in (1), near end before "reservation", inserted "state water". Amendment effective May 1, 1997.

*Saving Clause:* Section 22, Ch. 497, L. 1997, was a saving clause.

*Severability:* Section 23, Ch. 497, L. 1997, was a severability clause.

*1995 Amendment:* Chapter 418 in (1), after "department", deleted "or the board". Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*Applicability:* Section 4, Ch. 244, L. 1993, provided: "[This act] applies to all applications received by the department of natural resources and conservation after [the effective date of this act]." Effective April 1, 1993.

*Effective Date:* Section 5, Ch. 244, L. 1993, provided: "[This act] is effective on passage and approval." Approved April 1, 1993.

## 85-2-342. Definitions.

### Compiler's Comments

*2019 Amendment:* Chapter 59 deleted definition that read ""Nonconsumptive use" means a beneficial use of water that does not cause a reduction in the source of supply and in which substantially all of the water returns without delay to the source of supply, causing little or no disruption in stream conditions"; and made minor changes in style. Amendment effective October 1, 2019.

*2007 Amendment:* Chapter 391 deleted definition of ground water that read: ""Ground water" means water that is beneath the land surface or beneath the bed of a stream, lake, reservoir, or other body of surface water and that is not immediately or directly connected to surface water"; and made minor changes in style. Amendment effective May 3, 2007.

*Preamble:* The preamble attached to Ch. 391, L. 2007, provided: "WHEREAS, it is the policy of this state to encourage the wise use of the state's water resources by making them available for appropriation and to provide wise utilization, development, and conservation of the water of the state for the maximum benefit of its people with the least possible degradation of the state's natural aquatic ecosystems; and

WHEREAS, there has been confusion regarding ground water issues in closed basins and the Department of Natural Resources and Conservation needs guidance from the Legislature on how to proceed; and

WHEREAS, the basin closure laws were passed to protect senior appropriators while the state water adjudication is ongoing; and

WHEREAS, ground water development in closed basins should be able to proceed as long as the applicant collects the necessary scientific information to determine if there will be an adverse effect on a prior appropriator and takes the necessary actions to mitigate or prevent any adverse effects on a prior appropriator; and

WHEREAS, it is critical that the Legislature develop state water policies in a way that protects the prior appropriation doctrine while at the same time protecting the quality of Montana's water and the ability to appropriate water consistent with section 85-1-101, MCA, and Article IX, section 3, of the Montana Constitution; and

WHEREAS, augmentation is statutorily authorized for the Clark Fork River Basin only; and

WHEREAS, the Department of Natural Resources and Conservation has developed administrative rules and applied augmentation through these administrative rules to all basins even though not specifically statutorily authorized; and

WHEREAS, administrative rules and rulemaking must comply with section 2-4-305, MCA, and may not engraft material not contemplated by the Legislature; and

WHEREAS, this bill provides definitions and a new procedure for mitigation and aquifer recharge."

*Severability:* Section 29, Ch. 391, L. 2007, was a severability clause.

*Applicability:* Section 31, Ch. 391, L. 2007, provided: "[This act] applies to applications for an appropriation right in a closed basin filed on or after [the effective date of this act]." Effective May 3, 2007.

*1997 Amendment:* Chapter 497 in definition of application, near end before "water reservation", inserted "state". Amendment effective May 1, 1997.

*Saving Clause:* Section 22, Ch. 497, L. 1997, was a saving clause.

*Severability:* Section 23, Ch. 497, L. 1997, was a severability clause.

*Effective Date:* Section 4, Ch. 385, L. 1993, provided: "[This act] is effective on passage and approval." Approved April 16, 1993.

*Applicability:* Section 5, Ch. 385, L. 1993, provided: "[This act] applies to all applications received by the department of natural resources and conservation after [the effective date of this act]." Effective April 16, 1993.

**Case Notes**

*Improper Agency Interpretation of Basin Closure Language:* The Legislature did not define the phrase "immediately or directly connected to surface water" in 85-2-340. The Department of Natural Resources and Conservation interpreted the language to apply to ground water that induced surface water infiltration. However, that definition failed to account for impacts to surface water flow caused by the prestream capture of tributary ground water. The intent of the basin closure law was to protect senior water right holders and surface flows in the Upper Missouri River basin and other basins from reduced surface flows, and the Department's partial definition as it related to ground water was in contravention of legislative intent and did not provide sufficient protection to reasonably effectuate the purpose of the basin closure law. Mont. Trout Unlimited v. Dept. of Natural Resources and Conservation, 2006 MT 72, 331 M 483, 133 P3d 224 (2006).

**85-2-343. Basin closure — exceptions.**

**Compiler's Comments**

*2017 Amendment:* Chapter 264 in (2)(g) inserted "including for emergency fire training and emergency fire-related operations"; and made minor changes in style. Amendment effective October 1, 2017.

*2007 Amendments — Composite Section:* Chapter 213 inserted (2)(f) providing that the provisions of subsection (1) do not apply to an application submitted pursuant to 85-20-1401, Article VI; and made minor changes in style. Amendment effective April 17, 2007.

Chapter 391 in (1) near middle after "may not" deleted "process or"; in (2)(a) at end inserted "if the applicant complies with the provisions of 85-2-360"; in (2)(c)(i) substituted "use from surface water or pursuant to 85-2-306" for "municipal"; inserted (2)(c)(iii) concerning use of surface water by municipality; inserted (2)(h) concerning permit to conduct response actions related to natural resource restoration; inserted (3) concerning remedial actions or aquatic resource activities; inserted (4) concerning authorization for changing purpose of use; and made minor changes in style. Amendment effective May 3, 2007.

*Preamble:* The preamble attached to Ch. 391, L. 2007, provided: "WHEREAS, it is the policy of this state to encourage the wise use of the state's water resources by making them available for appropriation and to provide wise utilization, development, and conservation of the water of the state for the maximum benefit of its people with the least possible degradation of the state's natural aquatic ecosystems; and

WHEREAS, there has been confusion regarding ground water issues in closed basins and the Department of Natural Resources and Conservation needs guidance from the Legislature on how to proceed; and

WHEREAS, the basin closure laws were passed to protect senior appropriators while the state water adjudication is ongoing; and

WHEREAS, ground water development in closed basins should be able to proceed as long as the applicant collects the necessary scientific information to determine if there will be an adverse effect on a prior appropriator and takes the necessary actions to mitigate or prevent any adverse effects on a prior appropriator; and

WHEREAS, it is critical that the Legislature develop state water policies in a way that protects the prior appropriation doctrine while at the same time protecting the quality of Montana's water and the ability to appropriate water consistent with section 85-1-101, MCA, and Article IX, section 3, of the Montana Constitution; and

WHEREAS, augmentation is statutorily authorized for the Clark Fork River Basin only; and

WHEREAS, the Department of Natural Resources and Conservation has developed administrative rules and applied augmentation through these administrative rules to all basins even though not specifically statutorily authorized; and

WHEREAS, administrative rules and rulemaking must comply with section 2-4-305, MCA, and may not engraft material not contemplated by the Legislature; and

WHEREAS, this bill provides definitions and a new procedure for mitigation and aquifer recharge."

*Severability:* Section 29, Ch. 391, L. 2007, was a severability clause.

*Applicability:* Section 31, Ch. 391, L. 2007, provided: "[This act] applies to applications for an appropriation right in a closed basin filed on or after [the effective date of this act]." Effective May 3, 2007.

*1997 Amendment:* Chapter 441 near middle of (1), after "within the upper Missouri River basin", deleted "during the period from April 16, 1993"; inserted (2)(e) relating to use of water from Muddy Creek drainage; and made minor changes in style.

*1997 Statement of Intent:* The statement of intent attached to Ch. 441, L. 1997, provided: "This bill is intended to allow an applicant to apply for a water permit on the Muddy Creek drainage to use excess water to prevent significant impacts on adjoining lands. This conservation measure will be allowed only if the permit will help control erosion on the Muddy Creek drainage."

*1995 Amendment:* Chapter 418 in (1), after "department", deleted "and the board". Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*Effective Date:* Section 4, Ch. 385, L. 1993, provided: "[This act] is effective on passage and approval." Approved April 16, 1993.

*Applicability:* Section 5, Ch. 385, L. 1993, provided: "[This act] applies to all applications received by the department of natural resources and conservation after [the effective date of this act]." Effective April 16, 1993.

**Case Notes**

*Agency Prerogative to Repeal Administrative Rules as Long as Statute Not Violated — Repeal of Administrative Definition of Municipal Use in Water Use Act:* Although the term "municipal use" is used repeatedly in the Water Use Act, the term was not statutorily defined. In 2005, the Department of Natural Resources and Conservation adopted ARM 36.12.101 that defined municipal use as water appropriated by and provided for those in and around a municipality or unincorporated town. Under the rule, only a municipality or unincorporated town arguably qualified as an acceptable appropriator, when previously it was only necessary that water be appropriated for those in a municipality or unincorporated area. About 1 year after the rule was adopted, the Department sought to repeal the rule because the definition was not in keeping with the historical interpretation of the term by the Department and the Montana Water Court. Following repeal, plaintiffs requested that the District Court declare that repeal of the rule was invalid. The District Court held that by repealing the rule: (1) the definition of municipal use was rendered nebulous and unfairly accommodating of private developers' applications for water use permits; (2) the purpose of the basin closure law to protect and preserve existing water rights would be undermined, potentially threatening senior water rights in an already overappropriated basin; and (3) legislative intent was contravened and plaintiffs' water rights were placed in jeopardy. Plaintiffs' request was granted and repeal of the rule was declared invalid. On appeal, the Supreme Court reversed. The court first determined that the issue was justiciable because it continued to present a controversy concerning the nature of water rights applications and because plaintiffs had a statutory right to challenge the repeal of the rule under 2-4-506, although plaintiffs had the burden to show that the repeal interfered with or impaired their legal rights or privileges or that repeal was implemented with an arbitrary or capricious disregard for the purpose of the implementing legislation as evidenced by the documented legislative intent. Plaintiffs did not meet their burden. The rule was not in effect long enough for plaintiffs to demonstrate that their rights or privileges were impaired or threatened by the repeal, and private entities had previously been granted municipal use permits. Additionally, plaintiffs failed to show that the repeal was arbitrary or capricious. It was the agency's prerogative to enact rules to aid in the permitting process and to repeal rules that were not of assistance as long as the agency does not violate 2-4-506. Lohmeier v. St., 2008 MT 307, 346 M 23, 192 P3d 1137 (2008).

*Exhaustion of Administrative Remedies Not Required When Futile:* The District Court concluded that plaintiffs were required to exhaust administrative remedies before seeking a declaratory judgment in District Court. However, pursuant to DeVoe v. Dept. of Revenue, 263 M 100, 866 P2d 228 (1993), the Supreme Court will not require exhaustion of administrative remedies when the act would be futile. Here, exhaustion of administrative remedies would have required plaintiffs to stand by while defendant processed an application for ground water that did not fall within the exception to the Upper Missouri River basin closure law in this section. Waiting for applications to be issued before challenging them administratively or judicially would have been ineffective in preventing immediate harm to surface water in the basin and would have deprived plaintiffs of a remedy and required participation in a costly administrative process to object to applications that were expressly prohibited by the basin closure law and defendant's own rules. Thus, the futility exception to the exhaustion requirement relieved plaintiffs from having to exhaust administrative remedies before seeking judicial review, and the District Court was reversed. Mont. Trout Unlimited v. Dept. of Natural Resources and Conservation, 2006 MT 72, 331 M 483, 133 P3d 224 (2006).

*Improper Agency Interpretation of Basin Closure Language:* The Legislature did not define the phrase "immediately or directly connected to surface water" in 85-2-340. The Department of Natural Resources and Conservation interpreted the language to apply to ground water that induced surface water infiltration. However, that definition failed to account for impacts to surface water flow caused by the prestream capture of tributary ground water. The intent of the basin closure law was to protect senior water right holders and surface flows in the Upper Missouri River basin and other basins from reduced surface flows, and the Department's partial definition as it related to ground water was in contravention of legislative intent and did not provide sufficient protection to reasonably effectuate the purpose of the basin closure law. Mont. Trout Unlimited v. Dept. of Natural Resources and Conservation, 2006 MT 72, 331 M 483, 133 P3d 224 (2006).

### 85-2-344. Bitterroot River subbasin temporary closure — definitions — exceptions.

**Compiler's Comments**

*2017 Amendment:* Chapter 264 in (2)(c) inserted "including for emergency fire training and emergency fire-related operations"; and made minor changes in style. Amendment effective October 1, 2017.

*2009 Amendment:* Chapter 2 in (2) near end of introductory clause after "subsection" substituted "(5)" for "(3)". Amendment effective October 1, 2009.

*2007 Amendments — Composite Section:* Chapter 213 inserted (2)(d) providing that the requirement that the department may not process or grant an application to appropriate or reserve water within the Bitterroot River subbasin until the basin closure is terminated does not apply to an application submitted pursuant to 85-20-1401, Article VI; and made minor changes in style. Amendment effective April 17, 2007.

Chapter 391 in (2) near middle after "may not" deleted "process or"; in (2)(a) at end inserted "if the applicant complies with the provisions of 85-2-360"; in (2)(b) substituted "use of surface water by or for a municipality" for "a municipal water supply"; inserted (2)(f) concerning permit to conduct response actions related to natural resource restoration; inserted (3) concerning remedial actions or aquatic resource activities; inserted (4) concerning authorization for changing purpose of use; and made minor changes in style. Amendment effective May 3, 2007.

*Preamble:* The preamble attached to Ch. 391, L. 2007, provided: "WHEREAS, it is the policy of this state to encourage the wise use of the state's water resources by making them available for appropriation and to provide wise utilization, development, and conservation of the water of the state for the maximum benefit of its people with the least possible degradation of the state's natural aquatic ecosystems; and

WHEREAS, there has been confusion regarding ground water issues in closed basins and the Department of Natural Resources and Conservation needs guidance from the Legislature on how to proceed; and

WHEREAS, the basin closure laws were passed to protect senior appropriators while the state water adjudication is ongoing; and

WHEREAS, ground water development in closed basins should be able to proceed as long as the applicant collects the necessary scientific information to determine if there will be an adverse effect on a prior appropriator and takes the necessary actions to mitigate or prevent any adverse effects on a prior appropriator; and

WHEREAS, it is critical that the Legislature develop state water policies in a way that protects the prior appropriation doctrine while at the same time protecting the quality of Montana's water and the ability to appropriate water consistent with section 85-1-101, MCA, and Article IX, section 3, of the Montana Constitution; and

WHEREAS, augmentation is statutorily authorized for the Clark Fork River Basin only; and

WHEREAS, the Department of Natural Resources and Conservation has developed administrative rules and applied augmentation through these administrative rules to all basins even though not specifically statutorily authorized; and

WHEREAS, administrative rules and rulemaking must comply with section 2-4-305, MCA, and may not engraft material not contemplated by the Legislature; and

WHEREAS, this bill provides definitions and a new procedure for mitigation and aquifer recharge."

*Severability:* Section 29, Ch. 391, L. 2007, was a severability clause.

*Applicability:* Section 31, Ch. 391, L. 2007, provided: "[This act] applies to applications for an appropriation right in a closed basin filed on or after [the effective date of this act]." Effective May 3, 2007.

*Effective Date:* Section 3, Ch. 205, L. 1999, provided: "[This act] is effective on passage and approval." Approved March 29, 1999.

*Applicability:* Section 4, Ch. 205, L. 1999, provided: "[This act] applies to all applications received by the department of natural resources and conservation after [the effective date of this act]." Effective March 29, 1999.

**Case Notes**

*Water Appropriation Application Amendments So Significant as to Constitute New Appropriations — Original Applications Considered Shams — New Applications Barred by Subbasin Closure:* Just 10 days before the Legislature closed the Bitterroot River subbasin to new water appropriations in 1999, defendants submitted four appropriation applications to develop ponds on their property for the beneficial use of wildlife. All four applications were subsequently amended to variously revise volume and flow rates, proposed pond depth, points and means of diversion, place of use, and beneficial uses. Numerous parties objected to the proposed appropriations, including plaintiff, which moved to terminate the applications on grounds that the amendments were submitted in bad faith and were new applications and that deficiencies in the applications were not cured within the statutory time limit. A hearings examiner denied the motion to terminate the applications, but nevertheless denied the applications on numerous grounds. Defendants filed exceptions to the hearings examiner's decision, and the Department of Natural Resources and Conservation reversed the hearings examiner and granted all four applications. Plaintiff petitioned the District Court for review, and the court concluded that the Department erred in accepting and processing the amended applications after the subbasin closure and in other ways and denied the applications. On appeal, the Supreme Court affirmed. The amendments to the applications were not mere refinements, but constituted changes so significant that the amended applications bore such little resemblance to the original applications as to be considered shams. The nature and extent of the changes could be consistent only with new applications with new priority dates, which were prohibited by the subbasin closure. The Supreme Court noted that to hold otherwise would establish a precedent allowing a prospective appropriator to file a deficient application and later amend the application without penalty, thereby gaining an advantage over other appropriators and circumventing other restrictions associated with a subbasin closure. Bitterroot River Protective Ass'n, Inc. v. Siebel, 2005 MT 60, 326 M 241, 108 P3d 518 (2005).

## 85-2-351. Notice to permitholders — Clark Fork River basin.

**Compiler's Comments**

*Termination Provision Repealed:* Section 2, Ch. 434, L. 2005, repealed sec. 6, Ch. 447, L. 2001, which terminated this section April 15, 2005. Effective April 28, 2005.

*Effective Date:* Section 5, Ch. 447, L. 2001, provided that this section is effective on passage and approval. Approved April 30, 2001.

*Termination:* Section 6, Ch. 447, L. 2001, provided: "[This act] terminates April 15, 2005."

## 85-2-355. Definitions.

**Compiler's Comments**

*2015 Amendment:* Chapter 455 inserted definitions of ephemeral stream and intermittent stream; substituted definition of perennial flowing stream for former definition that read: "means a stream that historically has flowed continuously during all seasons of the year, during dry as well as wet years"; and made minor changes in style. Amendment effective October 1, 2015.

*Effective Date:* Section 8, Ch. 161, L. 2005, provided that this section is effective on passage and approval. Approved April 7, 2005.

## 85-2-360. Ground water appropriation right in closed basins.

**Compiler's Comments**

*2017 Amendment:* Chapter 243 inserted (3)(b) regarding the department not considering adverse effect on any water right listed on written consent to approval; and made minor changes in style. Amendment effective October 1, 2017, and terminates September 30, 2023.

*2013 Amendment:* Chapter 335 in (1) inserted "85-2-319, 85-2-321", after "85-2-344" deleted "or administratively closed pursuant to 85-2-319", substituted "report" for "assessment", and substituted "an aquifer recharge or mitigation plan if required, and an application for a change in appropriation right or rights if necessary" for "to predict whether the proposed appropriation right will result in a net depletion of surface water and must be accompanied by a plan as provided in 85-2-362, if necessary"; inserted (2) regarding potential net depletion of surface water; deleted former (2) through (4) that read: "(2) If the hydrogeologic assessment conducted pursuant to 85-2-361 predicts that the proposed appropriation right will not result in a net depletion of surface water, the department shall proceed under the criteria provided in 85-2-311.

(3) (a) If the hydrogeologic assessment predicts that the proposed appropriation right will result in a net depletion of surface water, the applicant shall analyze whether the net depletion results in an adverse effect on a prior appropriator. If the applicant provides a correct and complete application, the department shall proceed to process the application as provided in 85-2-363.

(b) If the applicant has used the water for the purpose of conducting the hydrogeologic assessment, the applicant shall terminate the use of the water. Failure to terminate use of the water must result in a fine of not more than $1,000 for each day of the violation.

(4) If the hydrogeologic assessment predicts that there will be net depletion as provided in subsection (3)(a), the department may proceed to process the application pursuant to 85-2-363 if, in addition to other applicable criteria, the applicant complies with 85-2-362"; in (3)(a) near end substituted "the rate, location, and timing of the net depletion" for "the amount, location, and duration of the amount of net depletion"; inserted (3)(b) regarding proof of offsetting adverse effect by preponderance of evidence; deleted former (6) that read: "(6) The priority date for an appropriation right that is granted to an entity whose permit application was returned after April 11, 2006, and before May 3, 2007, because of the department's interpretation of a court decision is the date of the initial application to the department"; and made minor changes in style. Amendment effective October 1, 2013.

*Preamble:* The preamble attached to Ch. 391, L. 2007, provided: "WHEREAS, it is the policy of this state to encourage the wise use of the state's water resources by making them available for appropriation and to provide wise utilization, development, and conservation of the water of the state for the maximum benefit of its people with the least possible degradation of the state's natural aquatic ecosystems; and

WHEREAS, there has been confusion regarding ground water issues in closed basins and the Department of Natural Resources and Conservation needs guidance from the Legislature on how to proceed; and

WHEREAS, the basin closure laws were passed to protect senior appropriators while the state water adjudication is ongoing; and

WHEREAS, ground water development in closed basins should be able to proceed as long as the applicant collects the necessary scientific information to determine if there will be an adverse effect on a prior appropriator and takes the necessary actions to mitigate or prevent any adverse effects on a prior appropriator; and

WHEREAS, it is critical that the Legislature develop state water policies in a way that protects the prior appropriation doctrine while at the same time protecting the quality of Montana's water and the ability to appropriate water consistent with section 85-1-101, MCA, and Article IX, section 3, of the Montana Constitution; and

WHEREAS, augmentation is statutorily authorized for the Clark Fork River Basin only; and

WHEREAS, the Department of Natural Resources and Conservation has developed administrative rules and applied augmentation through these administrative rules to all basins even though not specifically statutorily authorized; and

WHEREAS, administrative rules and rulemaking must comply with section 2-4-305, MCA, and may not engraft material not contemplated by the Legislature; and

WHEREAS, this bill provides definitions and a new procedure for mitigation and aquifer recharge."

*Severability:* Section 29, Ch. 391, L. 2007, was a severability clause.

*Effective Date:* Section 30, Ch. 391, L. 2007, provided that this section is effective on passage and approval. Approved May 3, 2007.

*Applicability:* Section 31, Ch. 391, L. 2007, provided: "[This act] applies to applications for an appropriation right in a closed basin filed on or after [the effective date of this act]." Effective May 3, 2007.

**Case Notes**

*Mitigation Plan Properly Required When Net Depletion of Surface Water Found:* The plaintiff applied to the Department of Natural Resources and Conservation (DNRC) for a ground water permit. The District Court determined that the plaintiff's proposed usage would have resulted in a net depletion of surface water, requiring that the plaintiff mitigate any net depletion of water. The plaintiff appealed the District Court's decision, arguing that its use would not result in a net depletion of surface water; therefore, no mitigation plan was necessary. The plaintiff noted its plan to pave roads and parking lots would result in adequate runoff to refill any surface water depleted by its use, but the Supreme Court found that under 85-2-361, the Legislature intended to consider only factors regarding appropriated water, rather than other water used to replace lost water. The plaintiff also argued that its use of ground water could not be proven to adversely affect surface or ground water and senior appropriators, but the court noted that the plaintiff was required under 85-2-311 to show its water usage would result in no adverse effects. The plaintiff argued that any senior water rights holders could force it to stop using water, but because adverse effects were difficult to prove for the plaintiff, senior water rights holders would find it equally difficult to defend their rights, and under 85-2-311, the applicant had the clear burden to prove the lack of adverse effect. Last, the plaintiff noted that its proposed de minimis usage could not affect senior water rights, but 85-2-360 creates no de minimis exception, and during annual irrigation periods, all water is already appropriated, resulting in junior rights holders generally being cut off because of a lack of water. Hence, because the District Court properly found the proposed usage would have resulted in a net depletion of surface water, the mitigation requirement was appropriate. Bostwick Properties, Inc. v. Dept. of Natural Resources and Conservation, 2013 MT 48, 369 Mont. 150, 296 P.3d 1154.

## 85-2-361. Hydrogeologic report — minimum requirements.

**Compiler's Comments**

*2013 Amendment:* Chapter 335 in (1) substituted current language for former text that read: "(1) (a) For the purposes of 85-2-360 through 85-2-362, "hydrogeologic assessment" means a report for the project for or through which water will be put to beneficial use, the point of diversion, and the place of use that describes the geology, hydrogeologic environment, water quality with regard to the provisions of 75-5-410 and 85-2-364, and predicted net depletion, if any, including the timing of any net depletion, for surface water within the area described in subsection (2)(a)(i) within the closed basins that are subject to an appropriation right, including but not limited to rivers, streams, irrigation canals, or drains that might be affected by the new appropriation right and any predicted water quality changes that may result.

(b) In predicting net depletion of surface water from a proposed use, consideration must be given, at a minimum, to:

(i) the actual amount diverted for like beneficial uses;

(ii) any amounts that will likely be lost in conveyance, if any, and whether any lost amounts are lost to the system through evaporation or other means or whether those amounts are returned to the system through percolation or other means; and

(iii) any return flows from the proposed use, including but not limited to any treated wastewater return flows if the treated wastewater that is considered effluent meets the requirements of 75-5-410 and 85-2-364"; in (2) substituted "A hydrogeologic report must be prepared" for "A hydrogeologic assessment that will be used to predict net depletion of surface water resulting from a new appropriation right must include hydrogeologic data or a model developed" and after "engineer" deleted "that incorporates for the new appropriation"; deleted former (2)(a)(i) through (3) that read: "(i) the area or estimated area of ground water that will be affected, not to exceed the boundaries of the drainage subdivisions established by the office of water data coordination, United States geological survey, and used by the water court, unless the applicant chooses to expand the boundaries;

(ii) the geology in the area identified in subsection (2)(a)(i), including stratigraphy and structure;

(iii) the parameters of the aquifer system within the area identified in subsection (2)(a)(i) to include, at a minimum, estimates for:

(A) the lateral and vertical extent of the aquifer;

(B) whether the aquifer is confined or unconfined;

(C) the effective hydraulic conductivity of the aquifer;

(D) transmissivity and storage coefficient related to the aquifer; and

(E) the estimated flow direction or directions of ground water and the rate of movement;

(iv) the locations of surface waters within the area described in subsection (2)(a)(i) that are subject to an appropriation right, including but not limited to springs, creeks, streams, or rivers that may or may not show a net depletion;

(v) evidence of water availability; and

(vi) the locations of all wells or other sources of ground water of record within the area identified in subsection (2)(a)(i).

(b) A hydrogeologic assessment must also include a water quality report that includes:

(i) the location of existing documented hazards that could be affected or exacerbated by the appropriation right, such as areas of subsidence, along with a plan to mitigate any conditions or impacts;

(ii) other water quality information necessary to comply with 75-5-410 and 85-2-364; and

(iii) a description of any water treatment method that will be used at the time of any type of injection or introduction of water to the aquifer to ensure compliance with 75-5-410 and 85-2-364 and the water quality laws under Title 75, chapter 5.

(3) The hydrogeologic assessment must include an analysis of whether the information required by subsection (2) predicts that there may be a net depletion of surface water in the area described in subsection (2)(a)(i) and the extent of the depletion, if any"; in (3) substituted "report" for "assessment, the model if provided" and substituted "make the information available through the ground water information center database" for "ensure that information submitted pursuant to this section is entered into the ground water information center database as part of the ground water assessment program"; deleted former (5) that read: "(5) An entity that has previously conducted some type of hydrogeologic assessment may submit the information from that assessment as the hydrogeologic assessment required by this section if the information meets the criteria and requirements of this section"; and made minor changes in style. Amendment effective October 1, 2013.

*Preamble:* The preamble attached to Ch. 391, L. 2007, provided: "WHEREAS, it is the policy of this state to encourage the wise use of the state's water resources by making them available for appropriation and to provide wise utilization, development, and conservation of the water of the state for the maximum benefit of its people with the least possible degradation of the state's natural aquatic ecosystems; and

WHEREAS, there has been confusion regarding ground water issues in closed basins and the Department of Natural Resources and Conservation needs guidance from the Legislature on how to proceed; and

WHEREAS, the basin closure laws were passed to protect senior appropriators while the state water adjudication is ongoing; and

WHEREAS, ground water development in closed basins should be able to proceed as long as the applicant collects the necessary scientific information to determine if there will be an adverse effect on a prior appropriator and takes the necessary actions to mitigate or prevent any adverse effects on a prior appropriator; and

WHEREAS, it is critical that the Legislature develop state water policies in a way that protects the prior appropriation doctrine while at the same time protecting the quality of Montana's water and the ability to appropriate water consistent with section 85-1-101, MCA, and Article IX, section 3, of the Montana Constitution; and

WHEREAS, augmentation is statutorily authorized for the Clark Fork River Basin only; and

WHEREAS, the Department of Natural Resources and Conservation has developed administrative rules and applied augmentation through these administrative rules to all basins even though not specifically statutorily authorized; and

WHEREAS, administrative rules and rulemaking must comply with section 2-4-305, MCA, and may not engraft material not contemplated by the Legislature; and

WHEREAS, this bill provides definitions and a new procedure for mitigation and aquifer recharge."

*Severability:* Section 29, Ch. 391, L. 2007, was a severability clause.

*Effective Date:* Section 30, Ch. 391, L. 2007, provided that this section is effective on passage and approval. Approved May 3, 2007.

*Applicability:* Section 31, Ch. 391, L. 2007, provided: "[This act] applies to applications for an appropriation right in a closed basin filed on or after [the effective date of this act]." Effective May 3, 2007.

**Case Notes**

*Mitigation Plan Properly Required When Net Depletion of Surface Water Found:* The plaintiff applied to the Department of Natural Resources and Conservation (DNRC) for a ground water permit. The District Court determined that the plaintiff's proposed usage would have resulted in a net depletion of surface water, requiring that the plaintiff mitigate any net depletion of water. The plaintiff appealed the District Court's decision, arguing that its use would not result in a net depletion of surface water; therefore, no mitigation plan was necessary. The plaintiff noted its plan to pave roads and parking lots would result in adequate runoff to refill any surface water depleted by its use, but the Supreme Court found that under 85-2-361, the Legislature intended to consider only factors regarding appropriated water, rather than other water used to replace lost water. The plaintiff also argued that its use of ground water could not be proven to adversely affect surface or ground water and senior appropriators, but the court noted that the plaintiff was required under 85-2-311 to show its water usage would result in no adverse effects. The plaintiff argued that any senior water rights holders could force it to stop using water, but because adverse effects were difficult to prove for the plaintiff, senior water rights holders would find it equally difficult to defend their rights, and under 85-2-311, the applicant had the clear burden to prove the lack of adverse effect. Last, the plaintiff noted that its proposed de minimis usage could not affect senior water rights, but 85-2-360 creates no de minimis exception, and during annual irrigation periods, all water is already appropriated, resulting in junior rights holders generally being cut off because of a lack of water. Hence, because the District Court properly found the proposed usage would have resulted in a net depletion of surface water, the mitigation requirement was appropriate. Bostwick Properties, Inc. v. Dept. of Natural Resources and Conservation, 2013 MT 48, 369 Mont. 150, 296 P.3d 1154.

## 85-2-362. Aquifer recharge or mitigation plans in closed basins — minimum requirements.

### Compiler's Comments

*2013 Amendment:* Chapter 335 in (1) substituted "hydrogeologic report" for "hydrogeologic assessment" and substituted "shall submit an aquifer recharge or mitigation plan. An aquifer recharge or mitigation plan" for "shall offset the net depletion that results in the adverse effect through a mitigation plan or an aquifer recharge plan. A mitigation plan"; in (1)(b) substituted "water for aquifer recharge or mitigation" for "water reallocated through exchange or substitution"; in (1)(c) substituted "water that is required for aquifer recharge or mitigation" for "water reallocated through exchange or substitution that is required"; in (1)(d) and (1)(g) before "mitigation" inserted "aquifer recharge or"; in (2) substituted current text for "An aquifer recharge plan must include:

(a) evidence that the appropriate water quality permits have been granted pursuant to Title 75, chapter 5, as required by 75-5-410 and 85-2-364;

(b) where and how the water in the plan will be put to beneficial use;

(c) when and where, generally, water reallocated through exchange or substitution will be required;

(d) the amount of water reallocated through exchange or substitution that is required;

(e) how the proposed project or beneficial use for which the aquifer recharge plan is required will be operated;

(f) evidence that an application for a change in appropriation right, if necessary, has been submitted;

(g) a description of the process by which water will be reintroduced to the aquifer;

(h) evidence of water availability; and

(i) evidence of how the aquifer recharge plan will offset the required amount of net depletion of surface water in a manner that will offset any adverse effect on a prior appropriator"; in (3) substituted "an aquifer recharge or mitigation plan" for "a mitigation plan or an aquifer recharge plan"; in (4) substituted "an aquifer recharge or mitigation plan must require that the aquifer recharge or mitigation plan be exercised" for "a mitigation plan or aquifer recharge plan to offset net depletion of surface water that results in an adverse effect on a prior appropriator must be issued as a conditional permit that requires that the mitigation plan or aquifer recharge plan must be exercised"; and made minor changes in style. Amendment effective October 1, 2013.

*2009 Amendment:* Chapter 104 inserted (2)(h) requiring that a mitigation plan include evidence that the appropriate water quality permits have been granted; and made minor changes in style. Amendment effective April 1, 2009.

*Applicability:* Section 7, Ch. 104, L. 2009, provided: "[This act] applies to applications received by the department of natural resources and conservation on or after [the effective date of this act]." Effective April 1, 2009.

*Preamble:* The preamble attached to Ch. 391, L. 2007, provided: "WHEREAS, it is the policy of this state to encourage the wise use of the state's water resources by making them available for appropriation and to provide wise utilization, development, and conservation of the water of the state for the maximum benefit of its people with the least possible degradation of the state's natural aquatic ecosystems; and

WHEREAS, there has been confusion regarding ground water issues in closed basins and the Department of Natural Resources and Conservation needs guidance from the Legislature on how to proceed; and

WHEREAS, the basin closure laws were passed to protect senior appropriators while the state water adjudication is ongoing; and

WHEREAS, ground water development in closed basins should be able to proceed as long as the applicant collects the necessary scientific information to determine if there will be an adverse effect on a prior appropriator and takes the necessary actions to mitigate or prevent any adverse effects on a prior appropriator; and

WHEREAS, it is critical that the Legislature develop state water policies in a way that protects the prior appropriation doctrine while at the same time protecting the quality of Montana's water and the ability to appropriate water consistent with section 85-1-101, MCA, and Article IX, section 3, of the Montana Constitution; and

WHEREAS, augmentation is statutorily authorized for the Clark Fork River Basin only; and

WHEREAS, the Department of Natural Resources and Conservation has developed administrative rules and applied augmentation through these administrative rules to all basins even though not specifically statutorily authorized; and

WHEREAS, administrative rules and rulemaking must comply with section 2-4-305, MCA, and may not engraft material not contemplated by the Legislature; and

WHEREAS, this bill provides definitions and a new procedure for mitigation and aquifer recharge."

*Severability:* Section 29, Ch. 391, L. 2007, was a severability clause.

*Effective Date:* Section 30, Ch. 391, L. 2007, provided that this section is effective on passage and approval. Approved May 3, 2007.

*Applicability:* Section 31, Ch. 391, L. 2007, provided: "[This act] applies to applications for an appropriation right in a closed basin filed on or after [the effective date of this act]." Effective May 3, 2007.

**Case Notes**

*Identification of Specific Water Right for Mitigation Proper:* The plaintiff applied to the Department of Natural Resources and Conservation (DNRC) for a ground water permit. Because the plaintiff's proposed usage would have resulted in a net depletion of surface water, a mitigation plan was required to mitigate any net depletion of water. DNRC required the plaintiff to identify a specific water right for mitigation. To properly mitigate the water it was depleting under the facts of this case, a water right would be sufficient in this instance only if it was senior to 1890 claims and if mitigation water reached the Canyon Ferry Dam. Therefore, the Supreme Court noted, DNRC needed a specific water right to properly analyze the mitigation plan. Furthermore, if the plaintiff could not in fact acquire the water right, it could ultimately purchase a similar water right. Bostwick Properties, Inc. v. Dept. of Natural Resources and Conservation, 2013 MT 48, 369 Mont. 150, 296 P.3d 1154.

**85-2-364. Department permit coordination — requirements for aquifer recharge or mitigation plans.**

**Compiler's Comments**

*2009 Amendment:* Chapter 104 in (1) and (2) after "recharge" inserted "or mitigation". Amendment effective April 1, 2009.

*Applicability:* Section 7, Ch. 104, L. 2009, provided: "[This act] applies to applications received by the department of natural resources and conservation on or after [the effective date of this act]." Effective April 1, 2009.

*Preamble:* The preamble attached to Ch. 391, L. 2007, provided: "WHEREAS, it is the policy of this state to encourage the wise use of the state's water resources by making them available for appropriation and to provide wise utilization, development, and conservation of the water of the state for the maximum benefit of its people with the least possible degradation of the state's natural aquatic ecosystems; and

WHEREAS, there has been confusion regarding ground water issues in closed basins and the Department of Natural Resources and Conservation needs guidance from the Legislature on how to proceed; and

WHEREAS, the basin closure laws were passed to protect senior appropriators while the state water adjudication is ongoing; and

WHEREAS, ground water development in closed basins should be able to proceed as long as the applicant collects the necessary scientific information to determine if there will be an adverse effect on a prior appropriator and takes the necessary actions to mitigate or prevent any adverse effects on a prior appropriator; and

WHEREAS, it is critical that the Legislature develop state water policies in a way that protects the prior appropriation doctrine while at the same time protecting the quality of Montana's water and the ability to appropriate water consistent with section 85-1-101, MCA, and Article IX, section 3, of the Montana Constitution; and

WHEREAS, augmentation is statutorily authorized for the Clark Fork River Basin only; and

WHEREAS, the Department of Natural Resources and Conservation has developed administrative rules and applied augmentation through these administrative rules to all basins even though not specifically statutorily authorized; and

WHEREAS, administrative rules and rulemaking must comply with section 2-4-305, MCA, and may not engraft material not contemplated by the Legislature; and

WHEREAS, this bill provides definitions and a new procedure for mitigation and aquifer recharge."

*Severability:* Section 29, Ch. 391, L. 2007, was a severability clause.

*Effective Date:* Section 30, Ch. 391, L. 2007, provided that this section is effective on passage and approval. Approved May 3, 2007.

*Applicability:* Section 31, Ch. 391, L. 2007, provided: "[This act] applies to applications for an appropriation right in a closed basin filed on or after [the effective date of this act]." Effective May 3, 2007.

## 85-2-368. Aquifer storage and recovery projects in closed basins.

### Compiler's Comments

*Preamble:* The preamble attached to Ch. 391, L. 2007, provided: "WHEREAS, it is the policy of this state to encourage the wise use of the state's water resources by making them available for appropriation and to provide wise utilization, development, and conservation of the water of the state for the maximum benefit of its people with the least possible degradation of the state's natural aquatic ecosystems; and

WHEREAS, there has been confusion regarding ground water issues in closed basins and the Department of Natural Resources and Conservation needs guidance from the Legislature on how to proceed; and

WHEREAS, the basin closure laws were passed to protect senior appropriators while the state water adjudication is ongoing; and

WHEREAS, ground water development in closed basins should be able to proceed as long as the applicant collects the necessary scientific information to determine if there will be an adverse effect on a prior appropriator and takes the necessary actions to mitigate or prevent any adverse effects on a prior appropriator; and

WHEREAS, it is critical that the Legislature develop state water policies in a way that protects the prior appropriation doctrine while at the same time protecting the quality of Montana's water and the ability to appropriate water consistent with section 85-1-101, MCA, and Article IX, section 3, of the Montana Constitution; and

WHEREAS, augmentation is statutorily authorized for the Clark Fork River Basin only; and

WHEREAS, the Department of Natural Resources and Conservation has developed administrative rules and applied augmentation through these administrative rules to all basins even though not specifically statutorily authorized; and

WHEREAS, administrative rules and rulemaking must comply with section 2-4-305, MCA, and may not engraft material not contemplated by the Legislature; and

WHEREAS, this bill provides definitions and a new procedure for mitigation and aquifer recharge."

*Severability:* Section 29, Ch. 391, L. 2007, was a severability clause.

*Effective Date:* Section 30, Ch. 391, L. 2007, provided that this section is effective on passage and approval. Approved May 3, 2007.

*Applicability:* Section 31, Ch. 391, L. 2007, provided: "[This act] applies to applications for an appropriation right in a closed basin filed on or after [the effective date of this act]." Effective May 3, 2007.

### 85-2-369. Permit not required for testing.

**Compiler's Comments**

*2013 Amendment:* Chapter 335 deleted former (1) that read: "(1) All aquifer testing data and other related information from test wells, monitoring wells, or other sources that is collected for the purpose of obtaining a new appropriation right or a change in appropriation right pursuant to 85-2-360 through 85-2-362 must be submitted to the department and the bureau of mines and geology in a form prescribed by the department and the bureau of mines and geology. The bureau of mines and geology shall ensure that information submitted pursuant to this section is entered into the ground water information center database as part of the ground water assessment program"; and made minor changes in style. Amendment effective October 1, 2013.

*Preamble:* The preamble attached to Ch. 391, L. 2007, provided: "WHEREAS, it is the policy of this state to encourage the wise use of the state's water resources by making them available for appropriation and to provide wise utilization, development, and conservation of the water of the state for the maximum benefit of its people with the least possible degradation of the state's natural aquatic ecosystems; and

WHEREAS, there has been confusion regarding ground water issues in closed basins and the Department of Natural Resources and Conservation needs guidance from the Legislature on how to proceed; and

WHEREAS, the basin closure laws were passed to protect senior appropriators while the state water adjudication is ongoing; and

WHEREAS, ground water development in closed basins should be able to proceed as long as the applicant collects the necessary scientific information to determine if there will be an adverse effect on a prior appropriator and takes the necessary actions to mitigate or prevent any adverse effects on a prior appropriator; and

WHEREAS, it is critical that the Legislature develop state water policies in a way that protects the prior appropriation doctrine while at the same time protecting the quality of Montana's water and the ability to appropriate water consistent with section 85-1-101, MCA, and Article IX, section 3, of the Montana Constitution; and

WHEREAS, augmentation is statutorily authorized for the Clark Fork River Basin only; and

WHEREAS, the Department of Natural Resources and Conservation has developed administrative rules and applied augmentation through these administrative rules to all basins even though not specifically statutorily authorized; and

WHEREAS, administrative rules and rulemaking must comply with section 2-4-305, MCA, and may not engraft material not contemplated by the Legislature; and

WHEREAS, this bill provides definitions and a new procedure for mitigation and aquifer recharge."

*Severability:* Section 29, Ch. 391, L. 2007, was a severability clause.

*Effective Date:* Section 30, Ch. 391, L. 2007, provided that this section is effective on passage and approval. Approved May 3, 2007.

*Applicability:* Section 31, Ch. 391, L. 2007, provided: "[This act] applies to applications for an appropriation right in a closed basin filed on or after [the effective date of this act]." Effective May 3, 2007.

### 85-2-370. Rulemaking.

**Compiler's Comments**

*Preamble:* The preamble attached to Ch. 391, L. 2007, provided: "WHEREAS, it is the policy of this state to encourage the wise use of the state's water resources by making them available for appropriation and to provide wise utilization, development, and conservation of the water of the state for the maximum benefit of its people with the least possible degradation of the state's natural aquatic ecosystems; and

WHEREAS, there has been confusion regarding ground water issues in closed basins and the Department of Natural Resources and Conservation needs guidance from the Legislature on how to proceed; and

WHEREAS, the basin closure laws were passed to protect senior appropriators while the state water adjudication is ongoing; and

WHEREAS, ground water development in closed basins should be able to proceed as long as the applicant collects the necessary scientific information to determine if there will be an adverse effect on a prior appropriator and takes the necessary actions to mitigate or prevent any adverse effects on a prior appropriator; and

WHEREAS, it is critical that the Legislature develop state water policies in a way that protects the prior appropriation doctrine while at the same time protecting the quality of Montana's water and the ability to appropriate water consistent with section 85-1-101, MCA, and Article IX, section 3, of the Montana Constitution; and

WHEREAS, augmentation is statutorily authorized for the Clark Fork River Basin only; and

WHEREAS, the Department of Natural Resources and Conservation has developed administrative rules and applied augmentation through these administrative rules to all basins even though not specifically statutorily authorized; and

WHEREAS, administrative rules and rulemaking must comply with section 2-4-305, MCA, and may not engraft material not contemplated by the Legislature; and

WHEREAS, this bill provides definitions and a new procedure for mitigation and aquifer recharge."

*Severability:* Section 29, Ch. 391, L. 2007, was a severability clause.

*Effective Date:* Section 30, Ch. 391, L. 2007, provided that this section is effective on passage and approval. Approved May 3, 2007.

*Applicability:* Section 31, Ch. 391, L. 2007, provided: "[This act] applies to applications for an appropriation right in a closed basin filed on or after [the effective date of this act]." Effective May 3, 2007.

### 85-2-380. Stream depletion zones — establishment — rulemaking

**Compiler's Comments**

*Effective Date:* This section is effective October 1, 2013.

### 85-2-381. Water right enforcement of ground water uses exempt from permitting — findings and purpose.

**Compiler's Comments**

*Effective Date:* This section is effective October 1, 2013.

## Part 4

## Utilization of Water

**Part Administrative Rules**

Title 36, chapter 12, subchapter 1, ARM Water Rights Bureau — Montana Water Use Act.

**Part Case Notes**

*Findings and Conclusions as to Water Rights Held Inadequate — Judgment Vacated and Remanded:* When a midstream and downstream water user filed suit against the upstream user to have the District Court declare the relative water rights of the parties, the findings of fact and conclusions of law entered by the District Court were so bare and inadequate as to provide no basis for meaningful appellate review. Because it could not be determined from the District Court's bare conclusions (i.e., that the parties had failed to prove their case by a preponderance of the evidence and had abandoned their rights) what the factual or evidentiary basis for the District Court's decision was, the Supreme Court vacated the judgment as to all of the three parties and remanded the case to the District Court and directed it to enter findings and conclusions reflective of the evidence presented at trial and the legal contentions of the parties. 79 Ranch, Inc. v. Pitsch, 193 M 229, 631 P2d 690, 38 St. Rep. 1048 (1981).

**Part Law Review Articles**

Use Preferences for Water, Beck, 76 N.D.L. Rev. 753 (2000).

### 85-2-401. Priority — recognition and confirmation of changes in appropriations issued after July 1, 1973.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 5, Ch. 244, L. 2023. Amendment effective January 1, 2024, and terminates June 30, 2031.

*2009 Amendment:* Chapter 251 in (2) near end substituted "85-2-310(8)" for "85-2-310(4)". Amendment effective July 1, 2009.

*Applicability:* Section 9, Ch. 251, L. 2009, provided: "[This act] applies to applications received by the department after [the effective date of this act]." Effective July 1, 2009.

*2007 Amendment:* Chapter 213 in (2) near end substituted "85-2-310(4)" for "85-2-310(3)". Amendment effective April 17, 2007.

*1997 Amendment:* Chapter 497 inserted (4) concerning recognition and confirmation of changes in appropriation rights actions of Department after July 1, 1973; and made minor changes in style. Amendment effective May 1, 1997.

*Saving Clause:* Section 22, Ch. 497, L. 1997, was a saving clause.

*Severability:* Section 23, Ch. 497, L. 1997, was a severability clause.

**Case Notes**

*Legal Availability and Adverse Effect — Criteria for Preliminary Determination Satisfied:* The Department of Natural Resources and Conservation (DNRC) rejected an application for a water use permit, and the applicant appealed to the Water Court pursuant to the Montana Administrative Procedure Act. The Water Court found that DNRC had improperly considered certain evidence and acted arbitrarily and capriciously in its consideration of other evidence. On review, the Supreme Court affirmed some of the Water Court's conclusions while reversing others. The Supreme Court concluded that, taking into account its evidentiary and substantive rulings, the administrative record should have been interpreted to indicate no net depletion to the water source and therefore no adverse impact on senior appropriators. Therefore, the Supreme Court ordered that the application be remanded to receive a preliminary determination and move forward in the process to face potential objectors. DeBuff v. Dept. of Natural Resources and Conservation, 2021 MT 68, 403 Mont. 403, 482 P.3d 1183.

*Prior Appropriation Doctrine and Statute — Denial of Defense of Futile Call Proper:* In a case involving water rights, the plaintiff senior appropriator sent a call to the defendant junior appropriator to cease diversions. Despite the call, the defendant junior appropriator continued to divert water and the plaintiffs filed suit. The District Court enjoined the defendant from continuing out-of-order diversions of water after receiving call letters. On appeal, the defendant argued that the plaintiffs were required to make calls on junior appropriators in reverse priority and that it established the necessary elements to raise the defense of futile call doctrine. The Supreme Court disagreed and affirmed, holding that nothing in the prior appropriation doctrine statute or judicial procedure required the plaintiffs to follow a specific method of making a call and that the District Court correctly found that the defendant had failed to establish the necessary elements to invoke the defense of futile call. Kelly v. Teton Prairie LLC, 2016 MT 179, 384 Mont. 174, 376 P.3d 143.

*Appropriative Rights Annual Rather Than Seasonal:* Generally, there is no division of the year into an irrigation season and a storage season, so as to give later direct users a seasonal preference over earlier indirect users, or vice versa. Cate v. Hargrave, 209 M 265, 680 P2d 952, 41 St. Rep. 697 (1984).

*Damage Award to Appropriator of Costs of Lawsuit Filed to Enforce Rights:* In a water rights dispute, upstream junior appropriators damaged downstream senior appropriators' headgate. A lawsuit over their respective water rights ensued, and the senior appropriators were successful both at trial and on appeal. At trial, the jury awarded the senior appropriators their court costs and attorney fees as damages. The Supreme Court refused to overturn the award, ruling that the costs of the lawsuit were consequential to the interference with the headgate and not so remote as to preclude recovery. Cate v. Hargrave, 209 M 265, 680 P2d 952, 41 St. Rep. 697 (1984).

*No Grounds for Change of Pre-1973 Water Right:* Upstream junior appropriators were precluded from challenging a change in place of use made by downstream senior appropriators' predecessor in interest in 1941 because the junior appropriators held no rights to the waters at issue in 1941. Cate v. Hargrave, 209 M 265, 680 P2d 952, 41 St. Rep. 697 (1984).

*Right of Priority:* Priority of application for water appropriation is an existing right which is preserved from extinction by the provisions of Art. IX, sec. 3, Mont. Const. Gen. Agriculture Corp. v. Moore, 166 M 510, 534 P2d 859 (1975).

*Priority of Senior Main Stem Water Rights Over Junior Tributary Water Rights:* Appellant owns water rights in Clear Creek dating to 1910. Petitioners have water rights in Rock Creek dating to 1896. Clear Creek is a tributary of Rock Creek. In 1970, appellant obtained a court order directing the Rock Creek Water Commissioner to "carry out" the Clear Creek water rights of appellant. Following the District Court order, the Water Commissioner honored in full the requests of appellant for water without regard to any priority in the relationship of the creeks' water rights. As a result, at times of water shortage, senior Rock Creek decreed waters are cut off. In 1977, petitioners filed this action to rescind the 1970 order and to direct the Water Commissioner to subject the Clear Creek water rights to the priorities of Rock Creek water rights. The District Court ruled that the 1970 court order, applied by the Water Commissioner to fulfill junior appropriations ahead of prior decreed rights, was improper. The Supreme Court affirmed the District Court's order and further stated that the order did not violate due process.

The Supreme Court reasoned that the only rights affected by the District Court order were the rights of the parties before the court. Granite Ditch Co. v. Anderson, 204 M 10, 662 P2d 1312, 40 St. Rep. 630 (1983).

*Waters of Tributary:* The waters of a tributary belong to the stream into which the tributary flows to the extent of prior appropriations. Granite Ditch Co. v. Anderson, 204 M 10, 662 P2d 1312, 40 St. Rep. 630 (1983).

*Valid Water Right Not Affected by Release of Surplus to Junior User:* Defendants' predecessor in interest began using water in the amount of 110 gallons a minute from Mahle Spring in 1917 for domestic, stock, and irrigation purposes. Mahle Spring flows into Ashley Creek. In 1958, defendants completed construction of a dam whose purpose was to stabilize their water supply only, not to increase the amount of water appropriated. In April 1973, defendants filed notice of completion of ground water appropriation without well, claiming 110 gallons a minute. In 1957, plaintiff's predecessor in interest began using water from Ashley Creek. At times, when Ashley Creek dried up, defendants agreed to release water from the dam. In 1978, plaintiff obtained a water use permit for Ashley Creek. Subsequently, defendants refused to release any water from the dam. Plaintiff filed an action to adjudicate the parties' water rights and to enjoin defendants from interfering with the flow of Ashley Creek. The Montana Supreme Court upheld the District Court's ruling that defendants are entitled to 110 gallons a minute with a priority date of 1917 and that plaintiff is entitled only to the excess over that. The court denied plaintiff's claim that defendants were estopped from asserting a superior claim, reasoning that the release of the water did not cause plaintiff's predecessor in interest to change her position for the worse because the defendants had already established a valid claim to the water and thus the release was either a mere gratuity or a release of surplus water. In the absence of evidence that defendant was not simply releasing surplus water, the court also denied plaintiff's claim of laches. Finally, the court denied plaintiff's claim that the release from the dam was evidence that defendants were not making beneficial use of all the water since the District Court findings indicated that the defendants' total claim was fully justified. Bagnell v. Lemery, 202 M 238, 657 P2d 608, 40 St. Rep. 58 (1983).

*Prior Rights:* Where plaintiff had over the years constructed a series of dikes in order to spread over his land the water which would flow down a dry gully after the melting of snow or a heavy rainfall, he had a prior right to the extent that his project was finished. He who first diverts the water to a beneficial use has the prior right thereto where the right is based upon the custom and practice of the early settlers and where there was no compliance with the statutes. Midkiff v. Kincheloe, 127 M 324, 263 P2d 976 (1953). (See, however, the dissenting opinion in the case in which it was contended that the waters were floodwaters and wastewaters which the defendant had a right to impound in a stock reservoir, 127 M 324, 263 P2d 976 (1953).)

*Temporary Suspension of Prior Right:* When the one holding the prior right does not need the water, such prior right is temporarily suspended and the next right in the order of priority may use the water until such time as the prior appropriator's needs justify his demanding that the junior appropriator give way to his superior claim. Cook v. Hudson, 110 M 263, 103 P2d 137 (1940), distinguished and overruled on other grounds in Grimsley v. Estate of Spencer, 206 M 184, 670 P2d 85 (1983).

*Abandonment — Resumption:* Where use of water is abandoned and resumed, use vests from the date of resumption. Galiger v. McNulty, 80 M 339, 260 P 401 (1927); O'Shea v. Doty, 68 M 316, 218 P 658 (1923).

*Priority of Appropriation:* Priority of appropriation of water confers superiority of right without reference to the character of the use, whether natural or artificial. Mettler v. Ames Realty Co., 61 M 152, 201 P 702 (1921).

## **85-2-402. Changes in appropriation rights — definition.**

### Compiler's Comments

*2021 Amendment:* Chapter 317 in (4)(b)(i) near beginning substituted "existing legal demands of water rights" for "existing demands" and in middle substituted "projected legal demands of water rights" for "projected demands for water"; and in (6)(b)(iv) substituted "existing legal demands of water rights" for "demands". Amendment effective April 30, 2021.

*2019 Amendment:* Chapter 78 in (2)(a) inserted last sentence concerning adverse effects analysis. Amendment effective October 1, 2019.

*2017 Amendment:* Chapter 243 inserted (1)(c) providing that applicant is not required to prove lack of adverse effect in connection with application; in (2) substituted "subsections (1)(c) and (17)" for "subsection (17)"; in (7) at end inserted exception provision for any right for which written consent to approval has been filed; and inserted (19) regarding the department not conducting adverse effects analysis. Amendment effective October 1, 2017, and terminates September 30, 2023.

*2015 Amendment:* Chapter 192 in (8) at end substituted "85-2-312" for "85-2-312(3)". Amendment effective April 8, 2015.

*2013 Amendment:* Chapter 335 deleted former (1)(c) that read: "(c) As used in this part, "national forest system lands" has the same meaning as that provided in 85-20-1401, Article I." Amendment effective October 1, 2013.

*2011 Amendment:* Chapter 29 deleted former (2)(b) that read: "(b) Except for a change in appropriation right for instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource pursuant to 85-2-436 or a temporary change in appropriation right authorization to maintain or enhance streamflows to benefit the fishery resource pursuant to 85-2-408 or a change in appropriation right to instream flow to protect, maintain, or enhance streamflows pursuant to 85-2-320, the proposed means of diversion, construction, and operation of the appropriation works are adequate"; inserted (2)(b) concerning proving the adequacy of the proposed means of diversion, construction, and operation of the appropriation works; deleted former (2)(d) that read: "(d) Except for a change in appropriation right for instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource pursuant to 85-2-436 or a temporary change in appropriation right authorization pursuant to 85-2-408 or a change in appropriation right to instream flow to protect, maintain, or enhance streamflows pursuant to 85-2-320, the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use or, if the proposed change involves a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water"; inserted (2)(d) concerning a possessory interest or a special use authorization; and made minor changes in style. Amendment effective October 1, 2011.

*2009 Amendments — Composite Section:* Chapter 86 in (15)(a)(i)(B) near middle after "provisions of the" substituted "rule establishing" for "order declaring". Amendment effective March 25, 2009.

Chapter 424 in (2) in introductory clause after "(16)" inserted "and (18)"; inserted (18) providing an exemption for a replacement appropriation for a water right for certain changes in points of diversion; and made minor changes in style. Amendment effective October 1, 2009.

*Saving Clause:* Section 9, Ch. 86, L. 2009, was a saving clause.

*2007 Amendments — Composite Section:* Chapter 213 inserted (1)(b) providing that if an application involves a change in a point of diversion, conveyance, or place of use located on national forest system lands, the application is not correct and complete until the applicant has submitted proof to the department of any written special use authorization required by federal law; inserted (1)(c) defining national forest system lands; in (2) in introductory clause after "(16)" inserted "and, if applicable, subject to subsection (17)"; in (2)(b) near middle after "85-2-408" inserted "or a change in appropriation right to instream flow to protect, maintain, or enhance streamflows pursuant to 85-2-320"; in (2)(d) near beginning after "85-2-408" inserted "or a change in appropriation right to instream flow to protect, maintain, or enhance streamflows pursuant to 85-2-320" and at end after "beneficial use" inserted "or, if the proposed change involves a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water"; inserted (15)(b)(i)(B) providing that if the replacement well is located on national forest system lands, the notice is not correct and complete under subsection (15) until the appropriator has submitted proof of any written special use authorization required by federal law; in (16)(c) inserted third sentence providing that if the redundant water supply well is located on national forest system lands, the notice is not correct and complete under this subsection until the appropriator has submitted proof of any written special use authorization required by federal law; in (16)(d) substituted "subsection (16)" for "section"; inserted (17) requiring the department to accept and process an application for a change in appropriation right to instream flow to protect, maintain, or enhance streamflows; and made minor changes in style. Amendment effective April 17, 2007.

Chapter 448 in (1) near beginning of first and second sentences after "change" inserted "in appropriation right"; in (2) near beginning of introductory clause after "(16)" inserted "and, if applicable, subject to subsection (17)"; in (2)(b) and (2)(d) at beginning after "Except for a" substituted "change in appropriation right for instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource" for "lease authorization"; in (4)(b) near beginning, in (7) in three places, in (8) at end of first sentence and near middle of second sentence, in (10) in three places, in (11) near middle, in (12) in two places, and in (15)(a)(i)(B) near end after "change" inserted "in appropriation right"; inserted (17) requiring the department to accept and process an application for a change in appropriation right for instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource; and made minor changes in style. Amendment effective May 8, 2007.

*Termination Provision Repealed:* Section 8(2), Ch. 448, L. 2007, repealed sec. 11, Ch. 658, L. 1989, sec. 4, Ch. 740, L. 1991, and secs. 5 and 6, Ch. 123, L. 1999, which terminated the amendments to this section June 30, 2009. Effective May 8, 2007.

*2005 Amendment:* (Temporary version) Chapter 85 in (2)(b) near beginning after "change" inserted "in appropriation right", after "authorization" substituted "to maintain or enhance streamflows" for "for instream use", and near middle after "85-2-408" deleted "or water use pursuant to 85-2-439 when authorization does not require appropriation works"; in (2)(d) near beginning after "change" inserted "in appropriation right" and after "85-2-408" deleted "or 85-2-439 for instream flow to benefit the fishery resource"; in (7) in second sentence near middle after "change" inserted "in appropriation right"; in (8) in first sentence near beginning after "change" inserted "in appropriation right"; in (10) at beginning of first sentence after "change" inserted "in appropriation right"; and made minor changes in style. Amendment effective March 24, 2005.

(Version effective July 1, 2009) In (2)(b) at beginning inserted exception clause; in (2)(d) at beginning inserted exception clause; in (6) near middle of first sentence after "requirements for" inserted "federal non-Indian and Indian"; in (7) near middle of second sentence after "change" inserted "in appropriation right"; in (8) near beginning of first sentence after "change" inserted "in appropriation right"; in (10) near beginning of first sentence after "change" inserted "in appropriation right"; and made minor changes in style.

*Termination Provision Repealed:* Section 9, Ch. 85, L. 2005, repealed sec. 6, Ch. 322, L. 1995, and sec. 14, Ch. 487, L. 1995, which terminated amendments to this section June 30, 2005. Effective March 24, 2005.

*2003 Amendment:* Chapter 161 in (1) in third sentence in exception clause and in (2) in exception clause inserted reference to subsection (16); inserted (15)(a)(iii)(A) concerning municipal wells; at end of (15)(a)(iii)(B) inserted "for all other wells"; inserted (16) concerning redundant water supply wells in a public water supply system; and made minor changes in style. Amendment effective March 28, 2003.

*Severability:* Section 3, Ch. 161, L. 2003, was a severability clause.

*2001 Amendments — Composite Section:* Chapter 132 at beginning of third sentence in (1) inserted exception clause and near middle of sentence after "right" substituted "without the approval of the department" for "except, as permitted under this section, by applying for and receiving the approval of the department"; near beginning of (2) inserted reference to subsection (15); inserted (15) allowing appropriator to change water right for replacement wells without prior approval of department if certain criteria are met; and made minor changes in style. Amendment effective March 27, 2001.

Chapter 381 in (1) at beginning of third sentence inserted exception clause and near middle after "appropriation right" substituted "without" for "except, as permitted under this section, by applying for and receiving"; and made minor changes in style. Amendment effective April 27, 2001.

*1999 Amendment:* Chapter 42 in (5)(b) at beginning inserted "for the withdrawal and transportation of appropriated water for out-of-state use"; and made minor changes in style. Amendment effective February 24, 1999.

*Extension of Termination Date:* Sections 5 through 7, Ch. 123, L. 1999, amended sec. 11, Ch. 658, L. 1989, and secs. 4 and 7, Ch. 740, L. 1991, by extending the termination date imposed by Ch. 658, L. 1989, and Ch. 740, L. 1991, to June 30, 2009. Effective March 19, 1999. Section 6, Ch. 322, L. 1995, and sec. 14, Ch. 487, L. 1995, provided a termination date of June 30, 2005, for one version of this section; however, the 1995 termination date was not extended by Ch. 123, L. 1999.

*1997 Amendments:* (Temporary version and version effective July 1, 1999) Chapter 353 in (2)(d), after "85-2-408", inserted "or 85-2-439". Amendment effective April 22, 1997.

(All versions) Chapter 497 in (1) inserted first and second sentences concerning right to make change and lack of presumption in change proceeding; and in (2)(a), near beginning, substituted "change in appropriation right" for "use", before "water rights of other persons" inserted "use of the existing", near middle, after "persons or other", inserted "perfected or", after "a permit" inserted "or certificate", and at end substituted "a state water reservation has been issued under part 3" for "water has been reserved". Amendment effective May 1, 1997.

(Temporary version and version effective July 1, 1999) In (6), near middle of first sentence after "requirements for", inserted "federal non-Indian and Indian". Amendment effective May 1, 1997.

*Saving Clause:* Section 22, Ch. 497, L. 1997, was a saving clause.

*Severability:* Section 23, Ch. 497, L. 1997, was a severability clause.

*1995 Amendments — Composite Section:* (Temporary version) Chapter 322 in (2)(b) inserted language pertaining to temporary change authorization for instream use to benefit fishery resource pursuant to 85-2-408; at beginning of (2)(d) inserted exception clause relating to 85-2-436 or 85-2-408; and made minor changes in style.

(Version effective July 1, 1999) At beginning of (1)(b) and (1)(d) inserted exception clause; and made minor changes in style. Amendment terminates June 30, 2005.

(Temporary version) Chapter 487 in (2)(b), after "85-2-436", inserted "or water use pursuant to 85-2-439"; and made minor changes in style. Amendment effective April 14, 1995, and terminates June 30, 2005. The amendment in (2)(b) rendered the Ch. 322 use of "either" after "85-2-408 when" inappropriate.

(Version effective July 1, 1999) In (2)(b), at beginning, inserted exception clause; and made minor changes in style. Amendment effective July 1, 1999, and terminates June 30, 2005. The insertion in (2)(b) of exception clause required the addition of "or" to separate exception clauses and required corresponding changes in style.

*1995 Statement of Intent:* The statement of intent attached to Ch. 322, L. 1995, provided: "This legislation, jointly developed by representatives from the agricultural, recreation, and conservation communities, is intended to authorize the temporary use of existing water rights for instream flow to benefit the fishery resource. In establishing the use of water rights for authorized instream flow to benefit the fishery resource, it is the intent of the legislature that the authorization respect and work within the prior appropriation water rights system.

This legislation creates an opportunity for citizens to voluntarily enter into agreements to lease existing water rights to protect fisheries and allows persons who own water rights to temporarily change the use of that water to instream flow to benefit the fishery resource.

To monitor and review the implementation of this instream flow program, the legislature directs the office of the governor to convene on an ongoing and regular basis a working group that includes representatives from the agricultural, recreation, and conservation communities. This working group shall consult with the department of natural resources and conservation on relevant changes in water use and shall submit a report to the governor and the legislature in 2001 outlining the status of the program."

*Severability:* Section 11, Ch. 487, L. 1995, was a severability clause.

*Applicability:* Section 12, Ch. 487, L. 1995, provided: "[This act] applies to all applications for changes in appropriation rights, permits, and water reservations received by the department of natural resources and conservation after [the effective date of this act]." Effective April 14, 1995.

*1993 Amendments:* Chapter 370 in (1), in first sentence after "this section", substituted "by applying for and receiving the approval" for "and with the approval" and inserted second sentence requiring applicant to submit a correct and complete application; in (2) and (4), after "proves by", substituted "a preponderance of evidence" for "substantial credible evidence"; near end of first sentence of (9), before "completed", deleted "properly" and at end of second sentence, after "works", substituted "describing how the appropriation was completed" for "that the appropriation has been properly completed in substantial accordance with the terms and conditions of the change approval"; and made minor changes in style. Amendment effective April 16, 1993.

Chapter 460 in (2) substituted "subsections (4) through (6)" for "subsections (3) through (5)"; in (2) and (4), after "proves by", substituted "a preponderance of evidence" for "substantial credible evidence"; inserted (2)(f) concerning water quality and (2)(g) concerning effluent limitations; inserted (3) requiring that a valid objection be made before an applicant needs to prove that the change approval criteria have been met; in (5)(a) substituted "subsections (2) and (4)" for "subsections (2) and (3)"; in (6)(b)(i) substituted "subsection (2) or (4)" for "subsection (2) or (3)"; in (6)(c) substituted "subsections (6)(b)(ii) and (6)(b)(iii)" for "subsections (5)(b)(ii) and (5)(b)(iii)"; inserted (14) allowing the Department to adopt rules; and made minor changes in style. Amendment effective April 21, 1993.

*1993 Statement of Intent:* The statement of intent attached to Ch. 460, L. 1993, provided: "A statement of intent is required for this bill because the bill gives the department of natural resources and conservation authority to adopt administrative rules. The bill adds statutory criteria for the department to consider in the processing of an application for a permit, change authorization, controlled ground water area, or basin closure. In adopting rules implementing this bill and in interpreting the new statutory language, it is the intent of the legislature that the department and board of natural resources and conservation [functions now transferred to department of natural resources and conservation] should assess the magnitude, character, duration, and geographical extent of the projected effects on the uses of water as classified and utilize this assessment in a practical manner."

*Severability:* Section 11, Ch. 370, L. 1993, was a severability clause.

Section 7, Ch. 460, L. 1993, was a severability clause.

*Retroactive Applicability:* Section 12, Ch. 370, L. 1993, provided: "[Sections 1 through 8] apply retroactively, within the meaning of 1-2-109, to all applications and objections pending on [the effective date of this act] [effective April 16, 1993] that are subject to the provisions of Title 85, chapter 2."

Section 8, Ch. 460, L. 1993, provided: "[Sections 1 and 3] [85-2-311 and 85-2-402] apply retroactively, within the meaning of 1-2-109, to all applications for a permit or change in appropriation right that the department has not noticed out for objection as of [the effective date of this act]." Effective April 21, 1993.

*1991 Amendments:* Chapter 308 inserted (2)(e) regarding salvaged water.

Chapter 805 inserted (8) requiring appropriator to notify Department that appropriation has been completed and requiring notification to contain certified statement by person with experience in design, construction, or operation of appropriation works that appropriation has been properly completed in accordance with terms of change approval. Amendment effective July 1, 1991.

*1991 Statement of Intent:* The statement of intent attached to Ch. 308, L. 1991, provided: "A statement of intent is required for this bill in order to provide guidance to the department of natural resources and conservation concerning the adoption of rules to allow the appropriation, use, and change of use of salvaged water. The legislature directs the department of natural resources and conservation to adopt rules that promote the conservation and efficient use of water by implementing the provisions of this bill."

*Saving Clause:* Section 5, Ch. 308, L. 1991, was a saving clause.

*1989 Amendments:* Chapter 432 inserted (2)(d) relating to possessory interest; and made minor changes in phraseology. Amendment effective April 4, 1989.

Chapter 658 at beginning of (2)(b) inserted exception clause; and made minor changes in phraseology. Amendment effective May 11, 1989, and terminates June 30, 1993.

*1987 Amendment:* In (7) inserted last sentence concerning time extension.

*1985 Amendment:* Substituted (1) through (8) (see 1985 Session Law) for former (1) through (6) that read: "(1) An appropriator may not change the place of diversion, place of use, purpose of use, or place of storage except as permitted under this section and approved by the department.

(2) The department shall approve the proposed change if it determines that the proposed change will not adversely affect the rights of other persons. If the department determines that the proposed change might adversely affect the rights of other persons, notice of the proposed change shall be given in accordance with 85-2-307. If the department determines that an objection filed by a person whose rights may be affected states a valid objection to the proposed change, the department shall hold a hearing thereon prior to its approval or denial of the proposed change. Objections shall meet the requirements of 85-2-308(2), and hearings shall be held in accordance with 85-2-309.

(3) An appropriator of more than 15 cubic feet per second may not change the purpose of use of an appropriation right from an agricultural or irrigation use to an industrial use.

(4) The department may approve a change subject to such terms, conditions, restrictions, and limitations it considers necessary to protect the rights of other appropriators, including limitations on the time for completion of the change.

(5) If a change is not completed as approved by the department or if the terms, conditions, restrictions, and limitations of the change approval are not complied with, the department may, after notice and opportunity for hearing, require the appropriator to show cause why the change approval should not be modified or revoked. If the appropriator fails to show sufficient cause, the department may modify or revoke the change approval.

(6) Without obtaining prior approval from the department, an appropriator may not sever all or any part of an appropriation right from the land to which it is appurtenant, sell the appropriation right for other purposes or to other lands, or make the appropriation right appurtenant to other lands. The department shall approve the proposed change if it determines that the proposed change will not adversely affect the water rights of other persons. If the department determines that the proposed change might adversely affect the water rights of other persons, notice of the proposed change must be given in accordance with 85-2-307. If the department then determines that an objection filed by a person whose water rights may be affected states a valid objection to the proposed change, the department shall hold a hearing thereon prior to its approval or denial of the proposed change. Objections must meet the requirements of 85-2-308, and hearings must be held in accordance with 85-2-309"; and inserted (11) relating to invalidating a change in appropriation right made contrary to law.

*Applicability:* Section 27, Ch. 573, L. 1985, provided: "This act applies to all permit applications, change in appropriation right applications, water sales and lease applications, and reservation applications filed and pending with the department on July 1, 1985, but upon which a hearing under Title 85, chapter 2, has not yet commenced."

*1983 Amendment:* In (3), after "agricultural" inserted "or irrigation"; inserted (6) through (8) describing criteria and procedures for departmental approval of a proposed change in appropriation.

**Case Notes**

DECISIONS UNDER CURRENT LAW

*Water Right Appropriator in Particular Source — Generally Has Standing to Challenge Any Water Right Granted in That Source:* A downstream user with senior private water rights to a reservoir storage project that declined shares in the reservoir storage project had standing where claims involved the natural flow rights of the river as well as the storage and delivery of the reservoir's stored flood water. In re E. Bench Irrigation District, 2021 MT 319, 406 Mont. 502, 501 P.3d 380.

*City's Updated Growth Plan Not Protected Interest With Respect to Application for Change of Water Use:* The city of Bozeman appealed the decision of a Department of Natural Resources and Conservation hearing examiner granting an application to change the place of use of a water use permit issued to a private water and wastewater developer. The city argued that its adoption of an updated water facility plan as part of its adopted growth policy required the developer's change application to be denied under 85-2-402(2)(a) as adversely affecting the city's planned use. On appeal, the Supreme Court disagreed. A "permit", "certificate", or "state water reservation" is required to trigger the type of adverse use of planned or existing use of water rights that would warrant denial of a change application. A growth policy or water facility plan is not a permit, certificate, or state water reservation and thus does not create the type of protectable interest contemplated by 85-2-402. Bozeman v. Dept. of Natural Resources and Conservation, 2020 MT 214, 401 Mont. 135, 471 P.3d 46.

*Summary Judgment and Injunction Granted Prohibiting Use of Water and Distribution Properties — Unreasonable Restraint of Water Right:* The plaintiff subdivision sought to enjoin the defendant water district from using water from wells located within the subdivision on any property outside of its borders pursuant to the subdivision's covenants. The District Court granted the injunction and the water district appealed, arguing that the restraint on the use of water, which included the use of all "water distribution properties", was not a reasonable restraint. The Supreme Court reversed and remanded, holding that the District Court had erred in concluding that the restraint on the use of water was reasonable, and granted summary judgment in favor of the defendants. Elk Grove Dev. Co. v. Four Corners County Water & Sewer District, 2020 MT 195, 400 Mont. 515, 469 P.3d 153, distinguished in Estate of Mandich v. French, 2022 MT 88, 408 Mont. 296, 509 P.3d 6.

*Denial of Application for Temporary Change in Water Rights Held to Be Arbitrary Action by Department:* The plaintiffs filed for a temporary change of irrigation water rights to instream flow. The Department of Natural Resources and Conservation denied the application on the basis of an alleged incomplete return flow analysis. The Supreme Court held that 85-2-408(7) dealing with return flow analysis did not require the applicant to provide the analysis; rather, it gives the Department the discretion to limit the amount that may be taken by an applicant. The Supreme Court further held that the Department's denial of the application for want of a complete return flow analysis without further explanation when it had granted similar applications in the past constituted arbitrary conduct and was an abuse of discretion. Hohenlohe v. Dept. of Natural Resources and Conservation, 2010 MT 203, 357 Mont. 438, 240 P.3d 628.

*Upon Applicant's Meeting Statutory Burden of Showing No Adverse Effect on Downstream Water Rights Holders, Department May Not Deny Application Based on Failure to Provide Return Flow Analysis:* The plaintiffs filed for a temporary change of irrigation water rights to instream flow. The Department of Natural Resources and Conservation denied the application on the basis of an alleged incomplete return flow analysis. The Supreme Court held that 85-2-408(7) dealing with return flow analysis did not require the applicant to provide the analysis; rather, it gives the Department the discretion to limit the amount that may be taken by an applicant. The Supreme Court further held that when the applicant successfully proves that the change in water usage will not adversely affect downstream water rights holders, the Department may not refuse to grant the change on the basis of the applicant's failure to provide a return flow analysis, as that is not a requirement that pertains to the applicant. Hohenlohe v. Dept. of Natural Resources and Conservation, 2010 MT 203, 357 Mont. 438, 240 P.3d 628.

*Waiver of Sovereign Immunity by United States Regarding Water Rights Limited to State Adjudications:* A plain reading of 43 U.S.C. 666, known as the McCarran amendment, indicates that the United States has waived its sovereign immunity so that it may be joined as a defendant when it is a necessary party in cases seeking to adjudicate or administer water rights in state courts. The waiver extends to Indian tribes, providing consent to determine federal reserved water rights held by tribes in state court cases. However, the waiver is not for purposes of private suits against the United States or Indian tribes but is limited to comprehensive state adjudications of water rights. Confederated Salish & Kootenai Tribes v. Clinch, 2007 MT 63, 336 M 302, 158 P3d 377 (2007).

*Water Use Changes — Interaction of State Regulatory Authority and Tribal Self-Government:* There are two general and overlapping approaches to analyzing the interaction of state regulatory authority and tribal self-government. The first takes the perspective of the tribe and seeks to identify the scope of authority that the tribe possesses (see Mont. v. U.S., 450 US 544 (1981)), while the second takes the perspective of the state and seeks to prescribe the limits of the state's power (see White Mtn. Apache Tribe v. Bracker, 448 US 136 (1980)). In cases adjudicating water rights, the weight of the state's interest depends in large part on the extent to which waterways or aquifers transcend the exterior boundaries of Indian country. In the case at bar, the District Court enjoined the state from processing a change of use application for a state water right. The question on appeal was whether the state had sovereign authority to process a change of use application concerning two appropriative water rights owned by non-Indians on the Flathead Reservation to allow a change from irrigation to recreation so that the owners could operate a waterski pond. Whether the change would adversely affect the tribe and whether assertion of regulatory authority by the state would have a direct effect on the tribes were legal conclusions. The Supreme Court concluded that the state's authority was not preempted by federal or tribal interests because neither the federal government nor the tribe asserted regulatory authority over the owner's water rights, so the state was not preempted from reviewing the change application. The Legislature acted within its constitutional prerogative in enacting this section, providing that no presumption is to work against a water right holder who seeks a change of use and providing that the state should be able to process change of use applications. The record was not clear whether the use change would adversely affect the tribe; however, the Supreme Court found no compelling reason to deprive the state water right holders of the opportunity to prove by a preponderance of the evidence that the proposed change in use, not amount, would not adversely affect the use of other water rights, including the tribe's reserved rights. Therefore, the injunction was removed, and the case was remanded to the District Court for a determination of whether the state had sovereign authority to conduct change of use proceedings and, if so, to allow the owners to attempt to prove that the proposed change in use would not adversely affect the use of other water rights, including the tribe's reserved rights. Confederated Salish & Kootenai Tribes v. Clinch, 2007 MT 63, 336 M 302, 158 P3d 377 (2007).

*Burden of Proof at All Stages:* This section requires the Department to approve an appropriation right change if: (1) the appropriator proves that the proposed use will not adversely affect the water rights of others; (2) the proposed means of diversion, construction, and operation are adequate; and (3) the proposed use is a beneficial one. Deletion by 1985 amendment of language referring to a contested case hearing stage in the application process did not have the effect of making this burden of proof apply only at the application stage, with the objector having the burden of proof at the hearing stage. The applicant has the burden of proof at all stages before the Department and courts. In re Application for Change of Appropriation of Water Rights for Royston, 249 M 425, 816 P2d 1054, 48 St. Rep. 747 (1991).

*Evidence That Change Would Not Affect Objector's Rights:* Applicant applied for a change in water rights that would alter the place of use, the amount of acres irrigated, and the type of irrigation used. The hearings examiner properly precluded applicant from showing the nature of objectors' water rights in an attempt to demonstrate that the rights would not be affected by applicant's proposed change. The records of objectors' water rights are in the Water Court's temporary preliminary decree, and the hearings examiner correctly concluded that the rights in the decree were prima facie evidence that the objectors had water rights in the stream. The provisions of this chapter, commonly referred to as the Water Use Act, have a separate procedure by which applicant can attack rights claimed by objectors. To allow applicant to present evidence pertaining to objectors' water rights could lead to readjudication of rights claimed in the creek. In re Application for Change of Appropriation of Water Rights for Royston, 249 M 425, 816 P2d 1054, 48 St. Rep. 747 (1991).

*Failure of Applicant to Carry Burden of Proof:* Applicant for a change of appropriation failed to meet the burden of proving that the change would not adversely affect objectors' rights. The application was properly denied because the evidence in the record does not sustain a conclusion of no adverse effect and because it cannot be concluded from the record that the means of diversion and operation are adequate. The hearings examiner's decision to deny the application was not clearly erroneous in view of the reliable, probative, and substantial evidence in the record. In re Application for Change of Appropriation of Water Rights for Royston, 249 M 425, 816 P2d 1054, 48 St. Rep. 747 (1991).

*Retroactivity and Validity of Change in Burden of Proof for Change of Water Appropriation:* The fact that a water right existing at the time of adoption of the 1972 Montana Constitution is recognized by that constitution does not mean that if the owner of the right applies for a change in the right, the burden of proof must be placed on the objector. The objector had the burden in 1972, but the holder now has the burden under this section. The change in the burden of proof is not an impermissible retroactive application of the statute to the detriment of vested rights acquired under the 1972 Montana Constitution. Statutes that modify the procedure for exercising a vested right or for carrying out a duty do not constitute retroactive legislation. In re Application for Change of Appropriation of Water Rights for Royston, 249 M 425, 816 P2d 1054, 48 St. Rep. 747 (1991). See also In re Helena v. Community of Rimini, 2017 MT 145, 388 Mont. 1, 397 P.3d 1.

*Standing of Junior Appropriators to Object:* The contention by applicant for a change of appropriation that junior downstream appropriators and junior upstream appropriator lacked standing to object to the change was without merit because either can be damaged by a change in the amount of water appropriated downstream if a shortage ensues and a senior appropriator causes the downstream or upstream appropriator to forego his water use until the senior's rights are fulfilled. In re Application for Change of Appropriation of Water Rights for Royston, 249 M 425, 816 P2d 1054, 48 St. Rep. 747 (1991).

*Change in Point of Use — Judicial Review of Procedural Orders Improper:* Pursuant to 1973 water use law, appellant applied for Department of Natural Resources and Conservation (DNRC) approval to change the point of use of its pre-1973 water right. DNRC hearing examiner ordered objectors to respond to appellant's discovery request, yet refused to dismiss the objections of objectors who failed to respond. Upon review, the Water Court reversed the DNRC denial. Appellant appealed, arguing review was inappropriate. The Supreme Court agreed, stating that judicial review of the hearing examiner's procedural order was improper as there had been no final decision or exhaustion of administrative remedies. Kingsbury Ditch Co. v. Dept. of Natural Resources and Conservation, 223 M 379, 725 P2d 1209, 43 St. Rep. 1805 (1986).

*Enlargement of Dam:* Permission for additional appropriation on an adjudicated stream was proper where the findings indicated that there was surplus water to be appropriated, there would be no injury to prior appropriators, impoundment of water would be beneficial, and the proposed dam could be operated so as not to interfere with others. Sunset Irrigation District v. Ailport, 166 M 11, 531 P2d 1349 (1974).

## DECISIONS UNDER FORMER LAW

*Change in Point of Diversion — Burden of Proof of Injury:* Under section 89-803, R.C.M. 1947 (now repealed), the point of diversion may be changed if the change would not prejudice the rights of other appropriators. The party claiming to be prejudiced has the burden of proving the prejudice. Holmstrom Land Co., Inc., v. Newlan Creek Water District, 185 M 409, 605 P2d

1060, 36 St. Rep. 1403 (1979), rehearing denied, 185 M 409, 605 P2d 1060, 37 St. Rep. 295 (1980); following Lokowich v. Helena, 46 M 575, 129 P 1063 (1913).

*Change in Place of Diversion — Water Exchange Prevented:* The defendants, upstream subsequent appropriators with respect to the plaintiff, diverted all the waters of a creek. Further downstream but still above the plaintiff, the defendants replenished the creek with water from a canal. The plaintiff could not change his diversion to a point upstream of the defendants because of the injury resulting to the defendants. Thompson v. Harvey, 164 M 133, 519 P2d 963 (1974).

*Diversion Point Changed:* An appropriator was entitled to move his point of diversion downstream, so long as he installed measuring devices to ensure that he took no more than would have been available at his original point of diversion, and the fact that a water commissioner might have to be employed to oversee the appropriation was not the kind of burden on other appropriators that would prevent the change. McIntosh v. Graveley, 159 M 72, 495 P2d 186 (1972).

*Use of Water Changed:* Where an appropriator had a decreed right to use water for irrigation of specified land outside the drainage area, his use of the water on other land outside the drainage area did not impose an undue burden on other appropriators, so long as he did not increase the amount of water diverted from the drainage area. McIntosh v. Graveley, 159 M 72, 495 P2d 186 (1972).

*Remedies of Servient Owner:* Changes in a ditch appurtenant to a water right did not forfeit the ditch right or justify the use of self-help by the servient landowner to fill in a portion of the ditch. Shammel v. Vogl, 144 M 354, 396 P2d 103 (1964).

*Substantial Change:* Under section 89-803, R.C.M. 1947 (now repealed), the owner of a ditch appurtenant to a water right could change the location by minor meandering along the course of the ditch and its marginal land with a bulldozer to account for topographical adjustments in the terrain, so long as he did not add any new burden to the servient estate or cause any additional damage thereto. Shammel v. Vogl, 144 M 354, 396 P2d 103 (1964).

*Sale of Portion of Land — Division of Water Right:*

When an owner of a tract of land with an appurtenant water right grants a portion of the tract without any express division or reservation, the water right is divided in the proportion the number of irrigated acres conveyed bears to the total irrigated acres. Spaeth v. Emmett, 142 M 231, 383 P2d 812 (1963).

Neither a change in the place of diversion of water nor a change in its use from mining to agriculture, or vice versa, affects its appropriation. Thomas v. Ball, 66 M 161, 213 P 597 (1923). See also Galiger v. McNulty, 80 M 339, 260 P 401 (1927); Whitcomb v. Murphy, 94 M 562, 23 P2d 980 (1933); Thrasher v. Mannix & Wilson, 95 M 273, 26 P2d 370 (1933); Loyning v. Rankin, 118 M 235, 165 P2d 1006 (1946).

Actual diversion of water and its beneficial use existing, prospective, or in contemplation constitute an appropriation, which is not affected by a change in the point of diversion or place of use. Wheat v. Cameron, 64 M 494, 210 P 761 (1922).

The location of a flume maintained over the land of another, as well as the use of the water flowing through it, may be changed, provided the change adds no new burdens to the servient estate or causes additional damage thereto. Pioneer Min. Co. v. Bannack Gold Min. Co., 60 M 254, 198 P 748 (1921).

*Burden of Proof of Injury:*

For a period of more than 50 years the defendant accumulated water rights and used them wherever and whenever needed to irrigate 34,000 acres of land. The burden was on the plaintiffs to show that they had been injured or prejudiced by such changing use. Forrester v. Rock Island Oil & Ref. Co., 133 M 333, 323 P2d 597 (1958).

The party who claims to have been injured by another's change in place of diversion of water right has the burden of alleging and proving the injury. Thrasher v. Mannix & Wilson, 95 M 273, 26 P2d 370 (1933); Lokowich v. Helena, 46 M 575, 129 P 1063 (1913); Hansen v. Larsen, 44 M 350, 120 P 229 (1911).

*Change in Place of Use — Decree Not Detailed:*

A water rights decree failed to describe the particular acreage to be irrigated and expressed the water rights in terms of flow per unit of time without stating during how many such units of time water could be taken. Adjudicated owners could not expand the use of water to additional lands or in length of time to the injury of subsequent appropriators. Quigley v. McIntosh, 110 M 495, 103 P2d 1067 (1940).

The conclusiveness of a judgment as res judicata in a water right suit between the same parties or their successors in interest in a prior action is not impaired by the alleged fact that in authorizing a change of place of use or point of diversion, it violated the provisions of section 89-803, R.C.M. 1947 (now repealed). Brennan v. Jones, 101 M 550, 55 P2d 697 (1936).

*Change of Use — Sale:* Appropriations not originally made for the purpose of sale may have their use changed to that purpose if subsequent appropriators are not thereby injured. Sherlock v. Greaves, 106 M 206, 76 P2d 87 (1938).

*Change in Use — Outside of Watershed:* Pursuant to an earlier water rights decree, the defendant irrigated land outside the watershed of the source. When the defendant brought additional lands outside the watershed under irrigation with this water right, the plaintiffs could not claim they were injured by this change in use. Their lands were either within the watershed of the source or higher than the defendant's irrigated land and would not benefit from percolating waters from his land. Thrasher v. Mannix & Wilson, 95 M 273, 26 P2d 370 (1933).

*Change in Use — Sale of Water Not in Use:* An appropriator of a water right for placer mining purposes attempted to convey to another a right to use the waters when not being used for mining. Although an appropriator may change the use of his appropriation, he may not sell the same in the interim when the water is not being used. Galiger v. McNulty, 80 M 339, 260 P 401 (1927); Creek v. Bozeman Water Works Co., 15 M 121, 38 P 459 (1894).

*Change in Place of Diversion or Use — Who May Complain:* Only an injured subsequent appropriator may complain that a prior appropriator's change in place of diversion or use is affecting subsequent rights. Carlson v. Helena, 43 M 1, 114 P 110 (1911).

*Change in Place of Diversion and Use — Placer Mining:* The successors of the appropriator of water appropriated for placer mining purposes cannot so change its use as to deprive lower appropriators of their rights, already acquired, in the use of it for irrigating purposes. Head v. Hale, 38 M 302, 100 P 222 (1909).

*Change in Place of Use — Deprivation of Subsequent Right:* After the defendant used his water right for placer mining purposes the water was turned into a gulch, whereupon the plaintiff appropriated it for irrigation purposes. The defendant then changed the place of use of his water right, resulting in the water no longer being returned to the gulch. Such change in use was unlawful because it absolutely deprived the plaintiff of his subsequent right. Gassert v. Noyes, 18 M 216, 44 P 959 (1896).

*Change in Use — Mining to Irrigation:* A water right was abandoned for mining purposes, the water returned to its original channel, and then recaptured by the original owner to be used for irrigation purposes. Such change in use was lawful. Meagher v. Hardenbrook, 11 M 385, 28 P 451 (1891).

## 85-2-403. Transfer of appropriation right.

### Compiler's Comments

*1987 Amendment:* In (2) deleted reference to subsection (6) of 85-2-402.

*1983 Amendments:* Chapter 448, in (1), after "use water" deleted "under a permit or certificate of water right"; deleted former (2) and (3), which read: "(2) The person receiving the appropriation interest shall file with the department notice of the transfer on a form prescribed by the department.

(3) Without obtaining prior approval from the department, an appropriator may not sever all or any part of an appropriation right from the land to which it is appurtenant, sell the appropriation right for other purposes or to other lands, or make the appropriation right appurtenant to other lands. The department shall approve the proposed change if it determines that the proposed change will not adversely affect the rights of other persons. If the department determines that the proposed change might adversely affect the rights of other persons, notice of the proposed change shall be given in accordance with 85-2-307. If the department then determines that an objection filed by a person whose rights may be affected states a valid objection to the proposed change, the department shall hold a hearing thereon prior to its approval or denial of the proposed change. Objections shall meet the requirements of 85-2-308(2) and hearings shall be held in accordance with 85-2-309."; (subsection (3) was enacted as 85-2-402(6)).

Chapter 674 also deleted former (2) that required a person receiving an appropriation interest to file with the Department a notice of transfer; and inserted new (2) relating both to the effect of a failure to comply with procedures for change in appropriation upon a conveyance or reservation and to the retroactive application of the subsection to conveyances or reservations made after July 1, 1973.

In (2), the Code Commissioner changed a reference to "subsection (2)" to "85-2-402(6)" because (2) (formerly (3)) was deleted by Ch. 448, L. 1983, and reenacted as 85-2-402(6). The apparent intent was to apply new subsection (2) of this section, including retroactive effect, to failure to comply with former subsection (3) of this section, as reenacted as 85-2-402(6).

**Case Notes**

### DECISIONS UNDER CURRENT LAW

*Original Decree Did Not Specify Where Water Right Could Be Used — Rights Appurtenant to All Irrigated Lands in Ranch Before Split — Right Determined by Historic Acres Irrigated:* The claimants owned adjoining ranches, which were once owned as a single ranch in the Blackfoot River Basin. In 1909, when the ranch was under common ownership, the District Court issued a decree declaring the water rights of users of Nevada Creek and its tributaries. Among the rights that the District Court decreed to the ranch were four water rights for irrigation from Nevada Creek. In 1912, the ranch was split and sold. No deed transfer for the properties in the ensuing years reserved specific water rights as appurtenances to the land. Both predecessors of the claimants filed water rights claims. The Water Court largely adopted the Water Master's conclusion that proportionally split the flow rates of each decreed right between the claimants based on the historic number of acres irrigated on each property using the formula provided in Spaeth v. Emmett, 142 Mont. 231, 383 P.2d 812 (1963). The Supreme Court affirmed, reasoning that because the original District Court decree itself did not specify parcels within the ranch where the water right could be used, the rights were appurtenant to all of the irrigated lands on the ranch. In re Quigley, 2017 MT 278, 389 Mont. 283, 405 P.3d 627.

*Water Court Properly Applied Clear Error Standard to Water Master's Findings of Fact — Need Firm Conviction of Mistake to Overrule:* The Water Court did not err in applying the clear error standard to the Water Master's findings of fact on a "decree exceeded" issue remark. The Supreme Court reasoned that it is a necessary outcome that at least one party will be apportioned less water than it previously claimed when the Water Court adjudicates a "decree exceeded" issue remark. Additionally, the Supreme Court was not left with a firm conviction that the Water Master committed a mistake in resolving the issue remark when it apportioned the parties less water than they originally claimed. The Water Master did not clearly err in its factual findings and properly applied the formula from Spaeth v. Emmett, 142 Mont. 231, 383 P.2d 812 (1963), to divide the water right given the evidence before it. In re Quigley, 2017 MT 278, 389 Mont. 283, 405 P.3d 627.

*Application of Approval Provision to Rights Perfected Prior to Statute — Construction With Constitutional Guarantee:* Article IX, sec. 3, Mont. Const., providing that "all existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed", is not violated by application of this section's provision, stating that prior approval of the Department of Natural Resources and Conservation must be obtained before an appropriator may sell, sever, or make appurtenant to other lands an appropriation right that was perfected prior to the effective date of this section. The law has not changed, and the Department has simply been given a review to determine an issue that could previously be determined only by a District Court. Castillo v. Kunnemann, 197 M 190, 642 P2d 1019, 39 St. Rep. 460 (1982), modifying upon rehearing 38 St. Rep. 1618 (1981).

*Chapter's Application to Rights Perfected Prior to Its Effective Date:* Except where it indicates a contrary intent, this chapter applies to water rights perfected prior to the effective date of this chapter, and failure to comply with the terms of this chapter does not render a conveyance or reservation void but suspends ability to use the right until the statutorily mandated permission is granted by the Department of Natural Resources and Conservation. Castillo v. Kunnemann, 197 M 190, 642 P2d 1019, 39 St. Rep. 460 (1982), modifying upon rehearing 38 St. Rep. 1618 (1981).

*Sale of Land and One of Two Water Rights — Legal Effects:* Landowner owned two water rights on river, one called the "McNiven Right" and one called the "Grannis Right". He sold part of his land together with part of the McNiven Right. The Supreme Court held that: (1) both the McNiven and the Grannis Rights were appurtenant to the conveyed land and both remained appurtenant to the conveyed land after the sales; (2) the conveyance impliedly reserved the Grannis Right to seller and passed title to part of the McNiven Right to buyer; (3) under this section, buyer's right to use the McNiven Right would be delayed until appropriate approval is granted by the Department of Natural Resources and Conservation as required by this section, and seller must apply under this section for permission to sever from the land conveyed the Grannis Right which the deed impliedly reserved to seller. Castillo v. Kunnemann, 197 M 190, 642 P2d 1019, 39 St. Rep. 460 (1982), modifying upon rehearing 38 St. Rep. 1618 (1981).

*Sale of a Water Right With Implied Reservation of Another Water Right:* Landowner owned two water rights on river and each had a related ditch right; one was called the "McNiven Right" and the other was called the "Grannis Right". He sold part of his land together with part of the McNiven Right and "related ditch rights". The Supreme Court held that the words "related ditch rights" in the deed's water right grant referred only to the McNiven ditch, and further held that since the landowner held two water rights and related ditch rights, the conveyance of the McNiven water and ditch right impliedly reserved to landowner the Grannis water right and related ditch right. Castillo v. Kunnemann, 197 M 190, 642 P2d 1019, 39 St. Rep. 460 (1982), modifying upon rehearing 38 St. Rep. 1618 (1981).

### DECISIONS UNDER FORMER LAW

*Storage of Water Beneficial Use — BLM Held Stock Watering Rights for Use by Grazing Permittees — Multiple Appropriators Can Claim Water Rights from Same Source:* The Water Court did not err in concluding that the United States Bureau of Land Management (BLM) held stock watering rights under Montana law in reservoirs constructed on federal land for the use of grazing permittees. The Supreme Court recognized that storage of water as a beneficial use is expressly provided by the Montana Constitution and that the BLM was entitled to proceed under Montana law to appropriate water in its reservoirs for use by grazing permittees and others. It has long been the common law and then statutory law in Montana that multiple appropriators can claim water rights from the same source and that the first in time has the best right. While overappropriation creates its own issues, it does not mean that the person or entity that made the first use on a water source acquired the right to exclude any other person or entity from claiming water from the same source. A fundamental precept of Montana water law is that multiple claims can exist on a single source of water. U.S. v. Barthelemess Ranch Corp., 2016 MT 348, 386 Mont. 121, 386 P.3d 952.

*Change in Use — Appurtenant to Land:* After purchasing an adjoining tract of land with an appurtenant water right, a farmer proceeded to irrigate all of his land with the newly purchased water right. This change in use resulted in the water right becoming appurtenant to all of the land. Spaeth v. Emmett, 142 M 231, 383 P2d 812 (1963).

*Sale of Portion of Land — Division of Water Right:* When an owner of a tract of land with an appurtenant water right grants a portion of the tract without any express division or reservation, the water right is divided in the proportion the number of irrigated acres conveyed bears to the total irrigated acres. Spaeth v. Emmett, 142 M 231, 383 P2d 812 (1963).

*Conveyance of Right as Appurtenance:* When land is conveyed, including the appurtenances, any water rights previously enjoyed are thereby transferred. When the grantor later purports to convey the water right only, the latter deed does not constitute severance of the water right, as it adds nothing to the conveyance previously made. Osnes Livestock Co. v. Warren, 103 M 284, 62 P2d 206 (1936).

## 85-2-404. Abandonment of appropriation right.

**Compiler's Comments**

*2007 Amendment:* Chapter 355 in (3) near middle inserted "in compliance with a candidate conservation agreement initiated pursuant to 50 CFR 17.32 or". Amendment effective April 28, 2007.

*Termination Provision Repealed:* Section 8(2), Ch. 448, L. 2007, repealed sec. 11, Ch. 658, L. 1989, sec. 4, Ch. 740, L. 1991, and secs. 5 and 6, Ch. 123, L. 1999, which terminated the amendments to this section June 30, 2009. Effective May 8, 2007.

*2005 Amendment:* (Temporary version) Chapter 85 in (4) near beginning after "85-2-436" deleted "the use of water pursuant to 85-2-439", near middle after "change" inserted "in appropriation right", and after "85-2-407" inserted "or 85-2-408"; and made minor changes in style. Amendment effective March 24, 2005.

(Version effective July 1, 2009) In (4) near beginning after "change" inserted "in appropriation right" and after "85-2-407" inserted "or 85-2-408"; and made minor changes in style.

*Termination Provision Repealed:* Section 9, Ch. 85, L. 2005, repealed sec. 14, Ch. 487, L. 1995, which terminated amendments to this section June 30, 2005. Effective March 24, 2005.

*Extension of Termination Date:* Sections 5 through 7, Ch. 123, L. 1999, amended sec. 11, Ch. 658, L. 1989, and secs. 4 and 7, Ch. 740, L. 1991, by extending the termination date imposed by Ch. 658, L. 1989, and Ch. 740, L. 1991, to June 30, 2009. Effective March 19, 1999. Section 14, Ch. 487, L. 1995, provided a termination date of June 30, 2005, for one version of this section; however, the 1995 termination date was not extended by Ch. 123, L. 1999.

*1997 Amendment:* (All versions) Chapter 174 in (2), near end after "right", deleted "in whole or"; and in (5), near end before "determined", inserted "finally". Amendment effective March 28, 1997.

*Saving Clause:* Section 7, Ch. 174, L. 1997, was a saving clause.

*1995 Amendment:* (Temporary version) Chapter 487 in (4), after "85-2-436", inserted "the use of water pursuant to 85-2-439"; and made minor changes in style. Amendment effective April 14, 1995, and terminates June 30, 2005.

(Version effective July 1, 1999) At beginning of (4) inserted "The use of water pursuant to 85-2-439 or"; and made minor changes in style. Amendment effective July 1, 1999, and terminates June 30, 2005.

*Severability:* Section 11, Ch. 487, L. 1995, was a severability clause.

*Applicability:* Section 12, Ch. 487, L. 1995, provided: "[This act] applies to all applications for changes in appropriation rights, permits, and water reservations received by the department of natural resources and conservation after [the effective date of this act]." Effective April 14, 1995.

*1991 Amendment:* (Temporary version) In (4), after "85-2-436", inserted "or the temporary change pursuant to 85-2-407" and in two places, after "abandonment", deleted "by the lessor".

(Version effective July 1, 1999) Inserted (4) providing that a temporary change pursuant to 85-2-407 is not an abandonment.

*1989 Amendment:* Inserted (4) regarding lease of an existing right pursuant to the water leasing study; and made minor changes in phraseology. Amendment effective May 11, 1989, and terminates June 30, 1993.

*1987 Amendment:* Inserted (3) establishing that nonuse as a result of participation in state or federal conservation set-aside program is not presumed abandonment; at beginning of (4) substituted "Subsections (1) and (2)" for "This section"; and made minor change in phraseology.

**Case Notes**

*Water Commissioner, Billing Records Contrary to Witness Testimony — Evidence Undermining Written Records With Witness Testimony Sufficient to Establish Continual Use — Failure to Assert Rights Through Water Commissioner — Nonuse:* In an action involving water rights adjudication, the Water Court adopted the Water Master's report, finding that the objectors failed to prove that the claimant had abandoned the water right due to 10 successive years of misuse. While the objectors provided evidence that the Water Commissioner and billing records established a period of nonuse for 17 years, the Water Court determined that witness testimony contradicted this evidence and that, while the records were instructive, evidence undermining the credibility of the records was persuasive. On appeal, the Supreme Court affirmed, holding that the objectors failed to establish a continuous period of nonuse, the Water Master's report was based on substantial credible evidence, the Water Commissioner and billing records were not dispositive, the failure to assert water rights through the Water Commissioner was not the equivalent of nonuse, and the Water Court was correct to not address the issues of partial abandonment and whether additional remedies were available to the objectors. In re Klamert, 2019 MT 110, 395 Mont 420, 443 P.3d 379.

*Water Rights — Abandonment Determined by Flume Capacity:* Claimants sharing a diversion point filed statements of claim for existing rights based on notices of appropriation filed between 1895 and 1913. The Chief Water Judge found that the flume historically limited the quantity of water that had been put to beneficial use and the claimants were limited to this amount. The Supreme Court held that abandonment of a water right requires both nonuse and intent to abandon, which may be inferred from the circumstances of each case. Based on the evidence, the claimed water in excess of the flume's historical capacity had been abandoned. Skelton Ranch, Inc. v. Pondera County Canal & Reservoir Co., 2014 MT 167, 375 Mont. 327, 328 P.3d 644.

*Retroactive Applicability of 79 Ranch — Presumption of Abandonment Rebutted:* The state appealed the Water Court's decision that the plaintiffs produced sufficient evidence to overcome the presumption that they abandoned their water right claim. The Supreme Court affirmed, concluding that the Water Court properly retroactively applied 79 Ranch, Inc. v. Pitsch, 204 Mont. 426, 666 P.2d 215 (1983), in analyzing the abandonment of a pre-1973 water right and that the claimants submitted sufficient evidence to overcome the presumption of abandonment. Heavirland v. St., 2013 MT 313, 372 Mont. 300, 311 P.3d 813.

*No Different Standard for Abandonment of Water Rights Used for Mining Purposes:* Graveley had not used the water right for his mining claim for more than 50 years but nevertheless claimed that he had not abandoned the right simply because the lack of profitability of mining the claim had led to the nonuse. Declining to distinguish the law of abandonment between various uses of water, the Supreme Court noted that the Legislature had not chosen to apply a different standard for determining the abandonment of water rights used for mining purposes and held that because Graveley had not introduced evidence sufficient to rebut the presumption of abandonment, the water right claim was terminated. In re Adjudication of Existing Rights to Use of All Water, Both Surface & Underground, Within Clark Fork River Drainage Above Blackfoot River, 274 M 340, 908 P2d 1353, 52 St. Rep. 1264 (1995).

*Abandonment of Water Right by Nonuse Distinguished From Abandonment of Easement or Ditch Right:* After hearing, the Water Court determined that three water rights held by appellants Pitsch had been abandoned because of nonuse over approximately 40 years. The Supreme Court held that the Water Court did not err in holding that the case was not governed by E.E. Eggebrecht, Inc. v. Waters, 217 M 291, 704 P2d 422 (1985), and that there was no conflict between Eggebrecht and 79 Ranch, Inc. v. Pitsch, 204 M 426, 666 P2d 215 (1983). Eggebrecht concerns the abandonment of easements by grant, more analogous to a ditch right by grant than a water right, while 79 Ranch concerns abandonment of a water right. There is no reason why Montana law on abandonment of those interests should be identical. In re Adjudication of Musselshell River Rights, 255 M 43, 840 P2d 577, 49 St. Rep. 866 (1992).

*General Evidence of Conditions Insufficient to Excuse Long Period of Nonuse:* Appellants presented general evidence to the Water Court of a variety of negative factors that caused them to not use perfected water rights for a period of 40 years. The Water Court held, in accordance with 79 Ranch, Inc. v. Pitsch, 204 M 426, 666 P2d 215 (1983), that appellants had abandoned their rights through nonuse. The Supreme Court held that evidence presented by appellants of dry conditions in the 1920s, "dust bowl years" of the 1930s, the depression, World War II, blown-in ditches, lack of water, and lack of money was conclusory in nature and not specific enough to excuse the long period of nonuse. Other parties to the case presented evidence that some amount of water was available and that blown-in ditches were easily opened. Under these facts, the Supreme Court held that the Water Court did not err in applying the abandonment presumption of 79 Ranch, which the appellants failed to rebut by their evidence. In re Adjudication of Musselshell River Rights, 255 M 43, 840 P2d 577, 49 St. Rep. 866 (1992).

*Post-1973 Evidence Unpersuasive as to Adjudication of Existing Water Right:* The purpose of statewide water rights adjudication is to adjudicate those rights as they existed on July 1, 1973, the effective date of the Montana Water Use Act. Therefore, the Water Court did not err in refusing to consider evidence pertaining to a water right claimant's actions taken after 1973 as showing a lack of intent to abandon the water right. In re Adjudication of Clark Fork River Drainage, 254 M 11, 833 P2d 1120, 49 St. Rep. 591 (1992).

*Water Right and Easement as Separate Rights — Abandonment:* Water rights and easements or ditch rights are separate and distinct rights; therefore, one can be abandoned without abandoning the other. In re Adjudication of Clark Fork River Drainage, 254 M 11, 833 P2d 1120, 49 St. Rep. 591 (1992), following McDonnell v. Huffine, 44 M 411, 120 P 792 (1912). See also Rieman v. Anderson, 282 M 139, 935 P2d 1122, 54 St. Rep. 286 (1997).

*Forty Years of Nonuse as Raising Rebuttable Presumption of Intent to Abandon:* In litigation to establish plaintiff's and defendant's respective priorities to water appropriated from Big Coulee Creek, the evidence showed that neither had used previously appropriated water for a period of at least 40 years. Thus, the District Court did not err in holding that under section 89-802, R.C.M. 1947 (now repealed), the appropriation rights of both parties had been abandoned for lack of use of the water. While abandonment of a water right is a question of fact, nonuse for a period of at least 40 years raises, in effect, a rebuttable presumption of abandonment. A claim that the predecessors of the parties could not afford to use the water by irrigating their land did not excuse the failure to use the water or rebut the presumption of abandonment since economics could excuse nearly every otherwise abandoned water right. 79 Ranch, Inc. v. Pitsch, 204 M 426, 666 P2d 215, 40 St. Rep. 981 (1983), followed in In re Adjudication of Clark Fork River Drainage, 254 M 11, 833 P2d 1120, 49 St. Rep. 591 (1992), in which nonuse for 23-plus years was sufficient to constitute a presumption of abandonment despite the fact that the water right was carried as an asset on the county's books during the period of nonuse, and In re Adjudication of Existing Rights to Use of All Water, Both Surface & Underground, Within Clark Fork River Drainage Above Blackfoot River, 274 M 340, 908 P2d 1353, 52 St. Rep. 1264 (1995), in which continuous nonuse of water for a mining claim for over 50 years raised a rebuttable presumption of abandonment, despite claimant's contention that the cyclical nature of the mining industry and its uncertain economics were reason enough to explain the long period of nonuse. See also Axtell v. M.S. Consulting, 1998 MT 64, 288 M 150, 955 P2d 1362, 55 St. Rep. 276 (1998), and Heavirland v. St., 2013 MT 313, 372 Mont. 300, 311 P.3d 813, in which the Supreme Court concluded that the 79 Ranch abandonment analysis applies retroactively.

*Abandonment by Nonuse:* Under section 89-802, R.C.M. 1947 (now repealed), 75 years of nonuse is sufficient to provide "clear evidence" of abandonment of the unused portion of a water right. Holmstrom Land Co., Inc. v. Newlan Creek Water District, 185 M 409, 605 P2d 1060, 36 St. Rep. 1403 (1979), rehearing denied, 185 M 409, 605 P2d 1060, 37 St. Rep. 295 (1980).

*Intent to Abandon:* Mere nonuse of a ditch appurtenant to a water right is not sufficient to establish abandonment. There must be concurrent intent to abandon. Shammel v. Vogl, 144 M 354, 396 P2d 103 (1964), followed in Rieman v. Anderson, 282 M 139, 935 P2d 1122, 54 St. Rep. 286 (1997), and distinguished in Roland v. Davis, 2013 MT 148, 370 Mont. 327, 302 P.3d 91.

*"Abandonment" Defined:* Before it may be said that the owner of a water right has abandoned it, there must be the necessary concurrence of act and intent to abandon. He must have relinquished it because he no longer desired to possess it. Irion v. Hyde, 107 M 84, 81 P2d 353 (1938).

*Abandonment — Essential Elements:* Abandonment of a water right is a voluntary act, and to constitute it there must be a concurrence of act and intent. Neither the relinquishment of possession nor the intent not to resume it for a beneficial use is alone sufficient to bring about its abandonment. Osnes Livestock Co. v. Warren, 103 M 284, 62 P2d 206 (1936); Thomas v. Ball, 66 M 161, 213 P 597 (1923).

*Abandonment — Trespassers:* Plaintiff's predecessors in interest for 13 years used a water right acquired by a desert land entryman after the entry had been canceled and thus were trespassers upon the public domain. That fact did not deprive the plaintiff from resuming the use of the water upon acquiring possession, unaffected by any junior rights which came into being in the meantime, there being no law enforcing abandonment of a vested water right as a penalty for exercising it as a trespasser. Osnes Livestock Co. v. Warren, 103 M 284, 62 P2d 206 (1936).

*Abandonment — Resumption:* Where use of water is abandoned and resumed, use vests from the date of resumption. Galiger v. McNulty, 80 M 339, 260 P 401 (1927); O'Shea v. Doty, 68 M 316, 218 P 658 (1923).

*Abandonment — Burden of Proof — Nonuse:* One who claims an abandonment of a water right has the burden of proving it by a preponderance of clear and definite evidence. Where the only evidence was nonuse for 7 years, whereupon its use was resumed by the owner and the water right later sold to another, the resumption and sale were evidence that abandonment was not intended. Thomas v. Ball, 66 M 161, 213 P 597 (1923).

*Abandonment of Ditch — No Effect on Water Right:* An appropriation was made from a creek, turned into a ditch, and eventually used at placer mines. Years later the appropriator abandoned the ditch, returned the water to the creek, and recaptured it for irrigation use. The abandonment of the ditch was not an abandonment of the entire water right. Meagher v. Hardenbrook, 11 M 385, 28 P 451 (1891).

*Abandonment — Insufficient Supply:* Defendant's appropriation for placer mining was not abandoned by his failure to use the appropriation for 5 years since there was not enough water to work the mines during those years. McCauley v. McKeig, 8 M 389, 21 P 22 (1889).

**Law Review Articles**

A New Rule of Law for the Abandonment of Water Rights, Hightower, 45 Mont. L. Rev. 167 (1984).

## 85-2-405. Procedure for declaring appropriation rights abandoned.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

## 85-2-406. District court supervision of water distribution.

**Compiler's Comments**

*1997 Amendment:* Chapter 174 inserted (2)(a) allowing enforcement of a prior decree pending entry of another enforceable decree or adjudication; in (2)(b), in first sentence before "determined", inserted "conclusively", after "chapter" deleted "or when a basin is the subject of a temporary preliminary decree or preliminary decree, as modified after objections and hearings", after "controversy" deleted "or any person whose rights are or may be affected by enforcement of the decree", and at end, after "court", substituted "to certify the matter to the chief water judge" for "for relief", inserted second sentence regarding certification of existing rights, in third sentence, after "sought", substituted "shall retain exclusive jurisdiction" for "may" and after "appropriate" substituted "pending adjudication of the existing water rights certified to the water judge" for "to preserve property rights or the status quo pending the issuance of the final decree", and inserted fourth and fifth sentences regarding claim priority and return of the Water Court decision to

District Court; in (3), at end of first sentence after "court", deleted "that issued the final decree"; in (4) inserted first sentence regarding enforceability of a preliminary or temporary preliminary decree and in second sentence, after first "decree", inserted "or preliminary decree"; deleted (5)(b) that read: "(b) The water judge is not bound by a supreme court determination on an appeal entered under this subsection in issuing any subsequent decree under part 2 of this chapter"; and made minor changes in style. Amendment effective March 28, 1997.

*Saving Clause:* Section 7, Ch. 174, L. 1997, was a saving clause.

*1989 Amendment:* In (2), after "chapter", inserted "or when a basin is the subject of a temporary preliminary decree or preliminary decree, as modified after objections and hearings" and after "controversy" inserted "or any person whose rights are or may be affected by enforcement of the decree"; in first sentence of (3) substituted "final decree" for "general determination of existing rights" and at end of second sentence inserted exception clause; inserted (4) requiring Water Judge to establish lists of existing rights and priorities; inserted (5) providing person whose existing rights and priorities are determined in temporary preliminary or preliminary decree or person exercising statutory suspension the right to appeal determination and providing that Water Judge in issuing subsequent decree is not bound by Supreme Court determination on appeal; and made minor changes in style and grammar. Amendment effective April 21, 1989.

*Saving Clause:* Section 9, Ch. 604, L. 1989, was a saving clause.

*Severability:* Section 10, Ch. 604, L. 1989, was a severability clause.

*Retroactive and Prospective Applicability:* Section 11, Ch. 604, L. 1989, provided: "(1) [This act] applies retroactively, within the meaning of 1-2-109, to all temporary preliminary decrees and preliminary decrees that have been issued by the Montana water courts and prospectively to all decrees issued on or after [the effective date of this act] [effective April 21, 1989].

(2) A person whose existing rights are determined in a temporary preliminary decree or a preliminary decree issued before [the effective date of this act] [effective April 21, 1989] may petition the water judge for relief concerning any matter in the decree prior to enforcement of the decree."

**Case Notes**

DECISIONS UNDER CURRENT LAW

*Water Court Jurisdiction Properly Invoked — Creation of Implied Junior Water Right Proper:* By virtue of the parties' act of seeking certification to the Water Court for a determination of the rights of the parties, the Water Court has jurisdiction to adjudicate all water rights at issue between the parties whether a particular claim was asserted by a party or not. Thus, determination that the May 28, 1891, notice of appropriation was never put to a beneficial use and perfected was proper. Further, the creation of a junior water right to account for the historic use of the ditch's capacity and use by the parties in excess of the June 1, 1891, water right was also proper based on substantial credible evidence. Hoon v. Murphy, 2020 MT 50, 399 Mont. 110, 460 P.3d 849.

*No Private Right of Action to Enforce:* A corporation that owns a water right in a creek sued for injunctive relief in District Court, alleging that a municipality that owns a water right in the same creek was making unpermitted use in violation of the Montana Water Use Act. The District Court held that the Legislature did not create a private right of action for enforcement. The Supreme Court affirmed, explaining the essential difference between protecting an established water right under 85-2-406, which allows users to petition in District Court for supervised distribution and for resolution to controversies between appropriators, and enforcing the Act under 85-2-114. The Supreme Court found that no private right of action is implied in the Act and that such a right would undermine the legislative intent. Lyman Creek, LLC v. Bozeman, 2019 MT 243, 397 Mont. 365, 450 P.3d 872. (Annotator's note: This case was filed prior to the enactment of Ch. 266, L. 2019, which amended 85-2-114 and pertained to a private right of action to injunctive or other relief.)

*Substantial Evidence of No Historical Restriction on Diversion:* In a water dispute, the objectors to a claim argued that the Water Court had erred in not limiting the claimant's wintertime water diversions to one-half of available water in the Teton River. The objectors argued that the claimant's water right had historically been limited in this manner; however, the Water Court concluded that the record did not support a finding of a historical restriction. On appeal, the Supreme Court affirmed, ruling that the Water Court's holding was supported by substantial evidence. In re Teton Co-op Reservoir Co., 2018 MT 66, 391 Mont. 66, 414 P.3d 1249.

*Disputed Location of Point of Diversion — Request for Preliminary Injunction — Court Within Its Authority to Interpret Location:* The defendants had placed a dam that diverted water from the plaintiffs' ditch. The plaintiffs sought a preliminary injunction in order to distribute water to their property by installing a headgate on the defendants' land. The defendants countered that the ditch, through which the plaintiffs' water had traveled, was not located on their land. After 4 days of hearings on the location of the ditch, the District Court granted a preliminary injunction allowing the plaintiffs to install a headgate on the defendants' property. The defendants appealed, arguing that the District Court had exceeded its jurisdiction by determining the location of the point of diversion. The Supreme Court affirmed, noting that the District Court has authority to supervise the distribution of established water rights. Mack v. Anderson, 2016 MT 204, 384 Mont. 368, 380 P.3d 730.

*Earlier Decree Superseded by Modified Temporary Preliminary Decree — Properly Enforced by Commissioner:* The plaintiff filed a dissatisfied water user complaint against a Water Commissioner for enforcing a modified temporary preliminary decree issued by the Water Court. The plaintiff argued that the commissioner should enforce the decree that preceded the temporary preliminary decree and that the decree was unenforceable. The District Court denied the plaintiff's complaint, holding that the temporary preliminary decree superseded the earlier decree and that the commissioner was correct in enforcing the temporary preliminary decree. On appeal, the Supreme Court agreed that the temporary preliminary decree superseded the plaintiff's claim of existing right and affirmed. Eldorado Coop Canal Co. v. Hoge, 2016 MT 145, 383 Mont. 523, 373 P.3d 836.

*Water Court Jurisdiction to Determine Scope of Controversy:* A water user with appropriation rights on the Teton River challenged the Water Commissioner's administration of water under a temporary preliminary decree. The Supreme Court held that a party may petition the Water Court to resolve a water distribution controversy if all existing water rights on the source of water in controversy have not been determined by final adjudication under the state Water Use Act. The Water Court did not err in determining the scope of the controversy, defining the purpose of the certification, or tabulating the applicable rights involved in the controversy. Fellows v. Saylor, 2016 MT 45, 382 Mont. 298, 367 P.3d 732.

*Motion to Exclude Parties' Experts Improperly Granted — Reversal Warranted:* The parties owned adjacent parcels of land and disputed the point of diversion of the plaintiffs' senior water right. Prior to trial, the defendants filed a motion in limine for the District Court to exclude the plaintiffs' experts, which the District Court granted based on its conclusion that the plaintiffs had failed to adequately disclose them. Subsequently, the District Court granted the defendants' motion for a directed verdict in their favor. The plaintiffs appealed to the Supreme Court, which reversed and remanded the case, holding that the plaintiffs' disclosures gave adequate details of their experts' findings and they had complied with Rule 26, M.R.Civ.P. (Title 25, ch. 20). Sharbono v. Cole, 2015 MT 257, 381 Mont. 13, 355 P.3d 782. See also Sunset Irrigation District v. U.S., 2021 MT 25, 403 Mont. 123, 480 P.3d 214, holding that the Water Court did not abuse its discretion in excluding a party's expert witness when the witness was disclosed 11 months after the Water Court's deadline and only 1 week before the hearing.

*Water Court Exceeded Authority by Allowing Water Rights Owner Option to Divert Water Right Through Ditch — Remanded for Modification:* A group of water users with appropriation rights on the Teton River challenged the Water Commissioners for their practice of diverting water upstream and through a ditch to satisfy the water rights of another user with senior appropriation rights. The District Court issued a certification notice to the Water Court to determine all existing rights to divert water through the ditch. The Water Court concluded that the ditch user had a private right to divert water along the ditch and had the option to divert water or to take it from the river directly. On appeal, the Supreme Court reversed, holding that the Water Court did not have the authority to allow the ditch user the right to choose how it received the water and that the option belonged to the Water Commissioners of the District Court. In re Eldorado Co-op Canal Co., 2014 MT 272, 376 Mont. 420, 337 P.3d 74. See also In re Teton Co-op Reservoir Co., 2018 MT 66, 391 Mont. 66, 414 P.3d 1249.

*Certification:* In an action challenging the Water Commissioner's practice of diverting the natural flow of a river, plaintiffs sought certification to the Chief Water Judge pursuant to this section and injunctive relief. The District Court determined that injunctive relief was not appropriate because the plaintiffs had not pleaded a certifiable claim. The Supreme Court reversed, concluding that the plaintiffs' allegations were sufficient for certification because the plaintiffs alleged that a controversy existed concerning the distribution of water, that not all existing rights on the river have been conclusively determined, and that their water rights had been adversely affected. Giese v. Blixrud, 2012 MT 170, 365 Mont. 548, 285 P.3d 458. See also In re Eldorado Co-op Canal Co., 2014 MT 272, 376 Mont. 420, 337 P.3d 74, in which one of the findings by the Water Court on the issues certified in Giese was reversed and remanded for modification.

*District Court Jurisdiction to Determine Contractual Appurtenance of Water Rights Based on Historic Use:* District Courts have jurisdiction to determine appurtenance of water rights based on historic use. Although a District Court may not have jurisdiction to reallocate disputed water rights absent a contract, in this case defendant contractually sold water rights to plaintiffs, and upon disagreement over which water rights were sold, the District Court was asked to resolve the disagreement and did so by interpreting the contract, which was wholly within the court's jurisdiction and did not impose on the exclusive domain of the Water Court. Kruer v. Three Creeks Ranch of Wy., LLC, 2008 MT 315, 346 M 66, 194 P3d 634 (2008). See also Castillo v. Kunnemann, 197 M 190, 642 P2d 1019 (1982), Axtell v. M.S. Consulting, 1998 MT 64, 288 M 150, 955 P2d 1362 (1998), and In re Petition of Deadman's Basin Users, 2002 MT 15, 308 M 168, 40 P3d 387 (2002).

*Enforcement of Water Distribution Under 1940 Decree — Jurisdiction of District Court to Determine Source and Flow:* In a dispute regarding the distribution of water pursuant to a 1940 decree, the District Court recognized the existence of an unadjudicated, independent source of water from a spring, determined its flow rate, and determined that plaintiff was entitled to the flow from the spring. Plaintiff appealed on grounds that the District Court exceeded its jurisdiction by making the source and flow determination because subsection (2)(b) of this section requires that controversies involving water in which all existing rights have not been determined must be settled exclusively by the Water Court. The Supreme Court disagreed. Under In re Petition of Deadman's Basin Water Users Ass'n to Appoint Water Comm'r to Distribute Stored Water, 2002 MT 15, 308 M 168, 40 P3d 387 (2002), and subsection (3) of this section a District Court has the authority to enforce an existing water decree and may, in certain cases, fill in a pre-1973 decree with further delineations, such as time or season of use and acreage of application. In the present case, the District Court was merely enforcing the 1940 decree, and in order to accurately distribute decreed water, it was necessary for the court to identify naturally occurring water in the drainage as distinguished from water produced by defendant's drainage works. The court properly concluded that defendant was entitled to all water present at the diversion except for the naturally occurring water from the spring that was granted to plaintiff. In making this simple determination, the District Court did not readjudicate existing water rights or otherwise modify the 1940 decree in excess of its authority. Plaintiff's motion to certify the issue to the Water Court was properly denied. Hidden Hollow Ranch v. Field, 2004 MT 153, 321 M 505, 92 P3d 1185 (2004).

*No Error in Classifying Imported Water as Developed Water or Referring to Natural Water Carrier as Unnamed Drainage:* In a dispute regarding the distribution of water pursuant to a 1940 decree, the District Court referred to water imported by defendant into the natural drainage from defendant's appropriated water source as developed water and referred to the natural water carrier as an unnamed drainage. Plaintiff contended that these determinations were the exclusive jurisdiction of the Water Court and that the District Court thus exceeded its jurisdiction. The Supreme Court disagreed. Although a claim for appropriation of water rights in which the original character of the water has been lost or that is no longer under the possession or control of the original owner should be adjudicated in the Water Court because it involves a determination of the source of the water right, in this case, the parties did not seek to adjudicate water that lost its character or that had left the control of the original owner. Defendant merely sought to use water that he brought into the natural drainage from his appropriated source. Any error in classifying the water as developed water was harmless because when water is intentionally emptied into a natural watercourse for conduction to another point, an equivalent amount may be recaptured or diverted at a later point as long as it does not diminish the rights of a prior appropriator, and under 85-2-411, appropriated water may be turned into the natural channel of another stream for beneficial use. Thus, defendant did not lose his order of priority by channeling the water through a natural drainage, nor did classifying the water as developed water create a new ground water right in favor of defendant. The District Court did not exceed its jurisdiction in applying nomenclature to an otherwise confusing process. Plaintiff's motion to certify the issue to the Water Court was properly denied. Hidden Hollow Ranch v. Field, 2004 MT 153, 321 M 505, 92 P3d 1185 (2004).

*Supervision and Enforcement of Pre-1973 Water Decree by District Court — No Due Process Violation:* Plaintiff brought a contempt and injunction action in District Court to prevent defendant from interfering with plaintiff's appropriation rights under a 1940 water decree. Following a bench trial in District Court, plaintiff's petition was dismissed and plaintiff was enjoined from interfering with defendant's diversion works and conveyance system. Following a determination of the source and flow of the water, the District Court also ordered that defendant allow a specific amount of water through the diversion system to plaintiff. On appeal, plaintiff contended that the permanent modification of the 1940 decree by the District Court in a contempt and injunction action violated plaintiff's due process rights. The Supreme Court held that the District Court did not exceed its jurisdiction by supervising the distribution of previously adjudicated water, enforcing the 1940 decree, and filling in the pre-1973 decree with further delineations. Because the District Court did not permanently modify the 1940 decree, plaintiff's due process rights were not violated. Hidden Hollow Ranch v. Field, 2004 MT 153, 321 M 505, 92 P3d 1185 (2004).

*District Court Error in Restraining Use of Contracted Irrigation Water:* Micks contracted to purchase the right to 775 acre-feet of water from the Deadman's Basin Water Users Association, to be appropriated from the Deadman's Basin Reservoir, in order to irrigate a hay crop. In April 2000, the District Court appointed two Water Commissioners to distribute the reservoir water pursuant to a rotation plan. In August 2000, the District Court, on its own motion, found that the water level in the reservoir had reached a critical level, that the remaining water was necessary to maintain domestic, municipal, stock, and wildlife usage, and that the irrigation of crops from the river was prohibited as long as the reservoir level remained critically low. Micks determined that he had used only 431 acre-feet of his contracted 775 acre-feet, and based on his limited usage and other reasons, he presumed that the District Court prohibition did not apply to him, so he continued to irrigate his hay crop. Micks' continued irrigation was discovered, and he was ordered by the District Court to show cause why he should not be held in contempt for failure to comply with the prohibition order. Micks requested that the District Court reconsider its order, but the request was denied, so Micks appealed. The Supreme Court noted that under Mildenberger v. Galbraith, 249 M 161, 815 P2d 130 (1991), and Baker Ditch Co. v. District Court, 251 M 251, 824 P2d 260 (1992), the jurisdiction to interpret and determine existing water rights rests exclusively with the Water Courts and that although the District Court has the authority to supervise the distribution of previously adjudicated water or to enforce an existing water decree and may in certain cases fill in a pre-1973 decree with further delineations, such as time or season of use and acreage of application, in this case, the District Court made a priority determination regarding domestic and irrigation water consumption based on the court's own inclinations, exceeding its authority to simply fill in a water decree with further delineations. Micks' contract unambiguously required a pro rata reduction in water distribution when an inadequate amount existed to satisfy outstanding water purchase contracts. Therefore, the District Court erred as a matter of law when it employed a first come, first served policy in contravention of the water contract. Denial of Micks' motion to reconsider the prohibition order was reversible error, and his motion to restrain the Water Commissioners from interfering with use of Deadman's Basin Reservoir irrigation water to which he was entitled should have been granted. In re Petition of Deadman's Basin Water Users Ass'n to Appoint Water Comm'r to Distribute Stored Water, 2002 MT 15, 308 M 168, 40 P3d 387 (2002).

*Recharge of River — Right to Use of Water by Subsequent Appropriator Even Though No Water Available to Upstream Prior Appropriator:* A Water Commissioner closed the headgate of the Baker Ditch Company, a downstream appropriator with decreed water rights, because there was no water available to an upstream superior appropriator, even though there was water available to the Company due to recharge of the river by return flows, seepage, and other sources. The Commissioner evidently believed that he had to enforce the decree to the extent that if a prior appropriator was without water upstream, a subsequent appropriator downstream could not divert water under its rights even though the river was being recharged. However, if a subsequent appropriator is using water in accordance with the decree and that use cannot in any way be a detriment to a prior appropriator, then the subsequent appropriator has the right to the use of the water. Baker Ditch Co. v. District Court, 251 M 251, 824 P2d 260, 49 St. Rep. 17 (1992), replacing the prior opinion at 48 St. Rep. 972 (1991).

*Jurisdiction to Determine Existing Water Rights to Rest With Water Court:* Defendants appealed from a District Court judgment granting plaintiffs a stockwater right of 200 miner's inches. The Supreme Court vacated the judgment, holding that a final adjudication of a water right rests with the Water Court and not the District Court. Mildenberger v. Galbraith, 249 M 161, 815 P2d 130, 48 St. Rep. 621 (1991), followed in State ex rel. Jones v. District Court, 283 M 1, 938 P2d 1312, 54 St. Rep. 460 (1997).

*Grounds for "Filling-In" Pre-1973 Water Decree:* A District Court may in certain instances "fill-in" a pre-1973 water decree with further delineations such as the time or season of use and acreage of application. However, such judicial interpretation should be limited to situations similar to that addressed by the Supreme Court in Quigley v. McIntosh, 110 M 495, 103 P2d 1067 (1940), where the appropriator has either expanded his appropriation, exceeded what can be beneficially used, or damaged junior appropriators. Cate v. Hargrave, 209 M 265, 680 P2d 952, 41 St. Rep. 697 (1984). See also State ex rel. Jones v. District Court, 283 M 1, 938 P2d 1312, 54 St. Rep. 460 (1997).

*Priority of Senior Main Stem Water Rights Over Junior Tributary Water Rights:* Appellant owns water rights in Clear Creek dating to 1910. Petitioners have water rights in Rock Creek dating to 1896. Clear Creek is a tributary of Rock Creek. In 1970, appellant obtained a court order directing the Rock Creek Water Commissioner to "carry out" the Clear Creek water rights of appellant. Following the District Court order, the Water Commissioner honored in full the requests of appellant for water without regard to any priority in the relationship of the creeks' water rights. As a result, at times of water shortage, senior Rock Creek decreed waters are cut off. In 1977, petitioners filed this action to rescind the 1970 order and to direct the Water Commissioner to subject the Clear Creek water rights to the priorities of Rock Creek water rights. The District Court ruled that the 1970 court order, applied by the Water Commissioner to fulfill junior appropriations ahead of prior decreed rights, was improper. The Supreme Court affirmed the District Court's order and further stated that the order did not violate due process. The Supreme Court reasoned that the only rights affected by the District Court order were the rights of the parties before the court. Granite Ditch Co. v. Anderson, 204 M 10, 662 P2d 1312, 40 St. Rep. 630 (1983).

*Valid Water Right Not Affected by Release of Surplus to Junior User:* Defendants' predecessor in interest began using water in the amount of 110 gallons a minute from Mahle Spring in 1917 for domestic, stock, and irrigation purposes. Mahle Spring flows into Ashley Creek. In 1958, defendants completed construction of a dam whose purpose was to stabilize their water supply only, not to increase the amount of water appropriated. In April 1973, defendants filed notice of completion of ground water appropriation without well, claiming 110 gallons a minute. In 1957, plaintiff's predecessor in interest began using water from Ashley Creek. At times, when Ashley Creek dried up, defendants agreed to release water from the dam. In 1978, plaintiff obtained a water use permit for Ashley Creek. Subsequently, defendants refused to release any water from the dam. Plaintiff filed an action to adjudicate the parties' water rights and to enjoin defendants from interfering with the flow of Ashley Creek. The Montana Supreme Court upheld the District Court's ruling that defendants are entitled to 110 gallons a minute with a priority date of 1917 and that plaintiff is entitled only to the excess over that. The court denied plaintiff's claim that defendants were estopped from asserting a superior claim, reasoning that the release of the water did not cause plaintiff's predecessor in interest to change her position for the worse because the defendants had already established a valid claim to the water and thus the release was either a mere gratuity or a release of surplus water. In the absence of evidence that defendant was not simply releasing surplus water, the court also denied plaintiff's claim of laches. Finally, the court denied plaintiff's claim that the release from the dam was evidence that defendants were not making beneficial use of all the water since the District Court findings indicated that the defendants' total claim was fully justified. Bagnell v. Lemery, 202 M 238, 657 P2d 608, 40 St. Rep. 58 (1983).

*Findings and Conclusions as to Water Rights Held Inadequate — Judgment Vacated and Remanded:* When a midstream and downstream water user filed suit against the upstream user to have the District Court declare the relative water rights of the parties, the findings of fact and conclusions of law entered by the District Court were so bare and inadequate as to provide no basis for meaningful appellate review. Because it could not be determined from the District Court's bare conclusions (i.e., that the parties had failed to prove their case by a preponderance of the evidence and had abandoned their rights) what the factual or evidentiary basis for the District Court's decision was, the Supreme Court vacated the judgment as to all of the three parties and remanded the case to the District Court and directed it to enter findings and conclusions reflective of the evidence presented at trial and the legal contentions of the parties. 79 Ranch, Inc. v. Pitsch, 193 M 229, 631 P2d 690, 38 St. Rep. 1048 (1981).

*Standing to Challenge Award of Water Right:* A party has standing to challenge a water right only if it conflicts with those granted to him. Thus, he has no standing to challenge a right to water from a source in which he has no water right. However, he may challenge a water right from a source from which he has a water right whether the challenged right is prior or subsequent to his own. Holmstrom Land Co., Inc. v. Newlan Creek Water District, 185 M 409, 605 P2d 1060, 36 St. Rep. 1403 (1979), rehearing denied, 185 M 409, 605 P2d 1060, 37 St. Rep. 295 (1980).

*Preliminary Injunctive Proceedings:* In the same way that substantive property rights cannot be adjudicated in a summary way and that title to real estate may not be litigated in an action for an injunction, water rights should not be determined in a preliminary proceeding for injunctive relief. Eliason v. Evans, 178 M 212, 583 P2d 398 (1978).

DECISIONS UNDER FORMER LAW

*Damages for Wrongful Diversion of Water:*

Where several parties have diverted water so as to injure the crops of another, they cannot be held jointly liable for the acts of each other nor can they be sued in one action for the entire damage, with or without an apportionment of the damage. Howell v. Bent, 48 M 268, 137 P 49 (1913).

Section 89-815, R.C.M. 1947 (now repealed), does not apply to an action at law for damages for the wrongful diversion of water where there is no allegation in the complaint that would authorize the court to grant equitable relief and there is no evidence to show that the plaintiff is entitled to such relief. Miles v. Du Bey, 15 M 340, 39 P 313 (1895). See Howell v. Bent, 48 M 268, 137 P 49 (1913).

*Equitable Actions:* Section 89-815, R.C.M. 1947 (now repealed), contemplates equitable actions only, in which relative priorities and conflicting rights of all parties may be settled and where the damages claimed are a mere incident. Howell v. Bent, 48 M 268, 137 P 49 (1913); Miles v. Du Bey, 15 M 340, 39 P 313 (1895).

*Pleadings:* The District Court may settle the relative priorities and rights of all the parties to a water right suit in one judgment only when pleadings have been framed so as to justify such settlement. Sloan v. Byers, 37 M 503, 97 P 855 (1908), distinguished and followed in Bennett v. Quinlan, 47 M 247, 131 P 1067 (1913).

*Claimant to Be Able to Use Water Before He May Object to the Use by Others:* Until a claimant is himself in a position to use the water of a stream subject to appropriation, the right to the water or water right does not exist in such sense that the mere diversion of the water by another is a ground of action either to recover the water or for damages for its diversion. Miles v. Butte Elec. & Power Co., 32 M 56, 79 P 549 (1905).

*Injunction:* Property owners having the right to divert the waters of a creek for irrigation purposes may join in a suit to restrain a third person from diminishing the volume of water to the use of which they are entitled. Beach v. Spokane Ranch & Water Co., 25 M 379, 65 P 111 (1901).

## 85-2-407. Temporary changes in appropriation right.

**Compiler's Comments**

*2017 Amendment:* Chapter 243 in (3) near end and in (4)(a) after "right of an appropriator" deleted "other than an appropriator described in subsection (7)" and at end after "adversely affected" inserted exception clauses; and made minor changes in style. Amendment effective October 1, 2017, and terminates September 30, 2023.

*2005 Amendment:* Chapter 85 in (3) inserted second sentence removing any limitation on the number of renewals an appropriator may seek, in third sentence near middle after "requires" substituted "notice" for "application", and in fourth sentence at beginning after "Upon" substituted "receipt of the notice" for "application" and near middle after "allow" substituted "90 days" for "30 days"; in (8) near beginning after "change" inserted "in appropriation right"; in (9) near beginning after "change" inserted "in appropriation right", near middle after "right" deleted "pursuant to 85-2-408 or 85-2-439", and at end substituted "not to exceed 30 years unless a renewal is obtained pursuant to subsection (3)" for "equal to the expected life of the project, not to exceed 30 years"; and made minor changes in style. Amendment effective March 24, 2005.

*Termination Provision Repealed:* Section 9, Ch. 85, L. 2005, repealed sec. 3, Ch. 433, L. 2001, and sec. 3, Ch. 122, L. 2003, which terminated amendments to this section June 30, 2005. Effective March 24, 2005.

*2003 Amendment:* Chapter 122 in (9) inserted reference to 85-2-439; and made minor changes in style. Amendment effective March 25, 2003, and terminates June 30, 2005.

*2001 Amendments — Composite Section:* Chapter 381 at beginning of (1) inserted exception clause; and made minor changes in style. Amendment effective April 27, 2001.

Chapter 433 in (2) at beginning inserted exception clause; inserted (9) authorizing approval of temporary change in appropriation right under 85-2-408 for period equal to expected life of project, up to 30 years, if quantity of water subject to temporary change is available from new water conservation or storage project development; and made minor changes in style. Amendment effective July 1, 2001, and terminates June 30, 2005.

*1995 Amendment:* Chapter 322 inserted (4)(b) authorizing an appropriator to object during initial temporary change application, during temporary change renewal process, and once during term of temporary change permit; and made minor changes in style.

*1995 Statement of Intent:* The statement of intent attached to Ch. 322, L. 1995, provided: "This legislation, jointly developed by representatives from the agricultural, recreation, and conservation communities, is intended to authorize the temporary use of existing water rights for instream flow to benefit the fishery resource. In establishing the use of water rights for authorized instream flow to benefit the fishery resource, it is the intent of the legislature that the authorization respect and work within the prior appropriation water rights system.

This legislation creates an opportunity for citizens to voluntarily enter into agreements to lease existing water rights to protect fisheries and allows persons who own water rights to temporarily change the use of that water to instream flow to benefit the fishery resource.

To monitor and review the implementation of this instream flow program, the legislature directs the office of the governor to convene on an ongoing and regular basis a working group that includes representatives from the agricultural, recreation, and conservation communities. This working group shall consult with the department of natural resources and conservation on relevant changes in water use and shall submit a report to the governor and the legislature in 2001 outlining the status of the program."

*1991 Statement of Intent:* The statement of intent attached to Ch. 435, L. 1991, provided: "It is the declared policy of the state in 85-1-101 that water resources be put to optimum beneficial use to secure maximum economic and social prosperity for its citizens. The legislature recognizes that water supplies are limited and vary from year to year. As water supplies become fully appropriated, the reallocation of some water may be necessary to meet changing economic and social needs.

The appropriate means of reallocating water among competing demands is with the voluntary approval of water right holders. With sufficient innovation and economic incentives, water can be reallocated voluntarily, without loss of appropriation rights, and to the profit of prior appropriators, through the temporary change of water rights in anticipation of periods of water scarcity. This legislation clarifies that these types of arrangements are allowed, except when other appropriators might be adversely affected. Thus, water can be reallocated for optimum beneficial use and the maximum economic and social prosperity of all Montana citizens."

**85-2-408. Temporary change authorization for instream flow — additional requirements.**

**Compiler's Comments**

*2017 Amendment:* Chapter 243 inserted (4) providing that applicant is not required to prove lack of adverse effect in connection with change application; and made minor changes in style. Amendment effective October 1, 2017, and terminates September 30, 2023.

*2005 Amendment:* Chapter 85 in (1) inserted (a) and (b) establishing application requirements; deleted former (5) that read: "(5) For the purpose of identifying and consulting with individuals or groups that may be affected by the proposed change authorization, the applicant shall, 30 days before submitting the application to the department, publish notice of the proposed change authorization in a local newspaper of general circulation in the county or counties affected"; inserted (7) establishing the maximum quantity of water that may be changed to maintain and enhance fishery instream flow; and made minor changes in style. Amendment effective March 24, 2005.

*Termination Provision Repealed:* Section 9, Ch. 85, L. 2005, repealed sec. 6, Ch. 322, L. 1995, which terminated this section June 30, 2005. Effective March 24, 2005.

*1995 Statement of Intent:* The statement of intent attached to Ch. 322, L. 1995, provided: "This legislation, jointly developed by representatives from the agricultural, recreation, and conservation communities, is intended to authorize the temporary use of existing water rights for instream flow to benefit the fishery resource. In establishing the use of water rights for authorized instream flow to benefit the fishery resource, it is the intent of the legislature that the authorization respect and work within the prior appropriation water rights system.

This legislation creates an opportunity for citizens to voluntarily enter into agreements to lease existing water rights to protect fisheries and allows persons who own water rights to temporarily change the use of that water to instream flow to benefit the fishery resource.

To monitor and review the implementation of this instream flow program, the legislature directs the office of the governor to convene on an ongoing and regular basis a working group that includes representatives from the agricultural, recreation, and conservation communities.

This working group shall consult with the department of natural resources and conservation on relevant changes in water use and shall submit a report to the governor and the legislature in 2001 outlining the status of the program."

*Termination:* Section 6, Ch. 322, L. 1995, provided that this section terminates June 30, 2005.

**Case Notes**

*Denial of Application for Temporary Change in Water Rights Held to Be Arbitrary Action by Department:* The plaintiffs filed for a temporary change of irrigation water rights to instream flow. The Department of Natural Resources and Conservation denied the application on the basis of an alleged incomplete return flow analysis. The Supreme Court held that 85-2-408(7) dealing with return flow analysis did not require the applicant to provide the analysis; rather, it gives the Department the discretion to limit the amount that may be taken by an applicant. The Supreme Court further held that the Department's denial of the application for want of a complete return flow analysis without further explanation when it had granted similar applications in the past constituted arbitrary conduct and was an abuse of discretion. Hohenlohe v. Dept. of Natural Resources and Conservation, 2010 MT 203, 357 Mont. 438, 240 P.3d 628.

*Upon Applicant's Meeting Statutory Burden of Showing No Adverse Effect on Downstream Water Rights Holders, Department May Not Deny Application Based on Failure to Provide Return Flow Analysis:* The plaintiffs filed for a temporary change of irrigation water rights to instream flow. The Department of Natural Resources and Conservation denied the application on the basis of an alleged incomplete return flow analysis. The Supreme Court held that 85-2-408(7) dealing with return flow analysis did not require the applicant to provide the analysis; rather, it gives the Department the discretion to limit the amount that may be taken by an applicant. The Supreme Court further held that when the applicant successfully proves that the change in water usage will not adversely affect downstream water rights holders, the Department may not refuse to grant the change on the basis of the applicant's failure to provide a return flow analysis, as that is not a requirement that pertains to the applicant. Hohenlohe v. Dept. of Natural Resources and Conservation, 2010 MT 203, 357 Mont. 438, 240 P.3d 628.

## 85-2-410. Short-term lease of appropriation right.

**Compiler's Comments**

*2003 Amendment:* Chapter 49 at beginning of (3) and (4) inserted exception clause; and inserted (9) concerning dust abatement and required notice. Amendment effective February 27, 2003.

*Effective Date:* Section 7, Ch. 381, L. 2001, provided: "[This act] is effective on passage and approval." Approved April 27, 2001.

## 85-2-411. Water turned into natural channels.

**Case Notes**

*Interpretation of Water Decree — Natural Flow to Downstream Appropriators — No Required Minimum of Inflow:* An individual landowner objected to three water right claims owned by the county. The objector claimed that under an earlier decree, the county was required to provide a minimum of 1,200 miner's inches (30 cubic feet per second) from Georgetown Lake into Flint Creek. The Water Court disagreed, holding that the county was required to provide the "natural flow" to the creek. On appeal, the Supreme Court affirmed, holding that the Water Court had correctly interpreted the earlier decree when it concluded that a downstream appropriator such as the objector had no right to water stored behind an upstream dam as long as the county released the natural inflow into the stream below the dam. Granite County Bd. of Comm'rs v. McDonald, 2016 MT 281, 385 Mont. 262, 383 P.3d 740.

*District Court Erred in Affirming Conservation District's Determination Regarding Mitchell Slough:* The District Court's narrow, technical definition of "natural" as meaning "in the absence of any man-made manipulation" and resulting conclusions led to errors of law. The totality of the circumstances of the factual record should have been considered in determining whether the Mitchell Slough is a "natural, perennial-flowing stream or river" for the purpose of Title 75, chapter 7, part 1. Bitterroot River Protective Assoc., Inc. v. Bitterroot Conserv. Dist., 2008 MT 377, 346 M 507, 198 P3d 219 (2008), followed in Pfeil Acquisitions, LLC v. Gallatin County Conserv. District, 2022 MT 237, 411 Mont. 18, 521 P.3d 47.

*No Error in Classifying Imported Water as Developed Water or Referring to Natural Water Carrier as Unnamed Drainage:* In a dispute regarding the distribution of water pursuant to a 1940 decree, the District Court referred to water imported by defendant into the natural drainage from defendant's appropriated water source as developed water and referred to the natural water carrier as an unnamed drainage. Plaintiff contended that these determinations were the exclusive jurisdiction of the Water Court and that the District Court thus exceeded its jurisdiction. The Supreme Court disagreed. Although a claim for appropriation of water rights in which the original character of the water has been lost or that is no longer under the possession or control of the original owner should be adjudicated in the Water Court because it involves a determination of the source of the water right, in this case, the parties did not seek to adjudicate water that lost its character or that had left the control of the original owner. Defendant merely sought to use water that he brought into the natural drainage from his appropriated source. Any error in classifying the water as developed water was harmless because when water is intentionally emptied into a natural watercourse for conduction to another point, an equivalent amount may be recaptured or diverted at a later point as long as it does not diminish the rights of a prior appropriator, and under this section, appropriated water may be turned into the natural channel of another stream for beneficial use. Thus, defendant did not lose his order of priority by channeling the water through a natural drainage, nor did classifying the water as developed water create a new ground water right in favor of defendant. The District Court did not exceed its jurisdiction in applying nomenclature to an otherwise confusing process. Plaintiff's motion to certify the issue to the Water Court was properly denied. Hidden Hollow Ranch v. Field, 2004 MT 153, 321 M 505, 92 P3d 1185 (2004).

*Supervision and Enforcement of Pre-1973 Water Decree by District Court — No Due Process Violation:* Plaintiff brought a contempt and injunction action in District Court to prevent defendant from interfering with plaintiff's appropriation rights under a 1940 water decree. Following a bench trial in District Court, plaintiff's petition was dismissed and plaintiff was enjoined from interfering with defendant's diversion works and conveyance system. Following a determination of the source and flow of the water, the District Court also ordered that defendant allow a specific amount of water through the diversion system to plaintiff. On appeal, plaintiff contended that the permanent modification of the 1940 decree by the District Court in a contempt and injunction action violated plaintiff's due process rights. The Supreme Court held that the District Court did not exceed its jurisdiction by supervising the distribution of previously adjudicated water, enforcing the 1940 decree, and filling in the pre-1973 decree with further delineations. Because the District Court did not permanently modify the 1940 decree, plaintiff's due process rights were not violated. Hidden Hollow Ranch v. Field, 2004 MT 153, 321 M 505, 92 P3d 1185 (2004).

*Canal Water Turned Into Slough — Amount That May Be Reclaimed:* The defendant permitted waters from a canal and spring to run in a slough and then used the slough as a waterway. The defendant could reclaim from the slough only that amount of water equal to what he put in. Meine v. Ferris, 126 M 210, 247 P2d 195 (1952).

*Seepage Water Potholed and Recaptured:* Since seepage water that has its rise along the bed of a stream and forms a natural accretion thereto belongs to the stream as a part of its source of supply, the same as do feeder springs, and an appropriator of water on such stream has the right to all such tributary flow even as against the owner of the land, the conducting of water from upper reaches of a tributary to "potholes" and "reservoirs" and then capturing the seepage therefrom in ditches is insufficient proof of creating a new supply for an additional water right. Woodward v. Perkins, 116 M 46, 147 P2d 1016 (1944), distinguished in Forrester v. Rock Island Oil & Ref. Co., 133 M 333, 323 P2d 597 (1958).

*Percolation From Irrigation on Adjacent Lands:* While under section 89-804, R.C.M. 1947 (now repealed), one may employ the natural channel of a stream for the conveyance of water which he has developed and reclaim it if the rights of prior appropriators are not thereby diminished in quantity or deteriorated in quality, the rule has no application where an increase in the flow of the stream results solely by percolation from irrigation on adjacent lands. West Side Ditch Co. v. Bennett, 106 M 422, 78 P2d 78 (1938); State ex rel. Mungas v. District Court, 102 M 533, 59 P2d 71 (1936); Rock Creek Ditch & Flume Co. v. Miller, 93 M 248, 17 P2d 1074, 89 ALR 200 (1933); Beaverhead Canal Co. v. Dillon Elec. Light & Power Co., 34 M 135, 85 P 880 (1906).

*Deterioration in Quality Prohibited:* While section 89-804, R.C.M. 1947 (now repealed), authorizes an appropriator to turn water into the channel of a stream other than the one from which he appropriates, he may do so only if the waters in the stream the channel of which he thus uses are not deteriorated in quality to the detriment of a prior appropriator. Missoula Pub. Serv. Co. v. Bitter Root Irrigation District, 80 M 64, 257 P 1038 (1927).

*Developed Water Supply — Burden of Proof as to Amount:* One who claims to have developed a water supply has the burden of proving the amount developed, especially when it is mingled with a water supply to which another is entitled. Spaulding v. Stone, 46 M 483, 129 P 327 (1912); Smith v. Duff, 39 M 382, 102 P 984 (1909).

*Drainage Ditch — Interception of Stream's Source:* In order to catch seepage water from irrigated land, the defendant constructed a drainage ditch that paralleled and intersected a stream. Because the ditch intercepted seepage water that was a source of supply for the stream, the defendant did not develop a new water supply to which he was entitled. Spaulding v. Stone, 46 M 483, 129 P 327 (1912).

### 85-2-412. Return of surplus water to stream.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

**Case Notes**

*Surplus Water:* Water in excess of the amount which defendant was entitled to appropriate and which ran over spillway on to plaintiff's land was "surplus water" and not artificial water. Clausen v. Armington, 123 M 1, 212 P2d 440 (1949).

*Duty of Appropriator to Turn Surplus Back Into Stream:* Under this section, a prior appropriator of water must turn back into the stream from which the water is taken all over and above what is actually and necessarily used by him. Brennan v. Jones, 101 M 550, 55 P2d 697 (1936); Galiger v. McNulty, 80 M 339, 260 P 401 (1927); Creek v. Bozeman Water Works Co., 15 M 121, 38 P 459 (1894).

*Rights of Subsequent Appropriators:* Subsequent appropriators of water may compel a prior appropriator to release water for their use which he does not need for a beneficial use. Gans & Klein Inv. Co. v. Sanford, 91 M 512, 8 P2d 808 (1932).

*Extent of Right of Owner:* Where a party has all the water his necessities require or that his ditches will carry, it is immaterial that he has a right, under decree or otherwise, to a greater flow from the stream; he must permit the excess to remain in the stream, or having diverted it, return it to the stream in such a manner that it will be available to subsequent appropriators. Tucker v. Missoula Light & Ry., 77 M 91, 250 P 11 (1926).

*Unused Excess Not Appropriated:* The diversion of water for domestic purposes in excess of what is required and allowing such excess to overflow lands without any intention of irrigating and without any intention of using such excess for any useful purpose does not constitute an appropriation of the excess. Power v. Switzer, 21 M 523, 55 P 32 (1898).

**Law Review Articles**

Once-Released Irrigation Waters: Liability and Litigation, 36 Mont. L. Rev. (1975).

### 85-2-413. Diversion of natural flow of waters — when permitted.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

**Case Notes**

*Recharge of River — Right to Use of Water by Subsequent Appropriator Even Though No Water Available to Upstream Prior Appropriator:* A Water Commissioner closed the headgate of the Baker Ditch Company, a downstream appropriator with decreed water rights, because there was no water available to an upstream superior appropriator, even though there was water available to the Company due to recharge of the river by return flows, seepage, and other sources. The Commissioner evidently believed that he had to enforce the decree to the extent that if a prior appropriator was without water upstream, a subsequent appropriator downstream could not divert water under its rights even though the river was being recharged. However, if a subsequent appropriator is using water in accordance with the decree and that use cannot in any way be a detriment to a prior appropriator, then the subsequent appropriator has the right to the use of the water. Baker Ditch Co. v. District Court, 251 M 251, 824 P2d 260, 49 St. Rep. 17 (1992), replacing the prior opinion at 48 St. Rep. 972 (1991).

*Appropriative Rights Annual Rather Than Seasonal:* Generally, there is no division of the year into an irrigation season and a storage season, so as to give later direct users a seasonal preference over earlier indirect users, or vice versa. Cate v. Hargrave, 209 M 265, 680 P2d 952, 41 St. Rep. 697 (1984).

*Grounds for "Filling-In" Pre-1973 Water Decree:* A District Court may in certain instances "fill-in" a pre-1973 water decree with further delineations such as the time or season of use and acreage of application. However, such judicial interpretation should be limited to situations similar to that addressed by the Supreme Court in Quigley v. McIntosh, 110 M 495, 103 P2d 1067 (1940), where the appropriator has either expanded his appropriation, exceeded what can be beneficially used, or damaged junior appropriators. Cate v. Hargrave, 209 M 265, 680 P2d 952, 41 St. Rep. 697 (1984).

*Lawful Exchange:* Owners of rights in a canal who, because of the topography of the area, could not transport water from the canal directly to their land, properly diverted the natural flow of the creek for use on their land and replaced the water with water from the canal which intersected with the stream below the point of diversion. Thompson v. Harvey, 164 M 133, 519 P2d 963 (1974).

*Misuse of Channel:* Where petitioners for an order authorizing a change in a point of diversion on a creek asserted that protestors had misused a channel on Deep Creek by exchanging canal water for stream water which was removed at points above the canal, this use of the channel was specifically authorized in Montana law and the protestors did not have unclean hands. Thompson v. Harvey, 164 M 133, 519 P2d 963 (1974).

*Interference With Prior Rights:* Primary rights to the use of water in a stream are those of appropriators of its natural flow. The burden is upon a subsequent storage claimant (in this case, defendant State Water Conservation Board, precursor to Department of Natural Resources and Conservation) or upon one who uses a watercourse as a part of his distribution system of developed or alien waters affirmatively to disprove interference with prior rights in a suit to enjoin such interference. Allendale Irrigation Co. v. St. Water Conservation Bd., 113 M 436, 127 P2d 227 (1942).

## 85-2-414. Conduction of water.

### Case Notes

*Ditch Easement — Trees and Shrubs Permissible — No Unreasonable Interference — Ditch Maintained by Owner of Land:* The District Court did not err when it determined that the defendant hotel did not unreasonably interfere with the plaintiff easement holder's secondary ditch easement by planting and maintaining trees and shrubs along a ditch. The Supreme Court reasoned that the ditch had been sufficiently, if not excellently, maintained since 1999, when the defendant acquired the property. The plaintiff's sole purpose for accessing the defendant's property was to inspect, repair, and maintain his irrigation ditch. Nothing the defendant (or its predecessors) did in the easement area restricted or inhibited the plaintiff's right to access for inspection purposes. And although the plaintiff could no longer utilize his large farm equipment to maintain the ditch, adequate or better-than-adequate maintenance was regularly performed. Fox v. BHCC II, 2017 MT 218, 388 Mont. 443, 401 P.3d 705.

*Duty to Clean Ditch Properly Imposed on Property Owner — Easement Holder's Argument to Have Trees and Shrubs Removed Not Valid:* The District Court did not err by imposing a duty on the defendant property owner to clean and maintain a ditch when the plaintiff easement holder held a secondary ditch easement. The plaintiff argued on appeal that the District Court abused its discretion when it imposed the duty to maintain the ditch onto the defendant rather than ordering trees and shrubs to be removed. The Supreme Court disagreed and affirmed, reasoning that the District Court had fashioned a unique, workable, and equitable solution for both parties under the facts and circumstances. Consequently, the District Court's factual findings were not erroneous, its conclusions of law were correct, and it did not abuse its discretion in accepting the defendant's judicial admission and tender of its duty to clean and maintain the plaintiff's irrigation ditch. Fox v. BHCC II, 2017 MT 218, 388 Mont. 443, 401 P.3d 705.

*Failure to Enjoin Against Interference With Secondary Easement Rights Not Error:* Engel asserted District Court error in failing to enjoin Gampps from interfering with Engel's use of a secondary easement to maintain an irrigation ditch running across the property of both parties. However, there was substantial evidence that Engel's access for routine inspections and maintenance was, and always had been, free and uninterrupted. Although failing to enjoin Gampps, the District Court nevertheless fashioned an order balancing Engel's reserved right for occasional access with Gampps' right not to be unreasonably burdened by Engel's secondary easement, so the District Court was affirmed. Engel v. Gampp, 2000 MT 17, 298 M 116, 993 P2d 701, 57 St. Rep. 96 (2000).

*Condemnation of Land for Conduct of Water Subject to Eminent Domain Proceedings:* An action to condemn land pursuant to 85-2-414 must follow the eminent domain proceedings set out in Title 70, ch. 30. A water appropriator could not contend that his right of eminent domain was taken away when he had not even initiated the proper procedures to pursue the action. Careless Creek Ranch Co. v. Murnion, 230 M 216, 748 P2d 475, 45 St. Rep. 154 (1988).

*Reservoir Water at Sufficient Height for Use Intended:* Defendant had no claim under this section to eminent domain over land covered by raising the water level behind his reservoir because the reservoir was already at a sufficient height to make the water enter a ditch, thereby fulfilling its intended use for irrigation. Careless Creek Ranch Co. v. Murnion, 230 M 216, 748 P2d 475, 45 St. Rep. 154 (1988).

*Prescriptive Easement:* This section has no application in the case of a prescriptive easement in a water right since the dominant tenement will not be required to pay for an easement acquired by prescription. O'Connor v. Brodie, 153 M 129, 454 P2d 920 (1969).

*Right of Easement Holder to Make Repairs:*

In a proceeding to quiet title to a secondary easement on another's land for irrigation purposes and to enable the dominant owner to maintain and repair his ditches, an award of so much of the lands of the servient owner as may be necessary for the purposes of maintenance was not objectionable for indefiniteness and uncertainty. Laden v. Atkeson, 112 M 302, 116 P2d 881 (1941), distinguished in Stalcup v. Cameron Ditch Co., 130 M 294, 300 P2d 511 (1956), and followed in Engel v. Gampp, 2000 MT 17, 298 M 116, 993 P2d 701, 57 St. Rep. 96 (2000).

The owner of a secondary easement, such as a right to pass over the land of the servient owner for the purpose of making repairs on a dam and ditches, has a duty to repair a route that has become impassable or merely inconvenient rather than to materially deviate therefrom without consent of the servient owner. He may dig up soil and use it for repairs, doing no more injury than is necessary. Laden v. Atkeson, 112 M 302, 116 P2d 881 (1941), distinguished in Stalcup v. Cameron Ditch Co., 130 M 294, 300 P2d 511 (1956), and followed in Engel v. Gampp, 2000 MT 17, 298 M 116, 993 P2d 701, 57 St. Rep. 96 (2000).

*Wing Dam Not Constituting Waste:* Under this section, which gives an appropriator of water the right to raise the level of water in a stream by means of a dam to a sufficient height to make it enter a ditch, the contention that where a wing dam is used, the water which does not enter the ditch is improperly wasted was erroneous. State ex rel. Crowley v. District Court, 108 M 89, 88 P2d 23, 121 ALR 1031 (1939).

*Water Rights and Ditches Separate Rights:* Water rights and ditch rights are separate and distinct property rights. One may own a water right without a ditch right or a ditch right without a water right. Connolly v. Harrel, 102 M 295, 57 P2d 781 (1936).

### **85-2-415. Owners of water to sell surplus.**

**Case Notes**

*Change of Use — Sale:* Appropriations not originally made for the purpose of sale may have their use changed to that purpose if subsequent appropriators are not thereby injured. Sherlock v. Greaves, 106 M 206, 76 P2d 87 (1938).

*Claims of Adverse Possession or Common-Law Dedication No Defense:* Where defendant townspeople for many years took water for domestic uses with the acquiescence of ditch owners and either performed labor in repairing the ditch or paid an annual charge for the privilege of obtaining the water, thus recognizing the paramount right of plaintiffs, they could not rely upon the defense of a common-law dedication in the absence of a showing of an offer to dedicate, in an action to enjoin their further use. Nor could defendant townspeople rely upon the defense of adverse possession or use. Sherlock v. Greaves, 106 M 206, 76 P2d 87 (1938).

*Injunction Against Further Use:* Where the owners of a water right had for many years permitted the inhabitants of a town to tap their nearby ditch for domestic uses for a consideration consisting in some instances of services about the ditch and in others of rental money, thus presumably acting under sections 89-823 through 89-826, R.C.M. 1947 (85-2-415 through 85-2-418), and then sought to enjoin such further use, inhabitants were not entitled to injunctive relief in the absence of proof of a tender of the customary rates although such use was clothed with a public interest. Sherlock v. Greaves, 106 M 206, 76 P2d 87 (1938).

*Restrictions on Sale of Water:* After an appropriator of water has used it sufficiently to fulfill the purposes of his appropriation, he may not take the water of the stream remaining which he cannot use for such purposes and sell it so that it will deprive subsequent appropriators of their right to use it. Sherlock v. Greaves, 106 M 206, 76 P2d 87 (1938).

*Tender Essential to Demand Delivery and Institute Suit:* While sections 89-823 through 89-826, R.C.M. 1947 (85-2-415 through 85-2-418), give to one who desires water from an appropriator who has a surplus and is entitled to sell it the right to demand delivery thereof and to institute suit to compel delivery if refused, he may do so only upon payment or a tender of the usual or customary rates per inch. Sherlock v. Greaves, 106 M 206, 76 P2d 87 (1938).

## 85-2-416. Duty of purchaser to dig ditches.

### Compiler's Comments

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

## 85-2-418. Purchaser not to sell surplus water.

### Compiler's Comments

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### Case Notes

*Application of Section:* The provision of this section relating to the retaking and selling of surplus water for commercial purposes applies to the sale and disposition of water by volume and has no application to water which has been abandoned and which through seepage and percolation reaches the waters of a natural stream. Rock Creek Ditch & Flume Co. v. Miller, 93 M 248, 17 P2d 1074, 89 ALR 200 (1933), distinguished in McGowan v. U.S., 206 F. Supp. 439 (D.C. Mont. 1962).

## 85-2-419. Salvaged water.

### Compiler's Comments

*2007 Amendment:* Chapter 448 at end of third sentence after "85-2-402" inserted "and 85-2-436, if applicable". Amendment effective May 8, 2007.

*2005 Amendment:* Chapter 85 at end of last sentence deleted "or 85-2-439"; and made minor changes in style. Amendment effective March 24, 2005.

*2001 Amendment:* Chapter 381 at beginning of third sentence inserted exception clause and near middle of fourth sentence after "salvaged water" deleted "for instream flow purposes" and near end after "85-2-408" inserted "85-2-410"; and made minor changes in style. Amendment effective April 27, 2001.

*1999 Amendment:* Chapter 123 in second sentence near middle after "salvage water" deleted "as defined in 85-2-102" and in fourth sentence near end inserted references to 85-2-408 and 85-2-439; and made minor changes in style. Amendment effective March 19, 1999.

*1991 Statement of Intent:* The statement of intent attached to Ch. 308, L. 1991, provided: "A statement of intent is required for this bill in order to provide guidance to the department of natural resources and conservation concerning the adoption of rules to allow the appropriation, use, and change of use of salvaged water. The legislature directs the department of natural resources and conservation to adopt rules that promote the conservation and efficient use of water by implementing the provisions of this bill."

*Saving Clause:* Section 5, Ch. 308, L. 1991, was a saving clause.

## 85-2-420. Change in appropriation right for aquifer recharge or mitigation — marketing.

### Compiler's Comments

*2019 Amendment:* Chapter 222 in (3)(b) after "pursuant to this section" deleted "the flow rate and volume of water allowed at the point of diversion must be equal to the flow rate and volume allowed under the initial beneficial uses minus the amount that was sold or marketed for mitigation or aquifer recharge" and inserted clause regarding original beneficial uses, mitigation, or aquifer recharge; inserted (3)(b)(i) regarding water not diverted at a common point of diversion; inserted (3)(b)(ii) regarding water diverted at a common point of diversion; inserted (4)(b) regarding measuring; and made minor changes in style. Amendment effective October 1, 2019.

*Effective Date:* This section is effective October 1, 2011.

## 85-2-421. Purpose.

### Compiler's Comments

*2007 Amendment:* Chapter 366 at end deleted "by requiring that water right ownership update forms be filed with the department and that the department notify the water court of each water right ownership update form filed". Amendment effective July 1, 2008.

*2005 Amendment:* Chapter 70 after "water right ownership" deleted "on both the state and local levels", substituted "water right ownership update forms" for "water right transfers", and after "water court" substituted "of each water right ownership update form filed" for "and the county clerk and recorder of each transfer filed". Amendment effective March 24, 2005.

*Saving Clause:* Section 15, Ch. 70, L. 2005, was a saving clause.

*1987 Amendment:* Near beginning of section deleted reference to 85-2-425.

*1985 Amendment:* Substituted requirement that transfers be filed with the department and that the department notify the water court and the county clerk and recorder of each transfer filed for former requirement that transfers be recorded with the county clerk and recorder, who was to notify the department and the water court of each transfer recorded.

### 85-2-423. Water right ownership update form.

**Compiler's Comments**

*2005 Amendment:* Chapter 70 at end substituted "water right ownership update form" for "water right transfer certificate"; deleted former (2) that read: "(2) The department shall provide an adequate supply of such forms to each county clerk and recorder in the state"; and made minor changes in style. Amendment effective March 24, 2005.

*Saving Clause:* Section 15, Ch. 70, L. 2005, was a saving clause.

### 85-2-424. Filing.

**Compiler's Comments**

*2021 Amendment:* Chapter 260 in (2)(a) at beginning substituted "The department shall update its records to reflect the new ownership of a water right within 30 days after receipt of either" for "If the realty transfer certificate discloses that the water rights will transfer with the property, the department's records must be updated to reflect the purchaser of the property as the new owner of the water right based on"; in (2)(a)(i) in introductory clause after "department of revenue" inserted "if"; inserted (2)(a)(i)(A) concerning transferor being the same; inserted (2)(a)(i)(B) concerning transferor conveying entirety of property; inserted (2)(a)(i)(C) concerning department not receiving form; in (2)(a)(ii) at beginning substituted "a complete water right ownership" for "an ownership" and at end after "submitted to the department" deleted "with a copy of the deed"; inserted (2)(b) introductory clause concerning information from the department of revenue of transferor and 30 days to notify each transferee; inserted (2)(b)(i) concerning submission of water right ownership update form and fee; inserted (2)(b)(ii) concerning ownership of the water right not being changed until form is provided; in (3)(a) at beginning inserted exception clause and after exception clause substituted current text for former text that read: "If the realty transfer certificate discloses the division of a water right among parcels, the person dividing the water right shall complete and file with the department a water right ownership update form, a map, and the required fee"; inserted (3)(b) concerning complete water right ownership update not being filed by all parties; in (4) near middle substituted "a completed form provided by the department, describing" for "on a form provided by the department, information describing"; in (5) near beginning substituted "without conveying the property" for "without selling the property", near middle substituted "a complete form" for "on a form", and near end after "provided by the department" deleted "information"; in (6) near middle of introductory clause after "water right is being" inserted "transferred"; in (6)(b) near middle substituted "have filed or mailed" for "have prepared", near end substituted "documents and fee with or to the department" for "documents and will send the required documents and fee to the department", and at end after "department" deleted "within 60 business days of recording, in which case the certification must also require the transferee to acknowledge that failure to file the appropriate documents and fee with the department will result in the department assessing the penalty in 85-2-431 against the transferee"; inserted (8) concerning update to reflect new ownership without collection of a transfer fee after receiving a withdrawal of a water right, receiving an order from a court, or learning of a clerical error; inserted (9) concerning dispute over the ownership of a water right and certification to a court; inserted (10) concerning nonpayment of transfer fees; inserted (11) concerning definition of complete and department notification of deficiencies in form; and made minor changes in style. Amendment effective October 1, 2021.

*2017 Amendment:* Chapter 70 inserted (2)(a)(ii) regarding submission of an ownership update form; and made minor changes in style. Amendment effective October 1, 2017.

*2013 Amendment:* Chapter 335 in (6)(b) substituted "60 business days" for "5 business days". Amendment effective October 1, 2013.

*2007 Amendment:* Chapter 366 deleted former (1) that read: "(1) The transferor of a water right shall file with the department a water right ownership update form within 60 days of recording a deed or other instrument evidencing a transfer of real property"; in (1) near middle after "closing" inserted "or transfer of real property"; in (2)(a) in first sentence after "discloses" substituted remainder regarding transfer of water right and update of department record and all of second sentence regarding payment of fee for "a transfer of water rights, a water right ownership update form must be completed and filed with the department. The recording of the deed or other instrument may not be delayed because of the transfer of the water rights"; inserted (2)(b) regarding responsibility of transferee; inserted (2)(c) requiring department to send notice to transferee; inserted (3), (4), (5), (6), and (7) regarding other requirements for transfer of water rights; and made minor changes in style. Amendment effective July 1, 2008.

*2005 Amendment:* Chapter 70 in (1) near middle and in second sentence in (2) substituted "water right ownership update form" for "water right transfer certificate"; and deleted former (3) that read: "(3) Upon request of the department, the county clerk and recorder shall send to the department, on a monthly basis, a copy of the clerk and recorder's copy of any realty transfer certificate that discloses a transfer of water rights." Amendment effective March 24, 2005.

*Saving Clause:* Section 15, Ch. 70, L. 2005, was a saving clause.

*1997 Amendment:* Chapter 167 in (1), before "shall", deleted "or his agent or representative"; in (2), at end of first sentence, substituted "contain a water rights disclosure whereby the transferor shall acknowledge, at or before closing, whether or not any water rights are associated with the property to be transferred and whether or not any water rights will transfer with the real property" for "note whether or not the transfer includes a transfer of water rights" and in second sentence, after "certificate", substituted "discloses" for "notes" and at end substituted "a water right transfer certificate must be completed and filed with the department" for "the clerk and recorder shall provide such person the form prescribed under 85-2-423 for the transfer of water rights"; substituted (3) requiring sending copies to the Department on a monthly basis for former language that read: "The county clerk and recorder shall send to the department a list of all transfers that involve transfers of water rights. The list must be sent every month and must include all transfers for the month immediately preceding the date of submittal to the department. The list must include the names and addresses of all parties to the transfer and a legal description of the land subject to the transfer"; and made minor changes in style. Amendment effective January 1, 1998.

*Effective Date — Applicability:* Section 5, Ch. 167, L. 1997 provided: "[This act] is effective January 1, 1998, and does not apply to deeds entering escrow before that date."

*1991 Amendment:* Deleted (4) that read: "(4) The department shall send a reference copy of the water right transfer certificate to the office of the chief water judge and to the county clerk and recorder in the county in which the transfer occurred". Amendment effectively July 1, 1991.

*1985 Amendment:* In (1) substituted "transferor" for "parties to a transfer", substituted requirement that certificate be filed with the department for former requirement that certificate be recorded with the county clerk and recorder, and after "certificate" inserted remainder of subsection requiring transferor to file certificate within 60 days of recording of deed or instrument evidencing transfer of real property; in (3) substituted language concerning list of transfers for "The county clerk and recorder shall cause a permanent record of the water right transfer certificate to be made"; and in (4) substituted requirement that department send reference copy of certificate to chief water judge and to county clerk and recorder in county in which transfer occurred for former requirement that county clerk and recorder send copy of certificate to department and chief water judge.

## 85-2-426. Fee.

### Compiler's Comments

*2007 Amendment:* Chapter 366 in (1) substituted first sentence requiring department to prescribe fee for "The department shall by rule prescribe a fee that will be no higher than necessary to cover the cost to the department of processing the water right ownership update form"; inserted (1)(a) requiring fee to be paid at closing when transfer of water right disclosed; in (1)(b) at end inserted reference to form describing severance or exempting of water right; and made minor changes in style. Amendment effective July 1, 2008.

*2005 Amendment:* Chapter 70 in (1) in first sentence after "to the department" substituted "of processing the water right ownership update form" for "and the county clerk and recorder of processing the transfer certificate" and in second sentence at end substituted "water right ownership update form" for "water right transfer certificate". Amendment effective March 24, 2005.

*Saving Clause:* Section 15, Ch. 70, L. 2005, was a saving clause.

*1995 Amendment:* Chapter 418 in (1), at beginning, substituted "department" for "board of natural resources and conservation"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1985 Amendment:* In (1) in first sentence, after "fee that", substituted "will be no higher than necessary to" for "must", after "department" inserted "and the county clerk and recorder", and in last sentence substituted "filing" for "recordation"; and in (2) substituted language concerning deposit of the fee for "The county clerk and recorder shall:

(a) collect the fee required under subsection (1) and forward it to the department to be deposited in the water right appropriation account provided for in 85-2-318; and

(b) charge and collect a recording fee as provided for in 7-4-2631 for recording the document."

*Statement of Intent:* The statement of intent attached to SB 401 (Ch. 674, L. 1983) provided: "Senate Bill 401 requires a statement of intent because it provides, [in section 6 (85-2-426)] that the Board of Natural Resources and Conservation [functions now transferred to Department of Natural Resources and Conservation] must by rule prescribe a fee for the processing of a copy of a water right transfer certificate. It is the intent of the legislature that the board study the cost of processing such certificates and set the fee commensurate with the department's cost in processing a certificate. In making its cost analysis study the board should consult with the department and obtain the department's opinion as to what the department's costs will be. The fee may not be set so high that it generates revenue in excess of actual costs."

## 85-2-431. Penalty.

### Compiler's Comments

*2021 Amendments — Composite Section:* Chapter 260 in (1) increased maximum civil penalty from $75 to $300; in (2) after near beginning of first sentence after "action to recover the penalty" substituted "may" for "must"; inserted (3) concerning attorney fees and costs incurred during collection; and made minor changes in style. Amendment effective October 1, 2021.

Chapter 535 in (2) after "filed in the district court" deleted "for the first judicial district. At the discretion of the department, the judgment may be certified to the district court". Amendment effective October 1, 2021.

*2007 Amendment:* Chapter 366 deleted former (1) that read: "(1) The transferor of a water right is responsible for the filing of a water right ownership update form with the department in accordance with 85-2-424"; in (1) at beginning substituted reference to person who fails to comply with requirements of 85-2-424 for "The transferor of a water right who violates 85-2-424(1)" and at end increased penalty from $50 to $75; in (2) inserted second sentence concerning certification of judgment; and made minor changes in style. Amendment effective July 1, 2008.

*2005 Amendment:* Chapter 70 in (1) substituted "water right ownership update form" for "water right transfer certificate". Amendment effective March 24, 2005.

*Saving Clause:* Section 15, Ch. 70, L. 2005, was a saving clause.

*1997 Amendment:* Chapter 167 in (2), at beginning, substituted "The transferor of a water right" for "A person". Amendment effective January 1, 1998.

*Effective Date — Applicability:* Section 5, Ch. 167, L. 1997, provided: "[This act] is effective January 1, 1998, and does not apply to deeds entered before that date."

## 85-2-436. Instream flow to protect, maintain, or enhance streamflows to benefit fishery resource — change in appropriation rights.

### Compiler's Comments

*2021 Amendment:* See 2021 Session Law for amendment made by sec. 123, Ch. 261, L. 2021. Amendment effective April 20, 2021.

*2019 Amendment:* Chapter 485 in (3)(b) substituted current text regarding no approval of appropriation right until objections are resolved for former text (see 2019 Session Law for former text); in (6)(a), (6)(b), and (7) substituted "June 30, 2029" for "June 30, 2019"; and made minor changes in style. Amendment effective May 13, 2019.

*2015 Amendment:* Chapter 122 in (2) substituted "outlined in 85-2-307" for "of 85-2-307" and before "in subsection (3)" inserted "described"; in (4)(a) substituted "water policy committee established in 5-5-231" for "environmental quality council"; and made minor changes in style. Amendment effective March 25, 2015.

*2011 Amendment:* Chapter 19 in (6)(b) and (7) after "department" inserted "of fish, wildlife, and parks". Amendment effective October 1, 2011.

*2007 Amendment:* Chapter 448 deleted former (1) that read: "(1) The department of fish, wildlife, and parks and the department, in consultation with the environmental quality council, shall conduct and coordinate a study that, at a minimum:

(a) provides the following data for each designated stream reach and each pilot lease entered into under subsection (2):

(i) the length of the stream reach and how it is determined;

(ii) technical methods and data used to determine critical streamflow or volume needed to preserve fisheries;

(iii) legal standards and technical data used to determine and substantiate the amount of water available for instream flows through leasing of existing rights;

(iv) contractual parameters, conditions, and other steps taken to ensure that each lease in no way harms other appropriators, particularly if the stream is one that experiences natural dewatering; and

(v) methods and technical means used to monitor use of water under each lease;

(b) based on the data provided under subsection (1)(a), develops a complete model of a water lease and lease authorization that includes a step-by-step explanation of the process from initiation to completion"; inserted (1) allowing the department of fish, wildlife, and parks to change an appropriation right; deleted former (2)(a) that read: "(2) (a) For purposes of undertaking the study described in subsection (1) and as authorized by law, the department of fish, wildlife, and parks and the department may engage in the activities described in this subsection (2). For purposes of this study, this section is the exclusive means by which the department of fish, wildlife, and parks may seek to change an appropriation right to an instream flow purpose"; inserted (2) requiring the change in purpose or place of use to meet certain criteria and process; in (3)(a) near middle after "purpose of" inserted "protecting" and at end after "benefit" substituted "the fishery resource" for "of fisheries in stream reaches determined eligible by the department pursuant to 85-2-437"; in (3)(b) in first sentence after "application for a" substituted "change in purpose of use or place of use" for "lease", in second sentence after "proposed" substituted "change in appropriation right" for "lease", at beginning of third sentence after "A" substituted "change in appropriation right" for "lease", and in fourth sentence after "authorize a" substituted "change" for "lease", after "existing" inserted "appropriation", and after "purpose of" inserted "protecting"; in (3)(c) near beginning after "application for a" substituted "change in appropriation right" for "lease" and near middle after "streamflow" substituted "is to be protected" for "must be"; in (3)(d) in first sentence after "may be" substituted "changed to instream flow" for "leased" and at end after "diverted" deleted "by the lessor" and near middle of second sentence after "in the" substituted "change in appropriation right" for "lease", after "used to" inserted "protect", after "below the" deleted "lessor's", and at end after "diversion" inserted "that existed prior to the change in appropriation right"; in (3)(e) at beginning of first sentence substituted "A lease for instream flow purposes" for "The lease", after "may" substituted "be entered" for "not be issued", after "term of" substituted "up to" for "more than", after "years" deleted "but it may be renewed once for up to 10 years", and near end after "project" substituted "may be for" for "is restricted to", inserted second sentence allowing all leases to be renewed an indefinite number of 10-year terms, in third sentence after "allow" substituted "90 days" for "30 days", at beginning of fourth sentence after "A" substituted "change in appropriation right" for "lease", and in fifth sentence before "authorization" substituted "change in appropriation right" for "lease"; in (3)(f) at beginning deleted "During the term of the lease", after "revoke the" substituted "change in appropriation right" for "lease", after "authorization" inserted "up to 10 years after it is approved", and near middle after "subsection" substituted "(3)(i) submits new evidence not available at the time the change in appropriation right was approved that" for "(2)(j)"; in (3)(g) after "lease" inserted "or change in appropriation right" and at end substituted "changed to an instream flow purpose" for "leased"; in (3)(h) after "reversion of" substituted "a leased" for "the"; in (3)(i) near middle after "application for a" substituted "change in appropriation right" for "lease", after "exercise of the" substituted "changed water right" for "lease", and after "reversion of" substituted "a leased" for "the"; in (3)(j) after "plan" substituted "required" for "submitted"; in (4)(a) near middle of first sentence after "council" substituted "a biennial" for "an annual study" and at end substituted "odd-numbered years" for "each year" and in second sentence after "include" substituted "a summary of all appropriation rights changed to an instream flow purpose in the last 2 years" for "the applicable information listed in subsection (1) for each lease, a summary of stream reach designation activity under 85-2-437, and a summary of leasing activity on all designated streams. If the department of fish, wildlife, and parks has not leased additional water rights under this section by December 1 of any year, the department of fish, wildlife, and parks shall provide compelling justification for that fact in the study progress report"; inserted (4)(b) regarding information in the report required for each change in appropriation right; deleted former (3)(b) that read: "(b) A final study report must be adopted by the department and commission and submitted to the environmental quality council, which shall complete the final report by December 1, 2008"; inserted (6) allowing the department of fish, wildlife, and parks to change the appropriation rights on no more than 12 stream reaches; inserted (7) prohibiting the department from entering any new lease agreements or renewing any leases that expire after June 30, 2019; and made minor changes in style. Amendment effective May 8, 2007.

*Termination Provision Repealed:* Section 8(2), Ch. 448, L. 2007, repealed sec. 11, Ch. 658, L. 1989, secs. 4 and 7, Ch. 740, L. 1991, and secs. 5, 6, 7, and 9, Ch. 123. L. 1999, which terminated this section June 30, 2009. Effective May 8, 2007.

*2005 Amendment:* Chapter 85 in (2)(a) at beginning of second sentence deleted "Except as provided in 85-2-439"; and made minor changes in style. Amendment effective March 24, 2005.

*1999 Amendment:* Chapter 123 in (2)(f) at end of first sentence after "term" substituted "equal to the expected life of the project but to not more than 30 years" for "of not more than 20 years"; in (3)(b) at end substituted "2008" for "1998"; and made minor changes in style. Amendment effective March 19, 1999, and terminates June 30, 2009.

*Extension of Termination Date:* Sections 5 through 7, Ch. 123, L. 1999, amended sec. 11, Ch. 658, L. 1989, and secs. 4 and 7, Ch. 740, L. 1991, by extending the termination date imposed by Ch. 658, L. 1989, and Ch. 740, L. 1991, to June 30, 2009. Effective March 19, 1999.

*1995 Amendments:* Chapter 418 in (2)(a), (3)(a), and (3)(b) substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 487 in (2), at beginning of second sentence, inserted "Except as provided in 85-2-439". Amendment effective April 14, 1995.

Chapter 545 in (1), near beginning, in (3)(a), in first sentence, and in (3)(b), near middle, substituted "environmental quality council" for "water policy committee". Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*Severability:* Section 11, Ch. 487, L. 1995, was a severability clause.

*Applicability:* Section 12, Ch. 487, L. 1995, provided: "[This act] applies to all applications for changes in appropriation rights, permits, and water reservations received by the department of natural resources and conservation after [the effective date of this act]." Effective April 14, 1995.

*1995 Transition:* Section 81, Ch. 545, L. 1995, provided: "(1) The members of the legislative council, as provided in 5-11-101, the members of the legislative finance committee, as provided in 5-12-202, the members of the legislative audit committee, as provided in 5-13-202, and the members of the environmental quality council, as provided in 5-16-101, must be appointed as soon as possible following [the effective date of this section] [effective April 27, 1995].

(2) To implement the changes provided in [this act], the office of the legislative council, the office of budget and program planning, and the department of administration shall establish all necessary authorizations during the accounting preparation process known as the "turnaround" process, beginning in April or May 1995, to administer the several appropriations made by any means to programs of the legislative branch agencies consolidated under [sections 3 and 4] [5-2-503 and 5-2-504] for fiscal year 1996 or 1997 or the biennium ending June 30, 1997, as appropriations to a single legislative agency while maintaining the specific identification, legislative intent, and purpose for which the appropriations were made. During this transition, the executive director may authenticate documents as required to accomplish the purposes of [this act]. Appropriate changes on the statewide budgeting and accounting system and the payroll, personnel, and position control system must also be made and authorized as required to accomplish the purposes of [this act].

(3) Personnel and property of the environmental quality council are transferred to the legislative services division effective July 1, 1995."

*1993 Amendments:* Chapter 175 in second sentence of (3)(a), after "lease", inserted "a summary of stream reach designation activity under 85-2-437, and a summary of leasing activity on all designated streams" and in third sentence, after "leased", inserted "additional"; and made minor changes in style. Amendment effective July 1, 1993.

Chapter 370 near beginning of (2)(b), before "application", inserted "correct and complete" and near end, before "complete application", inserted "correct and"; in (2)(f) substituted "a preponderance of evidence" for "substantial credible evidence"; and made minor changes in style. Amendment effective April 16, 1993.

*Severability:* Section 11, Ch. 370, L. 1993, was a severability clause.

*Retroactive Applicability:* Section 12, Ch. 370, L. 1993, provided: "[Sections 1 through 8] apply retroactively, within the meaning of 1-2-109, to all applications and objections pending on [the effective date of this act] [effective April 16, 1993] that are subject to the provisions of Title 85, chapter 2."

*1991 Amendment:* In (2)(e) increased lease term from 4 years to 10 years and after "years" substituted "but it may be renewed once for up to 10 years, except that a lease of water made available from the development of a water conservation or storage project is restricted to a term of not more than 20 years" for "but may be renewed for up to 10 years per renewal, if allowed by law and upon notification to the department. If this section terminates without reauthorization by the legislature, all leases and lease authorizations expire on the date of termination"; in (2)(f), before "lease", deleted "original"; in (2)(i), after "terms", deleted "the renewal of the lease"; in (2)(j), after "installing", deleted "measuring"; inserted (3)(a) requiring Department to submit to Board, Commission, and Water Policy Committee by December 1 annual progress report, including lease information, and requiring Department to provide compelling information justifying any water rights not leased by December 1 of any year in progress report; in (3)(b), before "study", inserted "final" and at end extended date from 1990 to 1998; inserted (4) providing that section does not create right to bring suit to compel renewal of expired lease; and made minor changes in style. Amendment effective May 1, 1991.

*Effective Date:* Section 10, Ch. 658, L. 1989, provided that this section is effective May 11, 1989.

**85-2-441. Temporary use of a water right on state trust land — restrictions on state ownership — rescinding of noncompliant ownership interests required.**

**Compiler's Comments**

*Effective Date:* Section 3, Ch. 432, L. 2019, provided: "[This act] is effective on passage and approval." Chapter 432, L. 2019, was enacted into law without the governor's signature on May 11, 2019.

*Retroactive Applicability:* Section 4, Ch. 432, L. 2019, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to water from a well or developed spring with ground water development works developed prior to [the effective date of this act]." Effective May 11, 2019.

*Preamble:* The preamble attached to Ch. 432, L. 2019, provided: "WHEREAS, the use of water derived from a well or developed spring whose diversion works is not located on state-owned land to provide stock water on state-owned land is in the best interest of the state land lessee and the state; and

WHEREAS, the ability to manage livestock grazing and improve grazing management through the use of stock tanks generates revenue to the state through increased revenue from grazing leases; and

WHEREAS, the state of Montana asserting ownership over privately held water rights derived from a well or developed spring whose diversion works are located wholly on private land serves as a disincentive to improving grazing management on state-owned lands through the use of water tanks; and

WHEREAS, the Montana Water Court in Case No. 43A-A found that the temporary use of a privately owned water right on state land did not equate to state ownership of all or a part of the water right; and

WHEREAS, a water right that is diverted and developed on private land is not subject to the holding in Department of State Lands v. Pettibone; and

WHEREAS, the state of Montana incorrectly expanded the scope of Department of State Lands v. Pettibone to include all trusts, not just school trust lands; and

WHEREAS, the state of Montana incorrectly expanded the scope of Department of State Lands v. Pettibone to assert ownership over water rights that were diverted and developed on private land; and

WHEREAS, the state of Montana is violating 85-2-306, MCA, in asserting ownership over a ground water development in which the state does not have exclusive property rights in the ground water development works; and

WHEREAS, the right to use water is a property right that cannot be taken without due process of law.

THEREFORE, the Legislature of the State of Montana finds that the use of water from a well or developed springs that is diverted from a privately owned diversion works located on private land and utilized on state land does not create an ownership interest in the water right in the state of Montana."

**Case Notes**

*Challenge to Constitutionality of Statute That Presumes Against State Ownership of Water Rights in Ground Water Diverted From Private Property for Use on Leased School Trust Land — Claim by Plaintiffs That Statute Devalues State Land — District Court Summary Judgment Holding Statute Facially Constitutional Affirmed.* Advocates for School Trust Lands v. St., 2022 MT 46, 408 Mont. 39, 505 P.3d 825.

## Part 5
## Ground Water

**Part Administrative Rules**

Title 36, chapter 12, subchapter 1, ARM Water Rights Bureau — Montana Water Use Act.

**Part Law Review Articles**

Water Law—Summary of Groundwater Legislation of 1961, 22 Mont. L. Rev. 131 (1961).

Ground Water Legislation in the Light of Experience in the Western States, Clark, 22 Mont. L. Rev. 42 (Fall 1960).

### 85-2-501. Definitions.

**Compiler's Comments**

*2009 Amendment:* Chapter 86 in definition of aquifer near end after "water" inserted "in usable quantities". Amendment effective March 25, 2009.

*Saving Clause:* Section 9, Ch. 86, L. 2009, was a saving clause.

*2007 Amendment:* Chapter 412 inserted definition of aquifer test; and made minor changes in style. Amendment effective October 1, 2007.

*1991 Amendment:* In definition of ground water substituted "water that is beneath the ground surface" for "fresh water beneath the land surface or beneath the bed of a stream, lake, reservoir, or other body of surface water and which is not a part of that surface water". Amendment effective July 1, 1991.

**Law Review Articles**

Groundwater Legislation in the Light of Experience in the Western States, 22 Mont. L. Rev. 42 (1960).

### 85-2-502. Administrative rules.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 at beginning substituted "department may prescribe and enforce" for "board may prescribe and the department shall enforce" and after "entry" deleted "for that purpose by the department"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

### 85-2-505. Waste and contamination of ground water prohibited.

**Compiler's Comments**

*2001 Amendment:* Chapter 578 inserted (1)(e) regarding water produced in association with coal bed methane well; and made minor changes in style. Amendment effective May 5, 2001.

*Severability:* Section 8, Ch. 578, L. 2001, was a severability clause.

**Law Review Articles**

Once Released Irrigation Waters: Liability and Litigation, 36 Mont. L. Rev. (1975).

### 85-2-506. Controlled ground water areas — designation or modification.

**Compiler's Comments**

*2015 Amendment:* Chapter 294 inserted (8) concerning applicability of section. Amendment effective April 24, 2015.

*2009 Amendment:* Chapter 86 in (1) near beginning of first sentence after "may" inserted "by rule" and after "modify" inserted "permanent or temporary", and inserted second sentence requiring that the rule designate controlled ground water area boundaries; in (2) at beginning of introductory clause inserted "The rulemaking process for", after "water" substituted "area" for "use", and after "may be" substituted "initiated by" for "proposed to"; in (2)(a) after "department" deleted "on its own motion, by"; in (2)(b) at beginning inserted "submission of a correct and complete"; inserted (2)(c) allowing submission of a petition by a municipality, county, conservation district, local water quality district, or certain water right holders; deleted remainder of former (2) that read: "or by petition signed by at least 20 or one-fourth of the users, whichever is the lesser number, of ground water in a ground water area in which there are alleged to be facts showing that:

(a) ground water withdrawals are in excess of recharge to the aquifer or aquifers within the ground water area;

(b) excessive ground water withdrawals are very likely to occur in the near future because of consistent and significant increases in withdrawals from within the ground water area;

(c) significant disputes regarding priority of rights, amounts of ground water in use by appropriators, or priority of type of use are in progress within the ground water area;

(d) ground water levels or pressures in the area in question are declining or have declined excessively;

(e) excessive ground water withdrawals would cause contaminant migration;

(f) ground water withdrawals adversely affecting ground water quality within the ground water area are occurring or are likely to occur; or

(g) water quality within the ground water area is not suited for a specific beneficial use defined by 85-2-102(4)(a)"; inserted (3)(a) setting out the form of the petition; in (3)(b) at beginning after "When" substituted "the department proposes a rule pursuant to this section" for "a proposal is made, the department shall fix a time and place for a hearing, which may not be less than 90 days from the making of the proposal" and before "controlled" inserted "proposed or existing"; inserted (3)(c) regarding notification and correction of petition defects; deleted former (4) that read: "(4) The department shall publish a notice of the hearing, setting forth:

(a) the names of the petitioners;

(b) the description by legal subdivisions (section, township, range) of all lands included in or proposed to be included in the ground water area or subarea;

(c) the purpose of the hearing; and

(d) the time and place of the hearing where any interested person may appear, either in person or by attorney, file written objections to the granting of the proposal, and be fully heard"; inserted (4)(a) and (4)(b) outlining department duties within 60 days after a petition is determined to be correct and complete; in (4)(c) inserted introductory clause; in (4)(c)(i) near beginning after "weeks" inserted "with the first notice", near end after "in which the" inserted "proposed controlled", after "area" deleted "or subarea"; substituted (4)(c)(ii) regarding service of notice on water right holders, landowners, and each well driller for former language that read: "The department shall also cause a copy of the notice, together with a copy of the petition, to be served by mail, not less than 30 days before the hearing, upon:

(i) each well driller licensed in Montana whose address is within any county in which any part of the area in question is located;

(ii) each person or public agency known from an examination of the records in the department's office to be a claimant or appropriator of ground water in the area in question;

(iii) the bureau; and

(iv) the mayor or presiding officer of the governing body of each incorporated municipality located in whole or in part within the proposed ground water area"; in (4)(c)(iii) deleted former second and third sentences that read: "The petition need not be served on any petitioner. A copy of the notice, together with a copy of the proposal, must be mailed to each person at the person's last-known address, and service is complete upon depositing it in the post office, postage prepaid, addressed to each person on whom it is to be served"; in (4)(d) inserted first sentence requiring that the notice include a summary; deleted former (5)(c) that read: "(c) As used in subsection (5)(a), "claimant or appropriator" means a person who diverts, impounds, or withdraws ground water and not merely a person who uses or obtains ground water from another person who diverts, impounds, or withdraws ground water"; inserted (5) and (6) regarding designation of a permanent controlled ground water area; inserted (7) outlining control provisions of a controlled ground water area; and made minor changes in style. Amendment effective March 25, 2009.

*Saving Clause:* Section 9, Ch. 86, L. 2009, was a saving clause.

*2007 Amendment:* Chapter 391 in (2)(g) at end substituted "85-2-102(4)(a)" for "85-2-102(2)(a)"; in (5)(a)(ii) at end deleted "(claimant or appropriator meaning one who diverts, impounds, or withdraws ground water and not merely one who uses or obtains ground water from another who diverts, impounds, or withdraws ground water)"; inserted (5)(c) defining claimant or appropriator; and made minor changes in style. Amendment effective May 3, 2007.

*Preamble:* The preamble attached to Ch. 391, L. 2007, provided: "WHEREAS, it is the policy of this state to encourage the wise use of the state's water resources by making them available for appropriation and to provide wise utilization, development, and conservation of the water of the state for the maximum benefit of its people with the least possible degradation of the state's natural aquatic ecosystems; and

WHEREAS, there has been confusion regarding ground water issues in closed basins and the Department of Natural Resources and Conservation needs guidance from the Legislature on how to proceed; and

WHEREAS, the basin closure laws were passed to protect senior appropriators while the state water adjudication is ongoing; and

WHEREAS, ground water development in closed basins should be able to proceed as long as the applicant collects the necessary scientific information to determine if there will be an adverse effect on a prior appropriator and takes the necessary actions to mitigate or prevent any adverse effects on a prior appropriator; and

WHEREAS, it is critical that the Legislature develop state water policies in a way that protects the prior appropriation doctrine while at the same time protecting the quality of Montana's water and the ability to appropriate water consistent with section 85-1-101, MCA, and Article IX, section 3, of the Montana Constitution; and

WHEREAS, augmentation is statutorily authorized for the Clark Fork River Basin only; and

WHEREAS, the Department of Natural Resources and Conservation has developed administrative rules and applied augmentation through these administrative rules to all basins even though not specifically statutorily authorized; and

WHEREAS, administrative rules and rulemaking must comply with section 2-4-305, MCA, and may not engraft material not contemplated by the Legislature; and

WHEREAS, this bill provides definitions and a new procedure for mitigation and aquifer recharge."

*Severability:* Section 29, Ch. 391, L. 2007, was a severability clause.

*Applicability:* Section 31, Ch. 391, L. 2007, provided: "[This act] applies to applications for an appropriation right in a closed basin filed on or after [the effective date of this act]." Effective May 3, 2007.

*1995 Amendment:* Chapter 418 in (1) and (3) substituted "department" for "board"; in (2), after "proposed to the", deleted "board by the"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1993 Amendment:* Chapter 460 near middle of (2), after "motion", inserted "by petition of a state or local public health agency for identified public health risks"; at end of (2)(e), after "migration", deleted "and a degradation of ground water quality within the ground water area"; inserted (2)(f) concerning water quality and (2)(g) concerning nonsuitability for beneficial use; and made minor changes in style. Amendment effective April 21, 1993.

*1993 Statement of Intent:* The statement of intent attached to Ch. 460, L. 1993, provided: "A statement of intent is required for this bill because the bill gives the department of natural resources and conservation authority to adopt administrative rules. The bill adds statutory criteria for the department to consider in the processing of an application for a permit, change authorization, controlled ground water area, or basin closure. In adopting rules implementing this bill and in interpreting the new statutory language, it is the intent of the legislature that the department and board of natural resources and conservation [functions now transferred to department of natural resources and conservation] should assess the magnitude, character, duration, and geographical extent of the projected effects on the uses of water as classified and utilize this assessment in a practical manner."

*Severability:* Section 7, Ch. 460, L. 1993, was a severability clause.

*1985 Amendment:* Inserted (2)(e) authorizing the designation or modification of an area of controlled ground water use upon alleged facts showing that excessive ground water withdrawals would cause contaminant migration and a degradation of ground water quality within the ground water area.

## 85-2-508. Controlled ground water areas — permits to appropriate.

### Compiler's Comments

*2009 Amendment:* Chapter 86 in (1)(b) after "requirements" substituted "a rule promulgated pursuant to 85-2-506" for "of an order issued pursuant to 85-2-507"; in (2) near middle substituted "controlled ground water area" for "ground water area". Amendment effective March 25, 2009.

*Saving Clause:* Section 9, Ch. 86, L. 2009, was a saving clause.

*2005 Amendment:* Chapter 161 in (1) in introductory clause near end after "controlled" inserted "ground water" and after "area" deleted "only"; inserted (1)(b) providing that an appropriation must meet the requirements of an issued order; and made minor changes in style. Amendment effective April 7, 2005.

**85-2-510. Production of water from oil and gas wells — hearings — jurisdiction of board of oil and gas conservation.**

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 2, Ch. 555, L. 2023. Amendment effective October 1, 2023.

**85-2-512. Investigations.**

**Compiler's Comments**

*1995 Amendment:* Chapter 418 in (1), near end, substituted "department of environmental quality" for "department of health and environmental sciences"; at beginning of (2) deleted "In addition to the foregoing"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

**85-2-514. Inspection of wells.**

**Compiler's Comments**

*1995 Amendment:* Chapter 418 substituted "department of environmental quality" for "department of health and environmental sciences". Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

**85-2-516. Well logs.**

**Compiler's Comments**

*2007 Amendment:* Chapter 412 in (2) inserted second sentence requiring a driller to provide a well location using at least two methods specified on the form. Amendment effective October 1, 2007.

*2003 Amendment:* Chapter 14 near end of (1) substituted "bureau" for "department"; at beginning of (2) inserted exception clause, after "form" substituted "specified" for "provided", and at end substituted "in consultation with the board of water well contractors provided for in 2-15-3307 and the bureau" for "through its offices"; inserted (3) allowing submission of the well log report in an electronic format; at beginning of (4) substituted "bureau" for "department" and deleted former second sentence that read: "The department shall provide a copy of the complete and correct well log to the Montana bureau of mines and geology"; and made minor changes in style. Amendment effective July 1, 2003.

*2001 Amendment:* Chapter 78 at end of first sentence substituted "through its offices" for "at its offices and at the offices of the county clerk and recorders". Amendment effective March 20, 2001.

**85-2-522. Aquifer tests.**

**Compiler's Comments**

*Effective Date:* This section is effective October 1, 2007.

**85-2-523. Rulemaking.**

**Compiler's Comments**

*Saving Clause:* Section 9, Ch. 86, L. 2009, was a saving clause.

*Effective Date:* Section 11, Ch. 86, L. 2009, provided that this section is effective March 25, 2009.

**85-2-524. Criteria for petition applications.**

**Compiler's Comments**

*Saving Clause:* Section 9, Ch. 86, L. 2009, was a saving clause.

*Effective Date:* Section 11, Ch. 86, L. 2009, provided that this section is effective March 25, 2009.

**85-2-525. Ground water investigation program — advisory committee.**

**Compiler's Comments**

*2019 Amendment:* Chapter 465 inserted (3) regarding the bureau of mines and geology reporting on the work of the ground water investigation program. Amendment effective July 1, 2019.

*Effective Date:* Section 6, Ch. 436, L. 2009, provided: "[This act] is effective July 1, 2009."

## Part 6
## Yellowstone River Basin

**Part Administrative Rules**

Title 36, chapter 12, subchapter 1, ARM Water Rights Bureau — Montana Water Use Act.
Title 36, chapter 16, ARM Water reservations — Water Resources Division.

**85-2-602. Definitions.**

**Compiler's Comments**

*2007 Amendment:* Chapter 448 in (1)(b) after "85-2-402" inserted "and 85-2-436, if applicable"; and made minor changes in style. Amendment effective May 8, 2007.

**85-2-603. Suspension of action.**

**Compiler's Comments**

*1995 Amendment:* Chapter 418 in (1)(a), at beginning, substituted "department" for "board of natural resources and conservation"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

**85-2-605. Reservations.**

**Compiler's Comments**

*1997 Amendment:* Chapter 145 inserted (2) extending water reservations in the Yellowstone Basin until they are perfected; and made minor changes in style. Amendment effective March 25, 1997.

**85-2-607. Utility facilities.**

**Compiler's Comments**

*2003 Amendment:* Chapter 217 near middle after "certificate of" substituted "compliance" for "environmental compatibility and public need". Amendment effective April 3, 2003.

*Saving Clause:* Section 19, Ch. 217, L. 2003, was a saving clause.

*Severability:* Section 20, Ch. 217, L. 2003, was a severability clause.

**85-2-608. Certain changes of use allowed.**

**Compiler's Comments**

*Section Not Codified:* Section 89-8-111, R.C.M. 1947, a severability clause, was not codified in the MCA. This clause has not been repealed and is still valid law. Citation may be made to sec. 9, Ch. 116, L. 1974.

## Part 7
## Indian and Federal Water Rights — Water Rights Within Indian Reservations

**Part Compiler's Comments**

*Rules of Procedure:* The rules of procedure for the Water Courts for the state of Montana are set forth in full under 85-2-231.

**Part Case Notes**

DECISIONS UNDER CURRENT LAW

*Exercise of Original Supreme Court Jurisdiction Based on Statewide Importance of Tribal Water Rights:* The Confederated Salish and Kootenai Tribes petitioned the Supreme Court to exercise original jurisdiction in a case involving the use of ground water on the Flathead Indian Reservation. The Supreme Court found this to be an appropriate case in which to exercise original jurisdiction because: (1) the petition implicated constitutional water rights issues under Art. IX, sec. 3, Mont. Const.; (2) tribal water rights are of statewide importance; (3) the decisive issue was purely legal or constitutional; and (4) the normal litigation process was inadequate. Confederated Salish & Kootenai Tribes v. Stults, 2002 MT 280, 312 M 420, 59 P3d 1093 (2002), following In re Application for Beneficial Water Use Permit, 278 M 50, 923 P2d 1073 (1996), and Confederated Salish & Kootenai Tribes v. Clinch, 1999 MT 342, 297 M 448, 992 P2d 244 (1999).

*Issuance of Permits for Ground Water on Indian Reservations Precluded Until Tribes' Federally Reserved Water Rights Defined and Quantified:* The Department of Natural Resources and Conservation (DNRC) granted a permit for the use of ground water on the Flathead Indian Reservation. Despite prior holdings in In re Application for Beneficial Water Use Permit, 278 M 50, 923 P2d 1073 (1996), and Confederated Salish & Kootenai Tribes v. Clinch, 1999 MT 342, 297 M 448, 992 P2d 244 (1999), that the state does not have jurisdiction to issue new use permits prior to formal adjudication of the tribes' reserved water rights, DNRC contended that this case was distinguishable because the tribes' federally reserved water right concerning ground water is legally uncertain. However, the only federal authority cited by either party, Tweedy v. Tex. Co., 286 F. Supp. 383 (D.C. Mont. 1968), supported the conclusion that there is no distinction between surface water and ground water for purposes of determining what water rights are reserved because those rights are necessary to the purpose of an Indian reservation. Further, neither of the prior state cases excluded ground water. The tribes contended that as a sovereign nation, they should not be required to defend their water rights in piecemeal fashion before a hostile forum and that pursuant to 85-2-311 and the prior case law, the ground water permit was illegal. The Supreme Court agreed with the tribes and vacated the permit, finding no reason to limit the scope of the prior holdings by excluding ground water from the tribes' federally reserved water rights in this case. Two statutory methods for comprehensively adjudicating Indian reserved water rights already exist—a general inter sese adjudication or negotiations with the Montana Reserved Water Rights Compact Commission. Therefore, the tribes should not be required to defend their water rights by participating in the DNRC hearings process. Thus, DNRC cannot determine whether water is available on the Flathead Reservation, whether surface water or ground water, because DNRC cannot determine whether the issuance of permits would affect existing water rights until the tribes' preeminent water rights are defined and quantified. Confederated Salish & Kootenai Tribes v. Stults, 2002 MT 280, 312 M 420, 59 P3d 1093 (2002).

*Quantification of Tribal Water Rights Required — 1997 Amendment Unconstitutional:* In an effort to avoid the result created by In re Application for Beneficial Water Use Permit, 278 M 50, 923 P2d 1073, 53 St. Rep. 777 (1996), the 1997 Legislature passed Senate Bill No. 97, which substantively eliminated the former protection of Indian reserved water rights provided by 85-2-311. The state conceded that the protection of existing water rights in Art. IX, sec. 3, Mont. Const., includes water rights reserved for Indian reservations and contended that those rights were not affected by Senate Bill No. 97, but rather that those rights would be considered in that part of the analysis requiring that water be legally available. The state also pointed out the provisional nature of any water use permit and alleged that there were some uses that would not diminish instream flow and that use permits could thus be issued without affecting reserved Indian water rights, regardless of the quantification of those rights. However, under State ex rel. Greely v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 219 M 76, 712 P2d 754 (1985), it was found that Indian reserved water rights are owned by the Indians, and because that ownership interest exists under federal law and does not depend on the use of the water, the Supreme Court was not persuaded that the state's permitting process might allow uses of Indian reserved water that in the long term might not diminish instream flows. The provisional nature of permits was not determinative either because use of water that may have been reserved by federal law for the tribes was no less impermissible simply because it was temporary and subject to termination following final quantification of the tribes' rights by adjudication or negotiation. Under the 1997 amendments, permits are still limited to water that is "legally available", but that phrase is not defined. Construing the phrase in a manner that sustains its constitutional validity, the Supreme Court interpreted "legally available" to mean that there is water available that, among other things, has not been federally reserved for Indian tribes. Therefore, as in In re Application for Beneficial Water Use Permit, the state cannot determine whether water is legally available on the Flathead Reservation because it cannot determine whether the issuance of permits would affect existing water rights until the tribes' rights are quantified by a compact negotiation under 85-2-702 or by a general inter sese water rights adjudication. To allow the issuance of water use permits on the reservation prior to quantification of the tribes' pervasive reserved right would require use of water that might belong to the tribes, in violation of Art. IX, sec. 3, Mont. Const., which protects existing water rights whether adjudicated or not. Confederated Salish & Kootenai Tribes v. Clinch, 1999 MT 342, 297 M 448, 992 P2d 244, 56 St. Rep. 1356 (1999).

*State May Not Grant Water Use Permits on Indian Lands When Reserved Tribal Rights Not Quantified:* The Confederated Salish and Kootenai Tribes of the Flathead Reservation objected to the Department of Natural Resources and Conservation (DNRC) issuing new water use permits to nontribal members owning land in fee on the reservation. The tribes argued that 85-2-311 clearly states that an applicant for a water use permit has to demonstrate that the proposed use will not unreasonably interfere with a planned use for which the water has been reserved and that such a showing cannot be made by an applicant until the tribes reserved rights are quantified by a compact negotiated with the state pursuant to 85-2-702. The Supreme Court held that 85-2-311 does include Indian reserved water rights and that an applicant cannot show that there will be no adverse impact on tribal rights until those rights have been quantified by a negotiated compact with the state. Therefore, DNRC does not have jurisdiction to issue new use permits prior to formal adjudication of the tribes' reserved water rights. (See Ch. 497, L. 1997.) In re Application for Beneficial Water Use Permit, 278 M 50, 923 P2d 1073, 53 St. Rep. 777 (1996), followed in Confederated Salish & Kootenai Tribes v. Clinch, 1999 MT 342, 297 M 448, 992 P2d 244, 56 St. Rep. 1356 (1999). See also State ex rel. Greely v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 219 M 76, 712 P2d 754 (1985).

*State Water Court — Jurisdiction to Adjudicate Indian Reserved Water Rights:* In an original proceeding to determine jurisdiction of the Water Court over Indian tribes and water flowing through state reservations, the Supreme Court held that Article I of the Montana Constitution does not bar state jurisdiction to adjudicate Indian reserved water rights. With the 1952 McCarran amendment, the U.S. Congress diminished the scope of absolute federal jurisdiction over controversies involving federal water rights by allowing state courts concurrent jurisdiction to adjudicate federal water rights. In Colo. River Water Conserv. District v. U.S., 424 US 800 (1976), the U.S. Supreme Court held that the McCarran amendment applied to Indian water rights. The state Legislature's enactment of the Water Use Act (Title 85, ch. 2) pursuant to Art. IX, sec. 3, Mont. Const., constitutes a valid and binding consent of the people of Montana to Congress' grant of state jurisdiction over Indian reserved water rights. State ex rel. Greely v. Confederated Salish & Kootenai Tribes, 219 M 76, 712 P2d 754, 42 St. Rep. 1856 (1985), followed in Blackfeet Indian Nation v. Hodel, 634 F. Supp. 646, 43 St. Rep. 863 (D.C. Mont. 1986).

*Water Use Act — Adjudication of Indian and Federal Reserved Water Rights:*

The Montana Water Use Act (Title 85, ch. 2) is adequate on its face to adjudicate Indian reserved water rights. Although state appropriative water rights and Indian reserved water rights differ in origin and definition, the Water Use Act, as amended, permits the Water Court to treat Indian reserved water rights differently from state appropriative rights. The Water Use Act does not state explicitly that the Water Court shall apply federal law in adjudicating Indian reserved rights; however, state courts are required to follow federal law with regard to those water rights. State ex rel. Greely v. Confederated Salish & Kootenai Tribes, 219 M 76, 712 P2d 754, 42 St. Rep. 1856 (1985), followed in Blackfeet Indian Nation v. Hodel, 634 F. Supp. 646, 43 St. Rep. 863 (D.C. Mont. 1986), and In re Application for Beneficial Water Use Permit, 278 M 50, 923 P2d 1073, 53 St. Rep. 777 (1996).

The Montana Water Use Act (Title 85, ch. 2) is adequate on its face to adjudicate federal reserved water rights. Although federal reserved rights differ from state appropriative rights in origin, determination of priority date, and quantification standards, the Water Use Act recognizes the distinction between federal reserved rights and state-created appropriative rights. As the Act permits each different class of water rights to be treated differently, the Act is adequate to allow for adjudication of federal reserved rights. State ex rel. Greely v. Confederated Salish & Kootenai Tribes, 219 M 76, 712 P2d 754, 42 St. Rep. 1856 (1985), followed in Blackfeet Indian Nation v. Hodel, 634 F. Supp. 646, 43 St. Rep. 863 (D.C. Mont. 1986), and In re Application for Beneficial Water Use Permit, 278 M 50, 923 P2d 1073, 53 St. Rep. 777 (1996).

*Federal Reserved Water Rights — Jurisdiction Over Water Court Not Barred by Suspension Provision:* After the U.S. Supreme Court decision in Ariz. v. San Carlos Apache Tribe, 463 US 545, 77 L Ed 2d 837, 103 S Ct 3201 (1983), that the McCarran amendment, 43 U.S.C. § 666, removed "whatever limitations the enabling acts or federal policy may have originally placed on state court jurisdiction" over the adjudication of Indian water rights, the state requested that the Montana Supreme Court exercise its powers of supervisory control over the state Water Court concerning the adjudication of federal reserved water rights. In assuming jurisdiction, the Supreme Court ruled that the request for supervisory control is not barred by the suspension provisions of 85-2-217, as the proceeding will not generally adjudicate any Indian reserved water rights or any federal reserved water rights. This proceeding will consider the following issues: (1) is the state Water Court prohibited from exercising jurisdiction over Indian reserved water rights based on the disclaimer clause of Art. I of the Montana Constitution or otherwise; (2) is the Montana Water Use Act, Title 85, ch. 2, adequate to adjudicate federal reserved water rights; and (3) is the Montana Water Use Act adequate to adjudicate federal reserved water rights held, on its own behalf, by the United States or any of its agencies. State ex rel. Greely v. Water Court, 214 M 143, 691 P2d 833, 41 St. Rep. 2373 (1984).

*State Court Jurisdiction Over Federal and Indian Water Rights:* The McCarran amendment, 43 U.S.C. § 666, granting state courts jurisdiction over the United States in litigation involving a comprehensive adjudication of water rights, removed "whatever limitations the enabling acts or federal policy may have originally placed on state court jurisdiction" over the adjudication of Indian water rights in actions brought by the United States on behalf of an Indian tribe as well as in actions brought by an Indian tribe itself. Assuming that the state adjudication procedure is adequate and complies with state law, dismissal of adjudication actions filed in federal District Court out of deference to state adjudication proceedings was proper. Ariz. v. San Carlos Apache Tribe, 463 US 545, 77 L Ed 2d 877, 103 S Ct 3201 (1983), reversing N. Cheyenne Tribe v. Adsit, 668 F2d 1080 (9th Cir. 1982); followed in Blackfeet Indian Nation v. Hodel, 634 F. Supp. 646, 43 St. Rep. 863 (D.C. Mont. 1986).

### DECISIONS UNDER FORMER LAW

*United States Water Rights for Stock Watering in Pothole Lake — Reservation Based on 1926 Federal Reservation — Prior Reservation Not Limited by 1976 Act of Congress:* The Water Court did not err in concluding that the United States owned reserved water rights for stock watering by permittees in a pothole lake on federal grazing land based on Public Water Reserve (PWR) 107, which was signed by the President of the United States in April 1926. The original PWR 107 reserved "every spring or waterhole, located on unsurveyed public land." The broad language of the reservation clearly included the pothole lake and there was nothing to indicate that the original reservation had been reversed. A 1980 federal regulation did not retroactively unreserve water sources like the pothole lake that had been reserved since 1926. Rather, the regulation implemented statutory changes that Congress made in 1976 intended to limit future reservations of federal land. The BLM's failure to inventory the pothole was likewise not significant in light of the original withdrawal, and while the BLM could have submitted its claim to the Reserved Water Rights Compact Commission, it was not required to do so. The Supreme Court found no evidence that the Water Court made any determination based on contested issues of material fact. U.S. v. Barthelemess Ranch Corp., 2016 MT 348, 386 Mont. 121, 386 P.3d 952.

*Appropriation on Indian Lands:*

Defendant's contention that an appropriation of a water right was made on Indian lands prior to opening for settlement and therefore initiated by trespass and hence void could not be sustained because the provision of the Crow Indian treaty of 1868 that white men should be excluded from Indian lands is directory and not mandatory. Whites could be excluded if inimical to Indian welfare. It was discretionary with those charged with protecting Indian rights to take action against whites invading without the consent of the tribe. The Indian land became public domain subject to squatter's rights after ratification of agreement for settlement in 1891. Cook v. Hudson, 110 M 263, 103 P2d 137 (1940), distinguished and overruled on other grounds in Grimsley v. Estate of Spencer, 206 M 184, 670 P2d 85 (1983).

By the treaty of May 7, 1868, between the United States and the Crow Indians, establishing the Crow Indian Reservation, the federal government impliedly reserved to itself the waters thereon for irrigation and other purposes for use by the Indians, hence they were not subject to appropriation by others. The right to use water appurtenant to lands on an Indian reservation and held by Indians under trust patents is property of the United States, and state courts are without jurisdiction to enter a decree affecting such right; but when an Indian becomes seized of a fee simple title after removal of a trust patent, the conveyance of land transfers the right to use the water appurtenant to the land. Anderson v. Spear-Morgan Livestock Co., 107 M 18, 79 P2d 667 (1938).

*Appropriation Made on Public Domain by Settler:* A settler on lands which were a part of the public domain could make a valid appropriation of water thereon. Galahan v. Lewis, 105 M 294, 72 P2d 1018 (1937).

*Method of Procedure:* The United States, under section 89-808, R.C.M. 1947 (now repealed), must proceed, in making appropriations of water from nonnavigable streams of this state, as a corporation or individual. Bailey v. Tintinger, 45 M 154, 122 P 575 (1912). See U.S. v. Burley, 172 F 615 (9th Cir. 1909); Burley v. U.S., 179 F 1 (9th Cir. 1910). See also Mettler v. Ames Realty Co., 61 M 152, 201 P 702 (1921).

**Part Law Review Articles**

A Non-Indian Entity Is Polluting Indian Waters: "Water" Your Rights to the Waters, and "Water" Ya Gonna Do About It?, Hanlon, 69 Mont. L. Rev. 173 (2008).

Indian Aboriginal and Reserved Water Rights, an Opportunity Lost, Carter, 64 Mont. L. Rev. 377 (2003).

Adjudication of Indian Water Rights: Implementation of the 1979 Amendments to the Water Use Act, 41 Mont. L. Rev. 73 (1980).

Comments on Indian Water Rights, 41 Mont. L. Rev. 39 (1980).

Riparian Rights Within Indian Reservations, 38 Mont. L. Rev. 424 (1977).

Western Water and the Reservation Theory—The Need for a Water Rights Settlement Act, 26 Mont. L. Rev. 199 (1965).

Beyond Mere Ownership: How the Confederated Salish and Kootenai Tribes Used Regulatory Control Over Natural Resources to Establish a Viable Tribal Homeland, Williams, 24 Pub. Land & Resources L. Rev. 121 (2004).

Ciotti: Preserving Federal Protection of Indian Reserved Water Rights in Montana, Nelson, 20 Pub. Land & Resources L. Rev. 131 (1999).

Damaging Indian Treaty Fisheries: A Violation of Tribal Property Rights, Sanders, 17 Pub. Land & Resources L. Rev. 153 (1996).

Indian Winters Water Rights Administration: Averting New War, Willimas, 11 Pub. Land L. Rev. 53 (1990).

Quantification of Indian Reserved Water Rights in Montana: State ex rel. Greeley in the Footsteps of San Carlos Apache Tribe, MacIntyre, 8 Pub. Land L. Rev. 33 (1987).

Taming the Rapids: Negotiation of Federal Reserved Water Rights in Montana, Miller, 6 Pub. Land L. Rev. 167 (1985).

Namen: Riparian Rights on Flathead Lake, 1 Pub. Land L. Rev. 103 (1980).

Public Land Law: Some Connecting Threads and Future Directions, Wilkinson, 1 Pub. Land L. Rev. 1 (1980).

Administration of Reserved and Non-Reserved Water Rights on an Indian Reservation: Post-Adjudication Questions on the Big Horn River, Hannum 32 Nat. Resources J. 681 (1992).

**85-2-701. Legislative intent.**

**Compiler's Comments**

*1997 Amendment:* Chapter 42 in (1), in second sentence, substituted "It is the intent of the legislature that the unified proceedings include all claimants" for "Therefore, it is the intent of the legislature that the attorney general's petition required in 85-2-211 include all claimants". Amendment effective March 12, 1997.

*1995 Amendment:* Chapter 418 in (2) inserted last sentence concerning representation of Governor. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1987 Amendment:* Inserted (2) establishing negotiation of federal reserved rights as highest priority for Commission.

*Purpose:* Subsection (1) of sec. 1, Ch. 697, L. 1979, provided: "[This act] amends the Montana Water Use Act to expedite and facilitate the adjudication of existing water rights."

**Case Notes**

DECISIONS UNDER CURRENT LAW

*State May Not Grant Water Use Permits on Indian Lands When Reserved Tribal Rights Not Quantified:* The Confederated Salish and Kootenai Tribes of the Flathead Reservation objected to the Department of Natural Resources and Conservation (DNRC) issuing new water use permits to nontribal members owning land in fee on the reservation. The tribes argued that 85-2-311 clearly states that an applicant for a water use permit has to demonstrate that the proposed use will not unreasonably interfere with a planned use for which the water has been reserved and that such a showing cannot be made by an applicant until the tribes reserved rights are quantified by a compact negotiated with the state pursuant to 85-2-702. The Supreme Court held that 85-2-311 does include Indian reserved water rights and that an applicant cannot show that there will be no adverse impact on tribal rights until those rights have been quantified by a negotiated compact with the state. Therefore, DNRC does not have jurisdiction to issue new use permits prior to formal adjudication of the tribes' reserved water rights. (See Ch. 497, L. 1997.) In re Application for Beneficial Water Use Permit, 278 M 50, 923 P2d 1073, 53 St. Rep. 777 (1996), followed in Confederated Salish & Kootenai Tribes v. Clinch, 1999 MT 342, 297 M 448, 992 P2d 244, 56 St. Rep. 1356 (1999). See also State ex rel. Greely v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 219 M 76, 712 P2d 754 (1985).

### DECISIONS UNDER FORMER LAW

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## **85-2-702. Negotiation with Indian tribes.**

### **Compiler's Comments**

*2009 Amendment:* Chapter 5 in (3) in second sentence near middle extended approval date from July 1, 2009, to July 1, 2013, and at end before "months" substituted "24" for "6". Amendment effective February 19, 2009.

*2003 Amendment:* Chapter 103 in (3) in second sentence extended date from July 1, 2005, until July 1, 2009. Amendment effective July 1, 2003.

*1997 Amendment:* Chapter 44 in (3), in second sentence, substituted "July 1, 2005" for "July 1, 1999"; and made minor changes in style. Amendment effective July 1, 1997.

*1991 Amendment:* In second sentence of (3) substituted July 1, 1999, for July 1, 1993; and made minor change in style. Amendment effective May 17, 1991.

*1987 Amendment:* In (3), near middle, extended approval period from July 1, 1987, to July 1, 1993.

*1985 Amendment:* In (2) after "governing body", substituted "and approval by the appropriate federal authority" for "and the congress of the United States"; in (3), in first sentence, substituted "ratification" for "approval", after "tribe" deleted "or federal agency", and inserted "and unless an objection to the compact is sustained under 85-2-233, the terms of the compact must be included in the final decree without alteration", in second sentence, after "tribe", deleted "or federal agency", substituted "1987" for "1985", before "Indian claims" deleted "federal and", and substituted "6 months" for "60 days".

*Select Committee Bill:* Chapter 667, L. 1985, was introduced at the request of the Select Committee on Indian Affairs (now Law and Justice Interim Committee). See Committee report published December 1984 by the Montana Legislative Council.

*1981 Amendment:* Added (3) requiring that either the terms of an approved compact or information concerning unresolved claims for reserved rights be included in the preliminary decree.

*Commissioner Correction:* Because of rearrangement of sec. 27, Ch. 697, L. 1979, the Code Commissioner, 1979, changed "The compact commission" to "The reserved water rights compact commission, created by 2-15-212," in subsection (1).

### **Case Notes**

### DECISIONS UNDER CURRENT LAW

*Immunity — Compact Provisions Did Not Require Two-Thirds Vote of Legislature — One Provision Waived Immunity Instead of Granting Immunity — Other Provision Only Provided Immunity to Individuals:* After many years of negotiation, representatives of the state of Montana, through the Reserved Water Rights Compact Commission, the Confederated Salish and Kootenai Tribes, and the United States agreed to the terms of a compact as a means of settling water rights disputes involving the tribes. In 2015, the Montana Legislature approved the Compact and concurrently enacted separate administrative and management provisions. After approval by the Legislature, the plaintiffs challenged specific sections of the Compact and administrative provisions based on an argument that Art. II, sec. 18, Mont. Const., required the Legislature to approve the Compact or its administrative provisions by a two-thirds vote of each house because they granted new immunities to the state. The Supreme Court held that none of the provisions required a two-thirds vote. As to the challenged provision in the Compact, the Supreme Court upheld the District Court and determined that the Compact provision at issue provided for a waiver of immunity, not a grant of new immunity. As such, the Compact on its face did not create any new immunity from suit and could be enacted by less than a two-thirds majority of each house. As to the challenged provision of the administrative provisions, the Supreme Court reversed the District Court and determined that the provisions did not establish or alter any immunity as to the state, counties, cities, towns, or other local governmental entities. To the contrary, the new immunities were specifically applied to designated individuals, including members of a board, an engineer, a designee, water commissioners, and any staff. Flathead Joint Bd. of Control v. St., 2017 MT 277, 389 Mont. 270, 405 P.3d 88.

*Crow Compact Upheld — Compact Held Reasonable — Public Property and Water Rights Reasonable Under Compact — Public Comment Satisfied Due Process:* Individual objectors to the Crow Water Compact appealed to the Supreme Court following the Water Court's determination that the Compact was valid. This action was subsequent to In re Crow Water Compact, 2015 MT 217, 380 Mont 168, 354 P.3d 1217. The objectors, who were not parties to the Compact but who owned land and water rights near the reservation, argued that the Water Court did not apply the proper legal standard, that they sustained injury because the Compact was unreasonable, and that their due process rights were violated during the Compact negotiation process. The Supreme Court disagreed with the objectors, holding that the Water Court correctly applied the correct standard articulated in Crow I, that the Compact was reasonable and had reasonable protection of state water and property rights, that the objectors' argument of future potential problems was beyond the scope of its review, that reservation of water for public recreation, wildlife, and aquatic life was for the benefit of the public, and that the record demonstrated sufficient opportunities for public comment during the Compact approval process. In re Crow Water Compact, 2015 MT 353, 382 Mont. 46, 364 P.3d 584.

*Water Court's Dismissal of Objections to Crow Water Compact Proper — No Error in Refusal to Stay Proceedings:* A group of Crow tribal members holding interests in parcels of former tribal land appealed the Water Court's dismissal of their objections to the Crow Water Compact (Compact) and the Water Court's refusal to stay the proceedings pending the resolution of a lawsuit that the tribal members filed in federal court, arguing that the Water Court erred in treating them as represented parties for the purposes of considering the Compact; that the Water Court should have stayed the proceedings until the resolution of the federal lawsuit; and that a current use list of the tribal water rights is a prerequisite to the validity of the Compact. The Supreme Court affirmed, finding that the Water Court properly determined that the adequacy of the tribal members' representation was not within the scope of its review and, following Officers for Justice v. Civil Service Comm'n, 688 F.2d 615 (9th Cir. 1982), properly limited its review to determining whether the Compact was the product of fraud, collusion, or overreaching. The Water Court acted within its discretionary powers in denying the stay because staying the proceedings until the federal lawsuit was resolved would work a hardship and injustice on the parties who negotiated the Compact and potentially risk the repeal of the Compact. The Compact and the congressional ratification do not require that the specific water rights of the tribal members be quantified prior to implementing the Compact; therefore, there are no grounds for concluding that the Water Court should have deferred action on the Compact. In re Crow Water Compact, 2015 MT 217, 380 Mont. 168, 354 P.3d 1217.

*Exercise of Original Supreme Court Jurisdiction Based on Statewide Importance of Tribal Water Rights:* The Confederated Salish and Kootenai Tribes petitioned the Supreme Court to exercise original jurisdiction in a case involving the use of ground water on the Flathead Indian Reservation. The Supreme Court found this to be an appropriate case in which to exercise original jurisdiction because: (1) the petition implicated constitutional water rights issues under Art. IX, sec. 3, Mont. Const.; (2) tribal water rights are of statewide importance; (3) the decisive issue was purely legal or constitutional; and (4) the normal litigation process was inadequate. Confederated Salish & Kootenai Tribes v. Stults, 2002 MT 280, 312 M 420, 59 P3d 1093 (2002), following In re Application for Beneficial Water Use Permit, 278 M 50, 923 P2d 1073 (1996), and Confederated Salish & Kootenai Tribes v. Clinch, 1999 MT 342, 297 M 448, 992 P2d 244 (1999).

*Issuance of Permits for Ground Water on Indian Reservations Precluded Until Tribes' Federally Reserved Water Rights Defined and Quantified:* The Department of Natural Resources and Conservation (DNRC) granted a permit for the use of ground water on the Flathead Indian Reservation. Despite prior holdings in In re Application for Beneficial Water Use Permit, 278 M 50, 923 P2d 1073 (1996), and Confederated Salish & Kootenai Tribes v. Clinch, 1999 MT 342, 297 M 448, 992 P2d 244 (1999), that the state does not have jurisdiction to issue new use permits prior to formal adjudication of the tribes' reserved water rights, DNRC contended that this case was distinguishable because the tribes' federally reserved water right concerning ground water is legally uncertain. However, the only federal authority cited by either party, Tweedy v. Tex. Co., 286 F. Supp. 383 (D.C. Mont. 1968), supported the conclusion that there is no distinction between surface water and ground water for purposes of determining what water rights are reserved because those rights are necessary to the purpose of an Indian reservation. Further, neither of the prior state cases excluded ground water. The tribes contended that as a sovereign nation, they should not be required to defend their water rights in piecemeal fashion before a hostile forum and that pursuant to 85-2-311 and the prior case law, the ground water permit was illegal. The Supreme Court agreed with the tribes and vacated the permit, finding no reason to limit the scope of the prior holdings by excluding ground water from the tribes' federally reserved water rights in this case. Two statutory methods for comprehensively adjudicating Indian reserved water rights already exist—a general inter sese adjudication or negotiations with the Montana Reserved Water Rights Compact Commission. Therefore, the tribes should not be required to defend their water rights by participating in the DNRC hearings process. Thus, DNRC cannot determine whether water is available on the Flathead Reservation, whether surface water or ground water, because DNRC cannot determine whether the issuance of permits would affect existing water rights until the tribes' preeminent water rights are defined and quantified. Confederated Salish & Kootenai Tribes v. Stults, 2002 MT 280, 312 M 420, 59 P3d 1093 (2002).

*Quantification of Tribal Water Rights Required — 1997 Amendment Unconstitutional:* In an effort to avoid the result created by In re Application for Beneficial Water Use Permit, 278 M 50, 923 P2d 1073, 53 St. Rep. 777 (1996), the 1997 Legislature passed Senate Bill No. 97, which substantively eliminated the former protection of Indian reserved water rights provided by 85-2-311. The state conceded that the protection of existing water rights in Art. IX, sec. 3, Mont. Const., includes water rights reserved for Indian reservations and contended that those rights were not affected by Senate Bill No. 97, but rather that those rights would be considered in that part of the analysis requiring that water be legally available. The state also pointed out the provisional nature of any water use permit and alleged that there were some uses that would not diminish instream flow and that use permits could thus be issued without affecting reserved Indian water rights, regardless of the quantification of those rights. However, under State ex rel. Greely v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 219 M 76, 712 P2d 754 (1985), it was found that Indian reserved water rights are owned by the Indians, and because that ownership interest exists under federal law and does not depend on the use of the water, the Supreme Court was not persuaded that the state's permitting process might allow uses of Indian reserved water that in the long term might not diminish instream flows. The provisional nature of permits was not determinative either because use of water that may have been reserved by federal law for the tribes was no less impermissible simply because it was temporary and subject to termination following final quantification of the tribes' rights by adjudication or negotiation. Under the 1997 amendments, permits are still limited to water that is "legally available", but that phrase is not defined. Construing the phrase in a manner that sustains its constitutional validity, the Supreme Court interpreted "legally available" to mean that there is water available that, among other things, has not been federally reserved for Indian tribes. Therefore, as in In re Application for Beneficial Water Use Permit, the state cannot determine whether water is legally available on the Flathead Reservation because it cannot determine whether the issuance of permits would affect existing water rights until the tribes' rights are quantified by a compact negotiation under this section or by a general inter sese water rights adjudication. To allow the issuance of water use permits on the reservation prior to quantification of the tribes' pervasive reserved right would require use of water that might belong to the tribes, in violation of Art. IX, sec. 3, Mont. Const., which protects existing water rights whether adjudicated or not. Confederated Salish & Kootenai Tribes v. Clinch, 1999 MT 342, 297 M 448, 992 P2d 244, 56 St. Rep. 1356 (1999).

*State May Not Grant Water Use Permits on Indian Lands When Reserved Tribal Rights Not Quantified:* The Confederated Salish and Kootenai Tribes of the Flathead Reservation objected to the Department of Natural Resources and Conservation (DNRC) issuing new water use permits to nontribal members owning land in fee on the reservation. The tribes argued that 85-2-311 clearly states that an applicant for a water use permit has to demonstrate that the proposed use will not unreasonably interfere with a planned use for which the water has been reserved and that such a showing cannot be made by an applicant until the tribes reserved rights are quantified by a compact negotiated with the state pursuant to this section. The Supreme Court held that 85-2-311 does include Indian reserved water rights and that an applicant cannot show that there will be no adverse impact on tribal rights until those rights have been quantified by a negotiated compact with the state. Therefore, DNRC does not have jurisdiction to issue new use permits prior to formal adjudication of the tribes' reserved water rights. (See Ch. 497, L. 1997.) In re Application for Beneficial Water Use Permit, 278 M 50, 923 P2d 1073, 53 St. Rep. 777 (1996), followed in Confederated Salish & Kootenai Tribes v. Clinch, 1999 MT 342, 297 M 448, 992 P2d 244, 56 St. Rep. 1356 (1999). See also State ex rel. Greely v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 219 M 76, 712 P2d 754 (1985).

### 85-2-704. Termination of negotiations.

**Compiler's Comments**

*2009 Amendment:* Chapter 5 in (1) near end before "months" substituted "24" for "6"; and made minor changes in style. Amendment effective February 19, 2009.

*1985 Amendment:* In (1) substituted "negotiating tribe or federal agency" for "other party to the negotiations", and substituted "6 months" for "60 days"; and inserted (2) permitting the reopening of terminated negotiations only by mutual agreement of the parties.

*Select Committee Bill:* Chapter 667, L. 1985, was introduced at the request of the Select Committee on Indian Affairs (now Law and Justice Interim Committee). The Legislature did not adopt the exact version proposed by the Committee. See Committee report published December 1984 by the Montana Legislative Council.

*1981 Amendment:* In (1) inserted the last sentence requiring a tribe or federal agency to file its claims for reserved rights within 60 days of the termination of negotiations.

### 85-2-705. Status reports to chief water judge.

**Compiler's Comments**

*Select Committee Bill:* Chapter 667, L. 1985, was introduced at the request of the Select Committee on Indian Affairs (now Law and Justice Interim Committee). The Legislature did not adopt the exact version proposed by the Committee. See Committee report published December 1984 by the Montana Legislative Council.

### 85-2-708. Water administration interim agreements within Indian reservations.

**Compiler's Comments**

*2003 Amendment:* Chapter 483 in (2) at beginning inserted "Subject to subsection (4)"; inserted (4) providing that if the department lacks authority to issue water use permits within a reservation, the department may enter into an interim agreement with the tribe and establishing requirements for the interim agreement; and made minor changes in style. Amendment effective April 24, 2003.

*Saving Clause:* Section 22, Ch. 497, L. 1997, was a saving clause.

*Severability:* Section 23, Ch. 497, L. 1997, was a severability clause.

## Part 8
## Diversions From the Yellowstone River Basin

**Part Administrative Rules**

Title 36, chapter 12, subchapter 1, ARM Water Rights Bureau — Montana Water Use Act.

### 85-2-804. Application — notice — objections — hearing.

**Compiler's Comments**

*2015 Amendment:* Chapter 52 in (3) after "85-2-307" deleted "(1) through (3)". Amendment effective February 25, 2015.

*2009 Amendments — Composite Section:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Chapter 251 in (3) at end substituted "85-2-307(1) through (3)" for "subsections (1) and (2) of 85-2-307". Amendment effective July 1, 2009.

*Applicability:* Section 9, Ch. 251, L. 2009, provided: "[This act] applies to applications received by the department after [the effective date of this act]." Effective July 1, 2009.

### 85-2-806. Combined proceeding.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 in first sentence, after "conjunction with", deleted "any board" and after "enable the" deleted "board and"; in third sentence, after "unless the", substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

## Part 9

## Ground Water Assessment

### 85-2-901. Short title.

**Compiler's Comments**

*Effective Date:* Section 21(1), Ch. 769, L. 1991, provided that this section is effective July 1, 1991.

### 85-2-902. Findings and purpose.

**Compiler's Comments**

*Effective Date:* Section 21(1), Ch. 769, L. 1991, provided that this section is effective July 1, 1991.

### 85-2-903. Definitions.

**Compiler's Comments**

*Effective Date:* Section 21(1), Ch. 769, L. 1991, provided that this section is effective July 1, 1991.

### 85-2-905. Ground water assessment account.

**Compiler's Comments**

*2007 Amendment:* Chapter 432 in (4)(a) before "the proceeds" deleted "$366,000 of", before "the interest earnings" deleted "$300,000 of", and after "15-38-202" deleted "unless at the beginning of the fiscal year the unobligated cash balance in the ground water assessment account:

(i) equals or exceeds $666,000, in which case an allocation may not be made and the proceeds must be deposited in the resource indemnity trust fund established by 15-38-201; or

(ii) is less than $666,000, in which case an amount equal to the difference between the unobligated cash balance and $666,000 must be allocated to the ground water assessment account and any remaining amount must be deposited in the resource indemnity trust fund established by 15-38-201"; deleted former (4)(c) that read: "(c) proceeds allocated to the account as provided in 15-38-106"; and made minor changes in style. Amendment effective July 1, 2007.

*2003 Amendment:* Chapter 522 in (4)(c) before "15-38-106" deleted "15-36-324 and". Amendment effective April 26, 2003.

*Saving Clause:* Section 19, Ch. 522, L. 2003, was a saving clause.

*Retroactive Applicability:* Section 21, Ch. 522, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to tax revenue derived from oil and natural gas production occurring after December 31, 2002."

*Contingent Effective Date:* Section 13(3), Ch. 552, L. 1999, provided: "If the funding switch described in [section 12(1)] does not occur, then [section 8] [85-2-905] is effective July 1 of the first year following the date that the governor by executive order certifies to the secretary of state that the resource indemnity trust fund balance has reached $100 million. The secretary of state shall notify the department of revenue, the department of administration, the code commissioner, and the legislative fiscal division of this certification." On February 27, 2002, the Governor certified that the balance in the resource indemnity trust fund had reached $100 million.

*1999 Amendment:* Chapter 552 in (4)(a) substituted "$366,000" for "14.1%" and substituted "and $300,000 of the interest earnings from the resource indemnity trust fund, as authorized by 15-38-202" for "and 2.2% of the proceeds from the metalliferous mines license taxes, as authorized by 15-37-117". Amendment effective on occurrence of contingency.

The amendment to this section made by Ch. 144, L. 1999, was rendered void by sec. 12(2), Ch. 552, L. 1999, a coordination section.

*1997 Amendments — Composite Section:* Chapter 42 in (1), in first sentence, substituted "special revenue fund" for "state special revenue fund"; and made minor changes in style. Amendment effective March 12, 1997.

Chapter 444 in (4)(a)(i) substituted "proceeds" for "funds"; in (4)(b) substituted "by state government agencies" for "by federal or state government agencies"; inserted (4)(c) relating to proceeds allocated to the ground water assessment account by 15-36-324 and 15-38-106; and made minor changes in style. Amendment effective July 1, 1997.

Style changes were slightly different in the chapters. In each case, the codifier chose the more appropriate.

The amendments to this section made by sec. 5, Ch. 120, L. 1997, were rendered void by sec. 7, Ch. 542, L. 1997, a coordination section.

*1995 Amendment:* Chapter 31 at beginning of (4)(a) deleted "on July 1, 1993, and", after "each" deleted "succeeding", and near middle inserted language directing 2.2% of metalliferous mines license tax proceeds to the ground water assessment account; and made minor changes in style. Amendment effective February 6, 1995.

*Retroactive Applicability:* Section 3, Ch. 31, L. 1995, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to all metalliferous mines taxes collected after December 31, 1994."

*Appropriation:* Section 18, Ch. 769, L. 1991, provided: "There is appropriated to the Montana bureau of mines and geology for the biennium ending June 30, 1993, all funds in the ground water assessment account, established in [section 4] [85-2-905], in the state special revenue fund, for purposes of establishing a ground water monitoring program and a ground water characterization program."

*Coordination Instruction:* Section 20, Ch. 769, L. 1991, provided: "If Senate Bill No. 407 is passed and approved and does not contain a provision that allocates a portion of public water supply system fees to the ground water assessment account, then [section 4(4)(d) of this act] [85-2-905(4)(d) (temporary version)] is void." Senate Bill No. 407 was approved April 26, 1991, as Ch. 645, L. 1991, and included a provision allocating fees to the ground water assessment account. Therefore, 85-2-905(4)(d) (temporary version) is valid.

*Effective Date:* Section 21(1), Ch. 769, L. 1991, provided that the temporary version of this section is effective July 1, 1991.

*Termination:* Section 22, Ch. 769, L. 1991, provided that subsections (4)(a) through (4)(d) of this section terminate July 1, 1993. Chapter 769, L. 1991, enacted two versions of the ground water assessment account. The effect of the termination provided in sec. 22, Ch. 769, L. 1991, is the implementation of the 1993 version of 85-2-905.

### 85-2-906. Ground water characterization program — ground water monitoring program.

**Compiler's Comments**

*Effective Date:* Section 21(1), Ch. 769, L. 1991, provided that this section is effective July 1, 1991.

### 85-2-907. Ground water information collection by local governments.

**Compiler's Comments**

*Effective Date:* Section 21(1), Ch. 769, L. 1991, provided that this section is effective July 1, 1991.

## Part 10

## Surface Water Assessment and Monitoring Program

### 85-2-1001. Surface water assessment and monitoring program — steering committee.

**Compiler's Comments**

*Effective Date:* This section is effective October 1, 2017.

# CHAPTER 3
# ATMOSPHERIC WATER
# WEATHER MODIFICATION

**Chapter Administrative Rules**

Title 36, chapter 20, ARM Weather modification.

## Part 1
## General Provisions

### 85-3-101. Definitions.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 deleted definition of Board that read: ""Board" means the board or natural resources and conservation provided for in 2-15-3302"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

### 85-3-102. Standards for research in weather modification control.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 at beginning substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

**Administrative Rules**

Title 36, chapter 20, ARM Weather modification.

### 85-3-104. Nonliability of state and agents for acts of private persons.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 near middle, before "the department", deleted "the board"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

## Part 2
## Licenses and Permits

**Part Administrative Rules**

Title 36, chapter 20, ARM Weather modification.

### 85-3-201. License and permit required for weather modification and control.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 near end substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

### 85-3-202. Department to review applications.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 in (1), in second sentence after "report and", deleted "submit it to the board"; at beginning of (2) substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1993 Amendment:* Chapter 611 in (1) inserted second, third, fourth, and fifth sentences relating to report and public meeting requirements; and made minor changes in style. Amendment effective May 5, 1993.

*Statement of Policy:* Section 3, Ch. 611, L. 1993, provided: "The legislature, pursuant to its mandate and authority under Article IX of the Montana constitution, declares that it is the policy of the state that before further development of certain atmospheric water resources within Montana may occur, the 1995 session of the legislature must be provided with information concerning the expected environmental impacts of any anticipated weather modification activities."

*Suspension of Action — Report to Legislature:* Section 4, Ch. 611, L. 1993, provided: "(1) Prior to April 30, 1995, the board may not grant an application for a proposed weather modification activity if the primary benefit of the weather modification activity is outside Montana.

(2) For any pending application or for any application filed after [the effective date of this act] [effective May 5, 1993] for a permit to conduct weather modification activities suspended under subsection (1), the department of natural resources and conservation and the applicant shall, in consultation with the water policy committee, comply with the requirements of 85-3-202(1). The department shall submit the report and environmental impact statement to the water policy committee. The water policy committee shall consider the report and environmental impact statement and submit a final report to the legislature. The water policy committee need not file a weather modification report to the legislature if the department does not file a report and environmental impact statement with the water policy committee prior to October 1, 1994."

*Severability:* Section 5, Ch. 611, L. 1993, was a severability clause.

*Retroactive Applicability:* Section 6, Ch. 611, L. 1993, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to applications currently pending with the department of natural resources and conservation on or after [the effective date of this act] [effective May 5, 1993] and to applications currently pending with the department for which a commitment to a funding agreement exists for the preparation of an environmental impact statement."

### 85-3-203. Licenses — qualifications of licensees.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 in two places substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

### 85-3-206. Permits — requirements and hearing.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 in (1), (2), in two places, (2)(c), (2)(e), (3), in two places, and (4) substituted "department" for "board"; in (2), near beginning, substituted "after completion of the report" for "after submission of the department's report"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1993 Amendment:* Chapter 611 inserted (2) requiring hearing within 30 days of submission of report; in (2)(d), after "85-3-212", inserted "and the department's costs incurred under 85-3-202 have been paid"; in (2)(e), at end, inserted introductory clause; inserted (2)(e)(i) through (2)(e)(iii) outlining specific findings for general welfare and public good determination; substituted (3) relating to when Board may not hold hearing for former language that read: "If the board determines that a hearing is necessary, the department shall hold a public hearing in the area to be affected by the issuance of the permit. The department may in its discretion assess the permit applicant for the costs incurred by the department in holding the hearing"; inserted (4) concerning costs payable by applicant; and made minor changes in style. Amendment effective May 5, 1993.

*Statement of Policy:* Section 3, Ch. 611, L. 1993, provided: "The legislature, pursuant to its mandate and authority under Article IX of the Montana constitution, declares that it is the policy of the state that before further development of certain atmospheric water resources within Montana may occur, the 1995 session of the legislature must be provided with information concerning the expected environmental impacts of any anticipated weather modification activities."

*Suspension of Action — Report to Legislature:* Section 4, Ch. 611, L. 1993, provided: "(1) Prior to April 30, 1995, the board may not grant an application for a proposed weather modification activity if the primary benefit of the weather modification activity is outside Montana.

(2) For any pending application or for any application filed after [the effective date of this act] [effective May 5, 1993] for a permit to conduct weather modification activities suspended under

subsection (1), the department of natural resources and conservation and the applicant shall, in consultation with the water policy committee, comply with the requirements of 85-3-202(1). The department shall submit the report and environmental impact statement to the water policy committee. The water policy committee shall consider the report and environmental impact statement and submit a final report to the legislature. The water policy committee need not file a weather modification report to the legislature if the department does not file a report and environmental impact statement with the water policy committee prior to October 1, 1994."

*Severability:* Section 5, Ch. 611, L. 1993, was a severability clause.

*Retroactive Applicability:* Section 6, Ch. 611, L. 1993, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to applications currently pending with the department of natural resources and conservation on or after [the effective date of this act] [effective May 5, 1993] and to applications currently pending with the department for which a commitment to a funding agreement exists for the preparation of an environmental impact statement."

### 85-3-207. Separate permit for each operation.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 in (2), in two places, substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

### 85-3-211. Proof of financial responsibility by applicant.

**Compiler's Comments**

*1997 Amendment:* Chapter 42 near middle substituted "department" for "board"; and made minor changes in style. Amendment effective March 12, 1997.

### 85-3-212. Permit fee.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 at end of second sentence deleted "by the board"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

### 85-3-213. State special revenue fund.

**Compiler's Comments**

*1991 Amendment:* At end inserted "or as appropriated by the legislature". Amendment effective April 24, 1991.

*1987 Amendment:* In middle, after "chapter", inserted "other than those collected in a justice's court".

*1983 Amendment:* Substituted reference to state special revenue fund for reference to earmarked revenue fund.

### 85-3-214. Termination of licenses and permits.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

## Part 3
## Records

**Part Administrative Rules**

Title 36, chapter 20, ARM Weather modification.

### 85-3-301. Records of operations maintained by licensees.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

## Part 4
## County Weather Modification Authorities

**Part Compiler's Comments**

*Source:* Chapter 609, L. 1983, was based in part on Chapter 61-04.1, Laws of North Dakota.

### 85-3-411. Weather modification authority created by petition — expiration — reinstatement.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 85-3-412. Petition content.

**Compiler's Comments**

*2001 Amendment:* Chapter 574 in (1)(c) near end of first sentence substituted "tax upon the taxable value of all taxable property" for "tax not to exceed 2 mills upon the net taxable valuation of property" and substituted second sentence providing that tax is subject to 15-10-420 for "which tax may be levied in excess of the mill levy limit fixed by law for taxes for general county purposes"; and made minor changes in style. Amendment effective July 1, 2001.

### 85-3-421. Commissioners — compensation — meetings — officers — disbursements.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 85-3-422. Tax certified by weather modification authority — disposition of proceeds.

**Compiler's Comments**

*2001 Amendment:* Chapter 574 in (1) near middle of first sentence substituted "tax on the taxable value of all taxable property" for "tax of not to exceed 2 mills upon the taxable valuation of the property" and near beginning of second sentence substituted "may" for "must" and at end deleted "and may be levied in excess of the mill levy limit fixed by law for taxes for general county purposes"; and made minor changes in style. Amendment effective July 1, 2001.

*1999 Amendment:* Chapter 584 in (1) inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

*Severability:* Section 172, Ch. 584, L. 1999, was a severability clause.

*Retroactive Applicability:* Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

### 85-3-423. County budget waived for first appropriation — conditions.

**Compiler's Comments**

*2001 Amendments — Composite Section:* Chapter 278 in first sentence at beginning deleted "The provisions of 7-6-2342 apply" and near middle after "by the authority" deleted part of former second sentence that read: "In that case and only for the initial or first appropriation for the authority"; and made minor changes in style. Amendment effective July 1, 2001.

Chapter 574 deleted former last sentence that read: "However, the appropriation may not exceed an amount equal to the amount that would be raised by a 2-mill levy upon the taxable valuation of the property in the county." Amendment effective July 1, 2001.

*Applicability:* Section 64, Ch. 278, L. 2001, provided: "[This act] applies to special purpose districts beginning July 1, 2002."

## CHAPTER 5
## WATER COMMISSIONERS AND WATER MEDIATORS

**Chapter Attorney General's Opinions**

*Water Commissioner Employee of District Court Judge:* When a District Court Judge appoints a Water Commissioner under Title 85, ch. 5, the District Court Judge, rather than the water users, is considered the employer for the purpose of payment of workers' compensation. 40 A.G. Op. 56 (1984).

## Part 1
## Appointment and Duties

**Part Law Review Articles**

Modern Western Legislation as a Pattern for Changes in the Montana Law of Water Rights, 28 Mont. L. Rev. 95 (1966).

### 85-5-101. Appointment of water commissioners.

**Compiler's Comments**

*2017 Amendment:* Chapter 212 in (1) near end of first sentence inserted "or at least 15% of the flow rate of the water rights affected by the decree" and in middle of last sentence inserted "or at least 15% of the flow rate of the water rights affected". Amendment effective October 1, 2017.

*2007 Amendment:* Chapter 92 in (1) in second sentence near end after "permits" inserted "and changes in appropriation right"; in (4) near middle of first sentence after "certificate holders" inserted "and holders of a change in appropriation right"; and made minor changes in style. Amendment effective March 30, 2007.

*2005 Amendment:* Chapter 416 in (7) near middle after "Title 39, chapter 71" deleted "or 72". Amendment effective July 1, 2005.

*Severability:* Section 42, Ch. 416, L. 2005, was a severability clause.

*Effective Date — Applicability:* Section 43, Ch. 416, L. 2005, provided: "[This act] is effective July 1, 2005, and applies to occupational diseases that occur on or after July 1, 2005."

*2003 Amendment:* Chapter 179 in (4) near beginning of first sentence after "compensation" inserted "require a commissioner or commissioners to purchase a workers' compensation insurance policy and elect coverage on themselves" and at end inserted "including the cost of workers' compensation insurance purchased by a water commissioner or commissioners"; inserted (6) providing that a water commissioner is not an employee of the judicial branch, a local government, or a water user; inserted (7) providing that a water commissioner who fails to obtain workers' compensation insurance coverage is precluded from receiving workers' compensation or occupational disease benefits; and made minor changes in style. Amendment effective March 31, 2003.

*Effective Date — Applicability:* Section 2, Ch. 179, L. 2003, provided: "[This act] is effective on passage and approval [approved March 31, 2003] and applies to water commissioner appointments made on or after [the effective date of this act]."

*1989 Amendments:* Chapter 468 in first sentence of (2), after "court", substituted "may" for "shall", after "application by" inserted "both", and after "conservation" inserted "and one or more holders of valid water rights in the source"; inserted second sentence of (4) allowing Department to be included in apportionment of costs; and made minor changes in phraseology. Amendment effective April 6, 1989.

Chapter 604 in (1), in first sentence after "jurisdiction", inserted "including temporary preliminary, preliminary, and final decrees issued by a water judge"; and in (2) inserted "temporary preliminary decree, preliminary decree, or". Amendment effective April 21, 1989.

*Saving Clause:* Section 9, Ch. 604, L. 1989, was a saving clause.

*Severability:* Section 10, Ch. 604, L. 1989, was a severability clause.

*Retroactive and Prospective Applicability:* Section 11, Ch. 604, L. 1989, provided: "(1) [This act] applies retroactively, within the meaning of 1-2-109, to all temporary preliminary decrees and preliminary decrees that have been issued by the Montana water courts and prospectively to all decrees issued on or after [the effective date of this act] [effective April 21, 1989].

(2) A person whose existing rights are determined in a temporary preliminary decree or a preliminary decree issued before [the effective date of this act] [effective April 21, 1989] may petition the water judge for relief concerning any matter in the decree prior to enforcement of the decree."

*1983 Amendment:* In (2), after "district court" deleted "which issued the final decree"; and in (4), inserted ", including permittees and certificate holders".

**Case Notes**

*Earlier Decree Superseded by Modified Temporary Preliminary Decree — Properly Enforced by Commissioner:* The plaintiff filed a dissatisfied water user complaint against a Water Commissioner for enforcing a modified temporary preliminary decree issued by the Water Court. The plaintiff argued that the commissioner should enforce the decree that preceded the temporary preliminary decree and that the decree was unenforceable. The District Court denied the plaintiff's complaint, holding that the temporary preliminary decree superseded the earlier decree and that the commissioner was correct in enforcing the temporary preliminary decree.

On appeal, the Supreme Court agreed that the temporary preliminary decree superseded the plaintiff's claim of existing right and affirmed. Eldorado Coop Canal Co. v. Hoge, 2016 MT 145, 383 Mont. 523, 373 P.3d 836.

*Water Court Exceeded Authority by Allowing Water Rights Owner Option to Divert Water Right Through Ditch — Remanded for Modification:* A group of water users with appropriation rights on the Teton River challenged the Water Commissioners for their practice of diverting water upstream and through a ditch to satisfy the water rights of another user with senior appropriation rights. The District Court issued a certification notice to the Water Court to determine all existing rights to divert water through the ditch. The Water Court concluded that the ditch user had a private right to divert water along the ditch and had the option to divert water or to take it from the river directly. On appeal, the Supreme Court reversed, holding that the Water Court did not have the authority to allow the ditch user the right to choose how it received the water and that the option belonged to the Water Commissioners of the District Court. In re Eldorado Co-op Canal Co., 2014 MT 272, 376 Mont. 420, 337 P.3d 74. See also In re Teton Co-op Reservoir Co., 2018 MT 66, 391 Mont. 66, 414 P.3d 1249.

*Distribution of Waters:* In an action by landowners against the State Water Conservation Board (precursor of the Department of Natural Resources and Conservation), for declaration of the respective rights of the parties to waters in a creek, plaintiffs alleged that the defendant's refusal to unlock the headgate to a ditch rendered it impossible for the Water Commissioner to measure and distribute the waters in question. Defendant's denial of this material allegation precluded a judgment on the pleadings. Johnson v. St. Water Conserv. Bd., 140 M 603, 374 P2d 325 (1962).

*Persons Concluded by Decree:*

Any act of the judge or of any Water Commissioner appointed by him done in violation of the plain mandate of the statute, which gives to the Commissioner authority to admeasure and distribute to the parties bound by the decree or decrees the waters to which they are entitled under the decrees, cannot be relied upon by a person to establish his claimed right to the prior use of waters by adverse possession. Lamping v. Diehl, 126 M 193, 246 P2d 230 (1952).

On certiorari, where landowner, who was not a party to an original water right suit or a successor in interest of a party thereto but who claimed a right under an appropriation the legality of which had not been a subject of litigation, tapped the stream and when advised by Water Commissioner that water in stream was insufficient for needs of those with decreed rights, continued in its use, a finding that he was guilty of contempt was not warranted in the absence of a showing that he interfered with the Commissioner in performance of his duties. State ex rel. Reeder v. District Court, 100 M 376, 47 P2d 653 (1935).

A person not mentioned in the decree, who joined in a petition for the appointment of the Water Commissioner and afterward refused to respect the decree, made himself a party thereto and was liable to be punished in contempt proceedings. State ex rel. Pool v. District Court, 34 M 258, 86 P 798 (1906).

*Contempt in County Other Than Where Decree Made:* Where the violation of the decree of the District Court of Cascade County was committed in Lewis and Clark County, the courts of Lewis and Clark County may punish for the violation. Contempts, being criminal in their nature, must be tried in the county where they were committed. State ex rel. Swanson v. District Court, 107 M 203, 82 P2d 779 (1938).

*River and Tributaries Flowing in Several Counties:* Where a river and its tributaries flowed in three counties, the District Court of any one of the counties had jurisdiction to adjudicate the water rights on the whole watershed. The court which first acquired jurisdiction retained it for the purpose of disposing of the whole controversy, and no court of coordinate power could interfere with its action. Such court "having jurisdiction" appoints the Water Commissioner to enforce its decree. This rule does not apply to rights not adjudicated in that decree. State ex. rel. Swanson v. District Court, 107 M 203, 82 P2d 779 (1938).

*Nature of Proceedings:*

Procedure under Montana statutes authorizing an owner or user of waters of an adjudicated stream who is dissatisfied with the method of distribution to file a written claim in the appropriate court and providing for a hearing and the making of appropriate findings and orders is not a formal trial but is more in the nature of proceedings ancillary to an original decree adjudicating rights on the stream. Sain v. Mont. Power Co., 84 F2d 126 (9th Cir. 1936).

In a proceeding brought under this act, relating to the appointment and duties of Water Commissioners, by one owning or using an adjudicated water right who is dissatisfied with the method of distribution of the waters in a stream by a Commissioner, a formal trial, upon pleadings filed by the interested parties, is not contemplated. The only pleading required is the complaint, and the sole question for determination is whether the Commissioner has distributed the waters in accordance with the decree. Other users may present themselves at the hearing and resist the demands of a complainant orally if they object to the granting of relief. Gans & Klein Inv. Co. v. Sanford, 91 M 512, 8 P2d 808 (1932).

*Contempt Proceeding Not Procedure to Adjudicate Water Rights:* A Water Commissioner does not possess complete and exclusive jurisdiction to control the stream, regardless of whether all rights are adjudicated under court decree fixing measurement of water. Nor may the District Court in a contempt proceeding, summary in nature, decide that contemnor claiming right in stream, otherwise adjudicated, has no right. This may be done only by appropriate action after due notice and hearing. State ex rel. Reeder v. District Court, 100 M 376, 47 P2d 653 (1935), distinguished in Clausen v. Armington, 123 M 1, 212 P2d 440 (1949).

*Damages for Impairment of Water Rights:* The provisions relating to the appointment of a Water Commissioner and prescribing his duties and powers do not provide an exclusive remedy for one whose water rights have been impaired and therefore do not preclude him from maintaining an action for damages. Tucker v. Missoula Light & Ry., 77 M 91, 250 P 11 (1926), distinguished in Sain v. Mont. Power Co., 20 F. Supp. 843 (D.C. Mont. 1937).

## 85-5-102. Appointment of chief commissioner.

### Compiler's Comments

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

## 85-5-103. Oath and bond.

### Compiler's Comments

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### Case Notes

*Discretion to Fix Bond:* The District Court has discretion to set the sum of a bond under this section at $1. Luppold v. Lewis, 172 M 280, 563 P2d 538 (1977).

## 85-5-104. Term of office.

### Compiler's Comments

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

## 85-5-105. Power and duty to distribute water.

### Compiler's Comments

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### Case Notes

*No Authority of Water Commissioner to Rule on Water Quality Issues:* A water commissioner is not vested with authority to rule on water quality issues. In re Water Complaint of Kelly, 2010 MT 14, 355 Mont. 86, 224 P.3d 640, clarifying Quigley v. McIntosh, 110 Mont. 495, 103 P.2d 1067, and Morrison v. Higbee, 204 Mont. 515, 668 P.2d 1025.

*Recharge of River — Right to Use of Water by Subsequent Appropriator Even Though No Water Available to Upstream Prior Appropriator:* A Water Commissioner closed the headgate of the Baker Ditch Company, a downstream appropriator with decreed water rights, because there was no water available to an upstream superior appropriator, even though there was water available to the Company due to recharge of the river by return flows, seepage, and other sources. The Commissioner evidently believed that he had to enforce the decree to the extent that if a prior appropriator was without water upstream, a subsequent appropriator downstream could not divert water under its rights even though the river was being recharged. However, if a subsequent appropriator is using water in accordance with the decree and that use cannot in any way be a detriment to a prior appropriator, then the subsequent appropriator has the right to the use of the water. Baker Ditch Co. v. District Court, 251 M 251, 824 P2d 260, 49 St. Rep. 17 (1992), replacing the prior opinion at 48 St. Rep. 972 (1991).

*Expiration of Commissioner's Term — Action Not Rendered Invalid:* The purpose of this section is to provide a uniform, equitable, and economical distribution of adjudicated, stored, and supplemental waters. In order to assure this type of distribution, instructions given by a District Court must be binding upon the office of the Water Commissioner, not merely upon the individual holding the office at a particular time. Thus the filing of an action to clarify decreed rights subsequent to the expiration of a Commissioner's term does not render the action invalid. Luppold v. Lewis, 172 M 280, 563 P2d 538 (1977).

## 85-5-107. Record of distribution of water.

### Compiler's Comments

*2007 Amendment:* Chapter 513 in (1) in first sentence near beginning after "record" inserted "unless a different recording schedule is ordered by the district judge" and in second sentence after "distributed" deleted "each day"; inserted (2) relating to use of reports as basis for amounts billed in a billing cycle prior to a distribution season; and made minor changes in style. Amendment effective May 16, 2007.

*1983 Amendment:* In first sentence after "monthly" inserted "or seasonally, at the discretion of the district judge"; after "water distributed" inserted "each day"; after "such month" substituted "or season" for "daily"; after "salary per day" inserted "and other costs of the water commissioner approved by the district judge".

## 85-5-108. Authority and arrest power.

### Compiler's Comments

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### Case Notes

*Power of Commissioner Appointed in Another County:* The fact that a Water Commissioner is by this section vested with the same power of arrest as is a Sheriff or Constable, whose powers are confined to their counties, does not militate against the holding that the District Court of one county may appoint a Commissioner in another county to which his duties are wholly confined. One violating a water right decree will not be heard to say that his arrest should have been accomplished by some other officer. State ex rel. Swanson v. District Court, 107 M 203, 82 P2d 779 (1938).

*Offender Liable to Injured Party for Damages:* It is true that under the authority vested in him by this section the Commissioner may arrest an offender for interference with such distribution and take him before the court for punishment, but such action does not in any manner compensate the party injured by the unlawful act of the culprit and therefore does not preclude him from maintaining an action for damages. Tucker v. Missoula Light & Ry., 77 M 91, 250 P 11 (1926), distinguished in Sain v. Mont. Power Co., 20 F. Supp. 843 (D.C. Mont. 1937).

*Nonjudicial Officer:* This section does not constitute Water Commissioners judicial officers in the sense that violations of their orders are contempts committed in the immediate view and presence of the court. State ex rel. Flynn v. District Court, 33 M 115, 82 P 450 (1905).

## 85-5-109. Failure to perform duty as contempt of court.

### Compiler's Comments

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

## 85-5-110. Appointment of water mediators — duties.

### Compiler's Comments

*2015 Amendment:* Chapter 294 in (1) at beginning inserted exception clause; and made minor changes in style. Amendment effective April 24, 2015.

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

*1991 Amendment:* In (1) and (1)(b), before "nondecreed basin", inserted "decreed or"; inserted (1)(c) providing for appointment of a water mediator in the discretion of a District Court Judge having jurisdiction; and made minor changes in style.

*Saving Clause:* Section 4, Ch. 625, L. 1989, was a saving clause.

*Severability:* Section 5, Ch. 625, L. 1989, was a severability clause.

*Effective Date:* Section 6, Ch. 625, L. 1989, provided that this section is effective April 24, 1989.

### 85-5-111. Water commissioner and mediator education.

**Compiler's Comments**

*2017 Amendment:* Chapter 118 inserted (2) requiring appointed water commissioners to complete at least one educational program prior to administering water unless a district court judge determines otherwise; and made minor changes in style. Amendment effective October 1, 2017.

*Saving Clause:* Section 4, Ch. 625, L. 1989, was a saving clause.

*Severability:* Section 5, Ch. 625, L. 1989, was a severability clause.

*Effective Date:* Section 6, Ch. 625, L. 1989, provided that this section is effective April 24, 1989.

## Part 2
## Charges and Expenses

### 85-5-201. Distribution of water and related expenses.

**Compiler's Comments**

*2007 Amendments — Composite Section:* Chapter 92 in (1) near beginning after "purpose" inserted "of distributing water" and near middle in two places and at end after "certificate" inserted "or change in appropriation right"; in (2) at end of second sentence after "whom" substituted "the ditch or ditches were repaired or the dams or headgates were made" for "such services in the repair of the ditch or ditches and the making of any dams or headgates were necessary"; and made minor changes in style. Amendment effective March 30, 2007.

Chapter 513 inserted (3) allowing a water commissioner, at district court's discretion, to bill water users prior to beginning of distribution season to offset distribution costs and establishing requirements for billing; and made minor changes in style. Amendment effective May 16, 2007.

Style changes were slightly different in the chapters. In each case, the codifier chose appropriate text.

*1983 Amendment:* Provided specifically for distribution of water to and payment of expenses by permit or certificate holders by inserting "permit or certificate"; and made minor changes in phraseology.

**Case Notes**

*Court Allowed to Assess Lands in Another County:* The District Court of one county has power to make an assessment for costs and expenses against lands situated in another county benefited by appointment of a Water Commissioner, thereby creating liens upon such lands. This procedure is no more objectionable than the statutory provision that a judgment rendered in one county is a lien upon real estate of the debtor in another county under 25-9-302. State ex rel. Swanson v. District Court, 107 M 203, 82 P2d 779 (1938).

### 85-5-202. Repair expenses.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 85-5-204. Apportionment of fees and expenses.

**Compiler's Comments**

*2007 Amendment:* Chapter 513 inserted (3) allowing a water commissioner, at district court judge's discretion, to bill water users prior to beginning of distribution season to offset distribution costs and limiting billing to not more than 80% of amount paid by user in prior distribution season; inserted (4) requiring refunds and refund report if amount collected through bill issued prior to distribution season exceeds distribution costs; and made minor changes in style. Amendment effective May 16, 2007.

### 85-5-206. Effect of order fixing fees.

**Compiler's Comments**

*2007 Amendment:* Chapter 513 deleted former third sentence that read: "Execution may issue upon the order, as upon a judgment, by direction of the court or judge upon the application of any person interested therein", inserted third and fourth sentences providing that lien has same effect as judgment and may be executed in same manner as a judgment, and in fifth sentence at end inserted reference to bills sent prior to beginning of distribution season; and made minor changes in style. Amendment effective May 16, 2007.

## Part 3
## Rights and Duties of Water Users

### 85-5-301. Complaint by dissatisfied user.

**Compiler's Comments**

*2007 Amendment:* Chapter 92 in (3) near end of second sentence after "decree" inserted "permit, certificate, or change in appropriation right"; in (4) in first sentence after "decree" inserted "permit, certificate, or change in appropriation right"; and made minor changes in style. Amendment effective March 30, 2007.

**Case Notes**

*Water Commissioner, Billing Records Contrary to Witness Testimony — Evidence Undermining Written Records With Witness Testimony Sufficient to Establish Continual Use — Failure to Assert Rights Through Water Commissioner — Nonuse:* In an action involving water rights adjudication, the Water Court adopted the Water Master's report, finding that the objectors failed to prove that the claimant had abandoned the water right due to 10 successive years of misuse. While the objectors provided evidence that the Water Commissioner and billing records established a period of nonuse for 17 years, the Water Court determined that witness testimony contradicted this evidence and that, while the records were instructive, evidence undermining the credibility of the records was persuasive. On appeal, the Supreme Court affirmed, holding that the objectors failed to establish a continuous period of nonuse, the Water Master's report was based on substantial credible evidence, the Water Commissioner and billing records were not dispositive, the failure to assert water rights through the Water Commissioner was not the equivalent of nonuse, and the Water Court was correct to not address the issues of partial abandonment and whether additional remedies were available to the objectors. In re Klamert, 2019 MT 110, 395 Mont 420, 443 P.3d 379.

*Place-of-Use Requirement — Water Supply Company's Claim of Service Area and Not Historic Place of Use Proper:* The plaintiffs sued a water supply company after it locked the plaintiffs' headgate. The parties disputed the extent to which the company satisfied the place-of-use requirement. The company argued that the water rights it acquired prior to the Water Use Act (Title 85, ch. 2) extended to its claimed service area. The Water Master, however, concluded that the company's rights were limited to the boundaries of its historical use. The Water Court rejected the Water Master's conclusions. On appeal, the Supreme Court affirmed the Water Court, holding that the concept of a service area is the proper method of satisfying the place-of-use requirement for a water service company. Curry v. Pondera County Canal & Reservoir Co., 2016 MT 77, 383 Mont. 93, 370 P.3d 440.

*Rights of Water Supply Company — Measurement Based on Shares Authorized by Carey Land Board, Not Actual Acreage Irrigated:* The plaintiffs sued a water supply company after it locked the plaintiffs' headgate. The plaintiffs argued that the company's water rights that were authorized by the Montana Carey Land Board (MCLB) extended only to the amount of actual acreage irrigated by the shareholders of the company, whereas the company claimed that its rights extended to the maximum number of shares authorized by the MCLB. The Water Master concluded that the company's rights extended to the actual acreage irrigated by the shareholders. The Water Court rejected the Water Master's conclusion, holding that the company's rights extended to the maximum number of shares authorized by the MCLB. On appeal, the Supreme Court affirmed the Water Court's ruling, holding that the Water Master's conclusion ran contrary to the policy and intent of the Carey Land Act. Curry v. Pondera County Canal & Reservoir Co., 2016 MT 77, 383 Mont. 93, 370 P.3d 440.

*No Authority of Water Commissioner to Rule on Water Quality Issues:* A water commissioner is not vested with authority to rule on water quality issues. In re Water Complaint of Kelly, 2010 MT 14, 355 Mont. 86, 224 P.3d 640, clarifying Quigley v. McIntosh, 110 Mont. 495, 103 P.2d 1067, and Morrison v. Higbee, 204 Mont. 515, 668 P.2d 1025.

*Objections to State Conduct in Issuing Water Rights Permit or Providing Information Regarding Permit Outside Scope of Dissatisfied Water User Complaint Process:* Any objections to the conduct of the Department of Natural Resources and Conservation in issuing water rights permits or in providing information regarding the permit are outside the scope of the informal dissatisfied water user complaint process. In re Water Complaint of Kelly, 2010 MT 14, 355 Mont. 86, 224 P.3d 640.

*Jurisdiction of District Court to "Update" Old Water Rights Decree — Statute Governing Complaints by Dissatisfied Users Inapplicable:* Pursuant to a previous writ of supervisory control, a remand to the District Court, and findings entered by the Senior Water Master, the Supreme

Court found that the Order Authorizing Updated Decree, entered by the judges of the Fourth Judicial District in January of 1989, was beyond the jurisdiction of the District Court. The order was intended to deal with the problem of a 1902 water rights decree by a District Court, in which the judge adjudicated 27 water rights on Carlton Creek, that had become so brittle with age and damaged by time that the decree could not be readily handled. In the process of updating and reissuing the 1902 order, the Supreme Court found that the Fourth Judicial District Judges had actually made a de facto adjudication of water rights in an overly appropriated drainage and that that adjudication had been undertaken without notice and hearing to the holders of certain of those water rights. Citing Mildenberger v. Galbraith, 249 M 161, 815 P2d 130 (1991), and Baker Ditch Co. v. District Court, 251 M 251, 824 P2d 260 (1992), the Supreme Court held that under 85-2-234(6), it is within the sole jurisdiction of the Water Court to determine such things as priority dates, flow rates, place of use, and means of diversion with respect to a water right. The Supreme Court also held that the matters adjudicated by the decree were not within the scope of matters cognizable under this section because that section concerns the correct administration of a water rights decree while the Updated Decree attempts to change the terms of the decree itself. For these reasons, the Supreme Court vacated the 1989 Updated Decree. State ex rel. Jones v. District Court, 283 M 1, 938 P2d 1312, 54 St. Rep. 460 (1997).

*Continuance of Water Use Case Properly Denied:* On October 7, 4 days before a scheduled hearing on charges of contempt of the order of a Water Commissioner, counsel for relator sent a letter notifying the court that his schedule would prevent him from appearing and requesting that the hearing be continued until November 4 or 18, approximately 1 month later. However, the court properly denied the request in light of the fact that the continuance would have left relator in sole possession and use of all waters of the creek for over a month at a time when very little remained of the irrigation season. Marks v. District Court, 239 M 428, 781 P2d 249, 46 St. Rep. 1804 (1989).

*Knowledge of Water Commissioner's Directives and Procedures Sufficient to Uphold Contempt Charge:* A water user's participation in many water controversies over a period of several years, his continuing refusal to abide by a Water Commissioner's directives, and his prior knowledge of procedures involving water Commissioners and Water Courts provided sufficient substantial evidence for a lower court to find that the water user was in contempt of court for failing to obey an order of a Water Commissioner. Marks v. District Court, 239 M 428, 781 P2d 249, 46 St. Rep. 1804 (1989).

*Proceedings to Be Informal:* The procedure in a dissatisfied water user's action filed under this section is informal. Since standard trial procedures are not followed in this informal, summary proceeding, the time limits governing posttrial procedures should not be strictly applied. Morrison v. Higbee, 204 M 501, 668 P2d 1029, 40 St. Rep. 1031 (1983).

*Scope of Court's Authority in Dissatisfied Water User's Action:* The purpose of a dissatisfied water user's action is to enforce the original decree and oversee the Water Commissioner's distribution of water through properly maintained ditches, headgates, and other water measuring devices. In an action of this type, it was appropriate for a District Court to order the removal of trees and brush on an irrigation ditchbank when the purpose of the removal was to enhance the method of distribution of water. Morrison v. Higbee, 204 M 501, 668 P2d 1029, 40 St. Rep. 1031 (1983).

*Court's Findings Exceeding Scope of Section:* Findings based upon facts and occurrences subsequent to the decree under consideration and those outside of the pleadings, record, and judgment role of that decree exceeded the scope of this section. Luppold v. Lewis, 172 M 280, 563 P2d 538 (1977).

*Evidence Sufficient to Establish Interference With Water Commissioner:* Evidence that a water user locked and rendered inoperative headgate controls at the diversion point from a creek was sufficient to establish that the water user interfered with and hindered the duties of the Water Commissioner. Luppold v. Lewis, 172 M 280, 563 P2d 538 (1977).

*Expiration of Commissioner's Term — Action Not Rendered Invalid:* The purpose of this section is to provide a uniform, equitable, and economical distribution of adjudicated, stored, and supplemental waters, and in order to assure this type of distribution, instructions given by a District Court must be binding upon the office of the Water Commissioner, not merely upon the individual holding the office at a particular time. Thus the filing of an action to clarify decreed rights subsequent to the expiration of a Commissioner's term does not render the action invalid. Luppold v. Lewis, 172 M 280, 563 P2d 538 (1977).

*Notice to All Water Users on a Creek:* The District Court is not required to give notice in an action for clarification of a 1890 water rights decree to all water users on a creek under the prior decree. Specifically, notice is not required to be given to users who have not questioned a Water Commissioner's authority and whose rights are not adversely affected. Luppold v. Lewis, 172 M 280, 563 P2d 538 (1977).

*Prior Decree Uncertain:* The purpose of an action pursuant to this section is not to adjudicate water rights previously determined by decree but only to enforce the rights determined by the prior decree. Thus, in determining whether a Water Commissioner properly distributed water, a District Court must look to two factors: (1) what was adjudged in the former proceeding and decree; and (2) was the Water Commissioner distributing the water in accordance with what was adjudged. As to the first factor, the absence of identifying the respective lands of the water owners is sufficient by itself to support the District Court's finding that the prior decree was uncertain in meaning and susceptible of different interpretations. Luppold v. Lewis, 172 M 280, 563 P2d 538 (1977).

*Standing:* Plaintiff has standing to pursue an action under this section on the basis that he is dissatisfied with the method of distribution of a Water Commissioner and that plaintiff's entitlement to more water is in jeopardy. Plaintiff may also have standing if he is dissatisfied with the method of distribution of the Water Commissioner and his entitlement to a right prior to that allowed him by a Water Commissioner is being challenged. Luppold v. Lewis, 172 M 280, 563 P2d 538 (1977).

*Counterclaim Denied:* A counterclaim against a petition of an irrigation district for additional appropriation of water was properly denied where evidence was uncontradicted that water was going to waste and that impoundment would be beneficial. Sunset Irrigation District v. Ailport, 166 M 11, 531 P2d 1349 (1974).

A petition filed under this section is limited to consideration of the rights under the decree that the Water Commissioner is administering. A plaintiff lacks standing as a dissatisfied user to challenge the Water Commissioner's actions under a decree if the plaintiff's water rights are not derived from that decree. Fellows v. Office of Water Comm'r, 2012 MT 169, 365 Mont. 540, 285 P.3d 448. See also Fellows v. Saylor, 2016 MT 45, 382 Mont. 298, 367 P.3d 732.

*Purpose of Summary Proceeding:* The District Court had no authority in a proceeding under this section to approve a method of distribution which changed the point of diversion of water to a tract and changed the transportation ditch thereto, because the only function of the court in such a proceeding is to determine whether the water involved is being allocated in compliance with existing decrees and not to decree new water rights. Allen v. Wampler, 143 M 486, 392 P2d 82 (1964).

*Purpose Not to Adjudicate Water Rights:* The purpose of the summary proceeding authorized by this section is not to adjudicate water rights determined by prior decrees or, under the guise of instructions to the Commissioner after hearing, to summarily subordinate the right of one to that of another where, as between the two, their rights have never been adjudicated. A Water Commissioner is as disinterested in such proceeding as a stakeholder or interpleader and may not champion the rights of an owner whose rights have never been adjudicated and who had no notice and did not appear at the hearing. State ex rel. McKnight v. District Court, 111 M 520, 111 P2d 292 (1941).

*Real Parties in Interest:* As in the case of an injunction action against a Water Commissioner, so in a proceeding under this section, the real parties interested are the parties whose water rights are affected. The constitutional right of due process cannot be abridged by the court's instructing the Water Commissioner in a manner subordinating the right of one to that of another to conform to a decree to which the former was not a party, merely because time and expense would be consumed in litigation between users whose rights between themselves have not been adjudicated. State ex rel. McKnight v. District Court, 111 M 520, 111 P2d 292 (1941).

*Appropriations in Anticipation of Future Needs:* When the intention is made manifest, the court must take into consideration prospective or future needs in entering a water right decree, and a mere description of lands does not justify the extended use of water in the absence of recitals in the pleadings and decree and proof in the record that the appropriation is made in anticipation of future needs. In reviewing the acts of the Water Commissioner in distributing water, in a proceeding under this section, reasonable diligence must be shown to have been exercised since entry of the decree in developing such needs. Quigley v. McIntosh, 110 M 495, 103 P2d 1067 (1940).

*Diversion Into Fishpond Without Outlet Constituting Unauthorized New Appropriation:* Where, after the appointment of a Water Commissioner, there never was more than enough water in an adjudicated stream to supply the needs of the parties under their adjudicated rights, a diversion of water therefrom by one of them into a fishpond which had no outlet constituted an attempted new appropriation under sections 89-829 through 89-838, R.C.M. 1947 (now repealed), which in the absence of a decree establishing it was unauthorized and therefore properly prohibited by an order of a court in a proceeding under this section. Quigley v. McIntosh, 110 M 495, 103 P2d 1067 (1940).

*Reference to Entire Record to Construe Obscure or Uncertain Decree:* In construing a water right decree which is lacking in certain elements or obscure and uncertain in meaning, the Supreme Court, on appeal from orders of the District Court in a proceeding under this section relating to the actions of a Water Commissioner in distributing water to claimants whose rights were adjudicated in prior decrees, may refer to the pleadings, judgment roll, or the entire record of the case. Quigley v. McIntosh, 110 M 495, 103 P2d 1067 (1940).

*Rule as to Extended Use of Water Irrespective of the Rights of Others:* Owners of decreed rights are not entitled to increase the use of the water decreed on additional lands even if they do not exceed their decreed quota per unit of time, when to do so would result in injury to subsequent appropriators. The decreed right is limited to water taken and beneficially applied on lands either in actual or contemplated irrigation at the time it was decreed. Quigley v. McIntosh, 110 M 495, 103 P2d 1067 (1940).

*Jurisdiction Federal Court May Entertain:* That a prior decree of a state court settling water priorities in a particular stream permanently enjoined parties thereto from interfering with rights of each other did not preclude federal court from entertaining jurisdiction of a suit to have the power company's rights adjudged inferior to plaintiffs', in view of holdings of state court authorizing independent actions, notwithstanding prior injunction; nor does the fact that state court had appointed a Water Commissioner and through him was still exercising jurisdiction over the res preclude exercise of jurisdiction, especially where state laws did not contemplate that his adjustment of water rights should be exclusive. Sain v. Mont. Power Co., 84 F2d 126 (9th Cir. 1936).

*Questions to Be Determined:* In a proceeding under this section, the primary questions for consideration by the trial court are: (1) what was adjudged in the former proceeding and decree; and (2) was the Water Commissioner distributing the water in accordance with what was there adjudged. Brennan v. Jones, 101 M 550, 55 P2d 697 (1936).

*Jurisdiction of District Court:* In a proceeding brought under this section by a dissatisfied water user against a Water Commissioner appointed to admeasure the waters of a tributary of a river, defendant's contention that his refusal to distribute water to plaintiff was justified by the fact that the tributary flowed entirely in his county and that therefore the District Court of a neighboring county was without jurisdiction to render the decree upon which plaintiff relied as the basis of his water right was without merit. Whitcomb v. Murphy, 94 M 562, 23 P2d 980 (1933), distinguished in State ex rel. Swanson v. District Court, 107 M 203, 82 P2d 779 (1938).

*Claimant to Be Able to Use Water Before He May Object to the Use by Others:* Until a claimant is himself in a position to use the water of a stream subject to appropriation, the right to the water or water right does not exist in such sense that the mere diversion of the water by another is a ground of action either to recover the water or for damages for its diversion. Miles v. Butte Elec. & Power Co., 32 M 56, 79 P 549 (1905).

**Attorney General's Opinions**

*Water Commissioner Employee of District Court Judge:* When a District Court Judge appoints a Water Commissioner under Title 85, ch. 5, the District Court Judge, rather than the water users, is considered the employer for the purpose of payment of workers' compensation. 40 A.G. Op. 56 (1984).

## 85-5-302. Maintenance of headgates and measuring devices.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

*1989 Amendment:* Near beginning of first sentence, after "water", deleted "under a decree" and in two places, before "certified", deleted "registered or"; and made minor changes in phraseology. Amendment effective April 4, 1989.

**Case Notes**

*Scope of Court's Authority in Dissatisfied Water User's Action:* The purpose of a dissatisfied water user's action is to enforce the original decree and oversee the Water Commissioner's distribution of water through properly maintained ditches, headgates, and other water measuring devices. In an action of this type, it was appropriate for a District Court to order the removal of trees and brush on an irrigation ditchbank when the purpose of the removal was to enhance the method of distribution of water. Morrison v. Higbee, 204 M 501, 668 P2d 1029, 40 St. Rep. 1031 (1983).

*Police Regulation:* This section requiring the installation of headgates and measuring boxes in ditches by persons using water from a stream under a decree where a Water Commissioner has been appointed is in the nature of a police regulation, under which the Commissioner may refuse to distribute water to one who fails to do so. It does not license a stranger to appropriate water to his own use from a stream merely because an owner of a right has not complied with such requirement. Tucker v. Missoula Light & Ry., 77 M 91, 250 P 11 (1926).

## Part 4
## Water Ditches Under Joint or Corporate Control

### Part Case Notes

*Irrigation Contract — Interpretation of Limitations on Water Usage:* In an action against an irrigation company, plaintiff irrigator claimed the company had violated its contract by failing to provide him with sufficient water to irrigate his land, the District Court did not err in holding that it was the plaintiff who violated the contract since there was substantial evidence showing that the blockage of the irrigation ditch by the plaintiff resulted in the plaintiff's taking of more than the 400 miner's inches of water a year allowed by the contract. The District Court did err, however, in prohibiting the plaintiff from diverting water by pumping and from irrigating land not historically irrigated. There was no language in the contract restricting the method of irrigation or the number or location of acres to be irrigated. As long as the plaintiff used no more water than his contractual entitlement, the District Court could not limit the means or place of irrigation. Griffel v. Cove Ditch Co., 207 M 348, 675 P2d 90, 41 St. Rep. 1 (1984).

### 85-5-401. Determination of water rights between partners, tenants in common, and corporate stockholders.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 85-5-402. Appointment of commissioner prior to final decree.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 85-5-405. Compensation and expenses.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 85-5-406. Interference with actions of commissioner.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 85-5-407. Appointment of water commissioner after final decree.

**Compiler's Comments**

*1997 Amendment:* Chapter 42 in second sentence substituted "this chapter" for "85-5-101 through 85-5-301"; and made minor changes in style. Amendment effective March 12, 1997.

### 85-5-408. Apportionment of costs.

**Compiler's Comments**

*1997 Amendment:* Chapter 42 in (2), in two places, substituted "this chapter" for "85-5-101 through 85-5-301"; and made minor changes in style. Amendment effective March 12, 1997.

# CHAPTER 6
# WATER USERS' ASSOCIATIONS

**Chapter Case Notes**

*Irrigation Contract — Interpretation of Limitations on Water Usage:* In an action against an irrigation company, plaintiff irrigator claimed the company had violated its contract by failing to provide him with sufficient water to irrigate his land, the District Court did not err in holding that it was the plaintiff who violated the contract since there was substantial evidence showing that the blockage of the irrigation ditch by the plaintiff resulted in the plaintiff's taking of more than the 400 miner's inches of water a year allowed by the contract. The District Court did err, however, in prohibiting the plaintiff from diverting water by pumping and from irrigating land not historically irrigated. There was no language in the contract restricting the method of irrigation or the number or location of acres to be irrigated. As long as the plaintiff used no more water than his contractual entitlement, the District Court could not limit the means or place of irrigation. Griffel v. Cove Ditch Co., 207 M 348, 675 P2d 90, 41 St. Rep. 1 (1984).

## Part 1
## General Provisions

### 85-6-103. Transfer of shares of stock.

**Collateral References**

The Reclamation Act of June 17, 1902, referred to in this section, is found in the United States Code, Title 43, sec. 372, et seq.

### 85-6-107. Liability of associations.

**Case Notes**

*No Negligence by Irrigation District for Failure to Warn of Unforeseeable Flood:* Plaintiffs' property was damaged by an unprecedented flood caused by an ice jam on the Clark Fork River. Plaintiffs alleged that the local irrigation district was liable for breaching its duty to construct and maintain an irrigation system that would protect the property and for failing to warn of the flooding conditions to allow plaintiffs the opportunity to protect their property. The District Court held that the irrigation district had no duty to prevent the flood or to warn of the impending natural disaster, and the Supreme Court affirmed. The first element that plaintiffs must establish in a negligence action is the existence of a duty of care, and the measure of a duty of care owed is the scope of the risk that the negligent conduct foreseeably entails. Thus, the primary factor in determining whether the irrigation district owed a duty of care was whether it was foreseeable, as a matter of law, that the district's acts or omissions would pose a risk of injury to plaintiffs. Here, substantial evidence supported the conclusion that the risk that flooding would damage plaintiffs' property was unforeseeable, so the district had no duty to erect or maintain flood control structures to prevent the unforeseeable event. The district also exercised reasonable care in the maintenance of the irrigation system that was in place. Further, plaintiffs failed to advance any applicable authority that would impose upon the district a duty to warn of the unforeseeable flood because mere knowledge of the dangerous situation, of which plaintiffs themselves had become aware the night of the flood, did not impose a legal duty to warn. Gaudreau v. Clinton Irrigation District, 2001 MT 164, 306 M 121, 30 P3d 1070 (2001), following Estate of Strever v. Cline, 278 M 165, 924 P2d 666 (1996).

*Liability of Users' Association Not Exclusive:* This section does not preclude liability of a third party for the safe operation of an irrigation ditch by an incorporated users' association. It merely precludes liability of the state of Montana for injuries allegedly caused by its regulation of such companies. Limberhand v. Big Ditch Co., 218 M 132, 706 P2d 491, 42 St. Rep. 1460 (1985).

### 85-6-109. Operation of projects with water users' association — definitions.

**Compiler's Comments**

*2021 Amendment:* Chapter 535 in (2) at end deleted "or to the district court in Lewis and Clark County". Amendment effective October 1, 2021.

*1997 Amendment:* Chapter 42 in (3), at beginning, substituted "an appeal" for "a complaint"; and made minor changes in style. Amendment effective March 12, 1997.

*1995 Amendment:* Chapter 418 in (2), in third sentence after "decision to", deleted "the board of natural resources and conservation as provided for in 85-1-212. The board shall notify the association of its decision. If the board's decision is adverse to the association, the association may file within 30 days of receipt of notice of the board's decision a complaint to review the board's decision in" and at end, after "located or", inserted "to the district court"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1991 Amendment:* In (5), in last sentence after "representing", increased percentage of ownership protest to 30% from 15%. Amendment effective April 15, 1991.

*1981 Amendment:* In (5) inserted "sell, or otherwise dispose of" after "abandon" near the beginning, inserted "a water users'" before "association" near the beginning, inserted the second sentence requiring that before action is taken to abandon, sell, or dispose of a project which involves a water user's association, the Department receive a petition approving the abandonment, sale, or disposition, signed by stockholders representing 66⅔% or more of the issued and outstanding association stock, substituted "final proposal of abandonment, sale, or other disposal" for "notice of abandonment" in the last sentence, and inserted "sold, or otherwise disposed of" after "abandoned" in the last sentence.

## CHAPTER 7
## IRRIGATION DISTRICTS

**Chapter Case Notes**

*No Negligence by Irrigation District for Failure to Warn of Unforeseeable Flood:* Plaintiffs' property was damaged by an unprecedented flood caused by an ice jam on the Clark Fork River. Plaintiffs alleged that the local irrigation district was liable for breaching its duty to construct and maintain an irrigation system that would protect the property and for failing to warn of the flooding conditions to allow plaintiffs the opportunity to protect their property. The District Court held that the irrigation district had no duty to prevent the flood or to warn of the impending natural disaster, and the Supreme Court affirmed. The first element that plaintiffs must establish in a negligence action is the existence of a duty of care, and the measure of a duty of care owed is the scope of the risk that the negligent conduct foreseeably entails. Thus, the primary factor in determining whether the irrigation district owed a duty of care was whether it was foreseeable, as a matter of law, that the district's acts or omissions would pose a risk of injury to plaintiffs. Here, substantial evidence supported the conclusion that the risk that flooding would damage plaintiffs' property was unforeseeable, so the district had no duty to erect or maintain flood control structures to prevent the unforeseeable event. The district also exercised reasonable care in the maintenance of the irrigation system that was in place. Further, plaintiffs failed to advance any applicable authority that would impose upon the district a duty to warn of the unforeseeable flood because mere knowledge of the dangerous situation, of which plaintiffs themselves had become aware the night of the flood, did not impose a legal duty to warn. Gaudreau v. Clinton Irrigation District, 2001 MT 164, 306 M 121, 30 P3d 1070 (2001), following Estate of Strever v. Cline, 278 M 165, 924 P2d 666 (1996).

*Irrigation Districts Special, Limited-Purpose Units of Government — Freeholder Requirement for Qualifications of Commissioners Constitutional — Reasonable Relationship Standard Applied:* The freeholder requirement under 85-7-1501 does not violate the right to equal protection under the federal constitution. Montana irrigation districts are special, limited-purpose units of government whose activities have a disproportionate effect on landowners in the districts as a group. It is appropriate to depart from the usual strict scrutiny standard applied to statutes impacting on a citizen's right to vote and to analyze the freeholder requirement of 85-7-1501 under the reasonable relationship standard. Johnson v. Killingsworth, 271 M 1, 894 P2d 272, 52 St. Rep. 274 (1995).

*Importance of Control of Distribution by District:* The most important function of an irrigation district is the control, to the mutual advantage of all the members, of the irrigation system. Water rights remain with the private appropriator, but control lies exclusively with the district. In re Establishment & Organization of Ward Irrigation District, 216 M 315, 701 P2d 721, 42 St. Rep. 824 (1985).

*Relationship Between District Rights and Nondistrict Rights:* A portion of the Fosses' ranch is included in the irrigation district and a portion is not. The part of the ranch not in the district has water rights, which precede the district rights, in two creeks, which during part of the year spill into the district's system. Further, a segment of the district's ditch follows the natural channel of one of the creeks. The Fosses habitually have conveyed their nondistrict water through the ditch, and the district has delivered water to Foss land not included within the district through a district headgate. In 1979, a dispute arose over control of the headgate. The District Court ruled that the Fosses had no legal right to use of the district's distribution system. The Supreme Court reversed and remanded the case for further proceedings in accordance with its ruling that the Fosses may convey their nondistrict water rights to the district and that the district has the obligation to deliver that water. If the ditch is too small to service the district and other water rights, the Fosses should not be required to bear any burden of expansion. In re Establishment & Organization of Ward Irrigation District, 216 M 315, 701 P2d 721, 42 St. Rep. 824 (1985).

**Chapter Attorney General's Opinions**

*Voting Procedure Based on Land Ownership Not Violative of "One Man, One Vote" Constitutional Provisions:* Montana's weighting of votes according to the size of land holdings in irrigation district elections does not violate the "one man, one vote" requirement of the U.S. Constitution. In upholding the weighted voting scheme in a similar case, the U.S. Supreme Court held in Salyer Land Co. v. Tulare Lake Basin Water Storage District, 410 US 719 (1973), that where the tax burden fell unequally according to the size of the land holdings, it was not unreasonable for the votes to be weighted according to the size of the land holdings. 42 A.G. Op. 47 (1987).

## Part 1
## Creation of Districts — Generally

### 85-7-101. Creation of irrigation districts by percentage of titleholders.

**Case Notes**

*Inclusion of State School Lands:* The Legislature has always assumed that it had authority to fix the policy as to whether state lands, as a matter of justice and equity, should be included in irrigation districts and subject to assessments, as was done by section 2401, R.C.M. 1907, section 4014, R.C.M. 1921, and Ch. 58, L. 1929. Sections 2401 and 4014, supra, were later repealed. In the instant case, section 4014, supra, could not apply to a district created in 1911 under Ch. 146, L. 1909, and in absence of specific legislation on the subject at the time plaintiff district was created, there was no authority for including state lands in the district subject to lien for assessments. Tongue River & Yellowstone River Irrigation District v. Hyslop, 109 M 190, 96 P2d 273 (1939).

*Intention of Legislature:* In ascertaining the intention of the Legislature in enacting a statute consisting of numerous sections all relating to the same general subject, the act must be considered in its entirety, since it was passed as a whole, not in parts or sections. Drake v. Schoregge, 85 M 94, 277 P 627 (1929).

*Liberal Construction:* After the organization of an irrigation district, the provisions of the act of its creation and rules of procedure should be given most liberal construction in order that the purpose of the act may be carried out. Drake v. Schoregge, 85 M 94, 277 P 627 (1929).

*Attacking Regularity of District:* An action by a landowner seeking to have his irrigated land excluded from an irrigation district on the ground of lack of jurisdiction in the court when the court entered its judgment creating the irrigation district, because of a failure of service of notice and a lack of written consent to the inclusion of his lands, was not a collateral attack upon the judgment of creation. Scilley v. Red Lodge-Rosebud Irrigation District, 83 M 282, 272 P 543 (1928), distinguished in Midland Dev. Co. v. Cove Irrigation District, 102 M 479, 58 P2d 1001 (1936).

*Public Corporation:* An irrigation district created under this act is a public corporation exercising essential governmental functions, one of which is the right to levy taxes, organized for the government of a portion of the state and for the promotion of the public welfare. Thus, it must be deemed a subdivision of the state within the meaning of 7-4-2516 and therefore is not required to pay fees for the recordation of papers in the County Clerk and Recorder's office. Crow Creek Irrigation District v. Crittenden, 71 M 66, 227 P 63 (1924), explained in Buffalo Rapids Irrigation District v. Colleran, 85 M 466, 279 P 369 (1929).

*Jurisdiction of District Court:* While the irrigation district act confers certain exclusive powers upon the District Court of the county in which the business of the district is being conducted, there is nothing in the act which gives exclusive jurisdiction to that court to compel the Treasurer of that county by mandamus to pay interest due upon bonds of the district. Therefore, the court of any district or county has the power to issue the writ. State ex rel. Carroll v. District Court, 69 M 415, 222 P 444 (1924), overruled on other grounds in USF&G v. St., 136 M 148, 345 P2d 734 (1959).

*Inclusion of Specially Benefited Lands:* Under the district irrigation statutes, only such lands as will be specially benefited may be included within a proposed district against the will of the owner. In re Crow Creek Irrigation District, 63 M 293, 207 P 121 (1922).

*Nonconsenting Owners:* Since the inclusion of a tract of land of a nonconsenting owner in an irrigation district and subjection of it to its pro rata part of the burden of the expense necessarily incident to the construction of the works and the operation of the system deprives him of his property to the extent of the burden thus imposed, such deprivation can be effected only by due process of law, i.e., he must be afforded adequate opportunity to be heard. In re Crow Creek Irrigation District, 63 M 293, 207 P 121 (1922).

*Character and Object of Act:* For general observations upon the character and objects of the legislation embraced in this chapter, see In re Gallatin Irrigation District, 48 M 605, 140 P 92 (1914).

*Constitutionality:* Sections 85-7-101 through 85-7-1507, relating to the creation of irrigation districts, are not, in conferring certain alleged nonjudicial powers and duties upon the District Judge, violative of Art. IV, sec. 1, 1889 Mont Const. (Art. III, sec. 1, 1972 Mont. Const.), which divides the powers of government into the legislative, executive, and judicial departments. O'Neill v. Yellowstone Irrigation District, 44 M 492, 121 P 283 (1912).

## 85-7-102. Evidence of title.

### Compiler's Comments

*1995 Amendment:* Chapter 418 in (1)(b) substituted "department of natural resources and conservation" for "department of state lands"; and in (2), after "department", deleted "of state lands". Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1991 Amendment:* In (1)(c) substituted "insurance producers" for "insurance agents"; and made minor changes in style.

*1987 Amendment:* Rearranged subsection (1); inserted (1)(c) establishing that ownership records prepared by licensed title insurance agents provide sufficient evidence of title to irrigation district land; and made minor changes in style and phraseology.

## 85-7-104. Petition for organization.

### Case Notes

*Amendment of Petition:* In the hearing and determination of petitions, a wide discretion is lodged in the District Court, an abuse of which must be clearly shown before its action in dismissing a petition for insufficiency will be disturbed. In re Gallatin Irrigation District, 48 M 605, 140 P 92 (1914).

*Signature by Majority of Landowners:* Where a petition disclosed on its face that it was not signed by a majority of the landowners in the proposed district, an order dismissing it was proper, since it did not confer jurisdiction to create the district. In re Gallatin Irrigation District, 48 M 605, 140 P 92 (1914).

*Sufficiency of Petition:* Since a homestead or desert entryman does not have a taxable interest in land he holds, prior to final proof, his name cannot be counted in determining the sufficiency of a petition for the creation of an irrigation district. Further, for the purpose of determining whether a petition meets the statutory requirements, the court is authorized to take testimony if necessary. In re Gallatin Irrigation District, 48 M 605, 140 P 92 (1914).

*Witness Fees and Costs of Objectors to District:* The allowance of mileage and per diem to witnesses who were present and ready to testify for the objectors to the creation of an irrigation district and whose testimony would have been relevant, competent, and material was proper, though they were not subpoenaed, sworn, or examined because of the dismissal of the petition for insufficiency. In re Gallatin Irrigation District, 48 M 605, 140 P 92 (1914).

*Effect of Failure to Give Bond:* Failure to give the bond required by this section does not affect the jurisdiction of the court or that of the Commissioners appointed to conduct the affairs of the district, since it is merely designed as security for costs in the event the district is not organized. O'Neill v. Yellowstone Irrigation District, 44 M 492, 121 P 283 (1912).

## 85-7-105. Order and notice of hearing on petition.

### Case Notes

*Notice to Nonresident:* The mailing of a copy of the petition for the creation of an irrigation district and notice of hearing to a nonresident landowner is an indispensable prerequisite to vesting the court with jurisdiction to create the district. Scilley v. Red Lodge-Rosebud Irrigation District, 83 M 282, 272 P 543 (1928), distinguished in Wood v. Kalispell, 131 M 390, 310 P2d 1058 (1957).

*Sufficiency of Notice:* Under this section, which provides that the Clerk of the District Court shall cause to be published at least once a week "for two successive calendar weeks" a notice of the time and place for hearing on a petition for the creation of an irrigation district, a notice published on March 31 and April 7 of a given year was a sufficient compliance with the requirement. The applicable rule is that publication for the number of times expressed in weeks, not more than 7 days apart, suffices. Scilley v. Red Lodge-Rosebud Irrigation District, 83 M 282, 272 P 543 (1928).

*Character of Notice:* The only notice required to be given under this section of the contemplated creation of an irrigation district was by publication or in certain cases by mail. Therefore, the objection made by landowners on a hearing upon a petition of the District Commissioners for confirmation of a contemplated contract that they had not been served with personal notice of the creation of the district had no merit. In re Fort Shaw Irrigation District, 81 M 170, 261 P 962 (1927).

## 85-7-106. Hearing on petition.

### Case Notes

*Conditions Imposed Without Final Judgment — Creation of New District Affirmed:* In a proceeding to establish an irrigation district organized to assume the operation and maintenance of an irrigation project from the state and its predecessors in interest, the Supreme Court held that the District Court did not err in imposing upon the appellants conditions for the use of their water rights and in not making any final judgment with respect to the appellants, who alleged that the extent of their water rights should be affirmatively established prior to the approval of the creation of the new district. The Supreme Court held that because the extent of the appellants' rights was made subject to the future negotiation or court decree, there was no final judgment to review. The Supreme Court therefore affirmed the District Court's order approving the creation of the district and remanded the case to the District Court for any further necessary proceedings respecting the rights of the parties and interested persons. In re Petition for Irrigation District in Ravalli County, 209 M 218, 680 P2d 944, 41 St. Rep. 658 (1984).

*Court to Address Issues Raised by Noncontesting Landowners:* In a proceeding to establish an irrigation district organized to assume the operation and maintenance of an irrigation project from the state, the District Court did not err in considering issues presented to it by water users who did not contest the formation of the district at a hearing on the petition. While the statutes contemplate that those persons contesting the establishment of the district attend the hearing on the petition, the District Court is also required by statute to determine which lands belonging to holders of appurtenant water rights are to be included in the district and which are not and is required to address the issues raised by those landholders whether or not they attended the hearing on the petition. In re Petition for Irrigation District in Ravalli County, 209 M 218, 680 P2d 944, 41 St. Rep. 658 (1984).

*Contents of Order:* While the court's order should be clear as to material issues on the hearing of a petition for the creation of an irrigation district, particularly on boundaries, lands included, practicability, benefits and damages to included lands, etc., it should leave the details respecting the works to be constructed to the discretion of the district. Blaser v. Clinton Irrigation District, 100 M 459, 53 P2d 1141 (1935).

*Finality of Order:* An order of a court creating an irrigation district is in the nature of a judgment or decree. It stands as an absolute finality as to everything directly or impliedly determined and cannot be attacked collaterally unless the judgment roll shows it to be void. Blaser v. Clinton Irrigation District, 100 M 459, 53 P2d 1141 (1935).

*Constitutionality:* The sections relating to organization of irrigation districts are not invalid as depriving a nonresident of the right of removal of a suit to federal court. Tomich v. Union Trust Co., 31 F2d 515 (9th Cir. 1929).

*Court to Determine Whether or Not Land Shall Be Included:* Whether or not lands then under irrigation should have been included in an irrigation district subsequently organized was for determination of the court on hearing of petition for organization of district. Tomich v. Union Trust Co., 31 F2d 515 (9th Cir. 1929).

*Time of Objecting to Inclusion of Land:* The objection that land proposed to be included in an irrigation district should not be included must be made by the landowner at time the district is formed, since there is a hearing afforded for that purpose. Tomich v. Union Trust Co., 31 F2d 515 (9th Cir. 1929).

*Taxation of Property of a Public Corporation:* The property of a public corporation may not be declared exempt from taxation unless it is made exempt by virtue of express pronouncement of the Montana Constitution or legislative declaration permitted by the Constitution. Further, an irrigation district is not a "municipal corporation" within the meaning of Art. XII, sec. 2, 1889 Mont. Const., providing that the property of municipal corporations shall be exempt from taxation, and therefore the county in which such a district was located had the power to assess and levy a tax upon lands acquired by the district by tax deed. Buffalo Rapids Irrigation District v. Colleran, 85 M 466, 279 P 369 (1929).

*Effect of Failure to Appeal:* The provisions of this section and section 3967, R.C.M. 1921 (since repealed), declaring, in effect, that an appeal from a judgment creating an irrigation district and from one confirming a bond issue of such a district shall be the exclusive method of attacking the validity of either, do not bar an action by which it is sought to evade the effect of such judgments on grounds recognized as sufficient to vacate an ordinary judgment—fraud and lack of jurisdiction. Scilley v. Red Lodge-Rosebud Irrigation District, 83 M 282, 272 P 543 (1928).

*Inclusion of Irrigated Lands:* While under the irrigation district act the question of whether lands will or will not be benefited by means of an irrigation system in contemplation is left to the discretion of the court, under this section the inclusion of lands already irrigated from appurtenant water rights depends not upon the exercise of the court's discretion but upon the written consent of the owner. Scilley v. Red Lodge-Rosebud Irrigation District, 83 M 282, 272 P 543 (1928).

*Description of Land:* Where in an order establishing an irrigation district, the description of the lands included in it were sufficient under this section, the fact that the court went further and made a tabulation under various headings, such as "Gross Area", "Area Included", etc., did not render the order void. Walden v. Bitter Root Irrigation District, 68 M 281, 217 P 646 (1923).

### 85-7-107. Court decision — appointment of commissioners.

#### Case Notes

*Court to Address Issues Raised by Noncontesting Landowners:* In a proceeding to establish an irrigation district organized to assume the operation and maintenance of an irrigation project from the state, the District Court did not err in considering issues presented to it by water users who did not contest the formation of the district at a hearing on the petition. While the statutes contemplate that those persons contesting the establishment of the district attend the hearing on the petition, the District Court is also required by statute to determine which lands belonging to holders of appurtenant water rights are to be included in the district and which are not and is required to address the issues raised by those landholders whether or not they attended the hearing on the petition. In re Petition for Irrigation District in Ravalli County, 209 M 218, 680 P2d 944, 41 St. Rep. 658 (1984).

*Exchange Water Users Right to Credit Against Water-Use Charges — Terms of District Membership:* In a proceeding to establish an irrigation district organized to assume the operation and maintenance of an irrigation project from the state and its predecessors in interest, the Supreme Court found that the District Court did not err in holding that the newly organized district had an obligation to provide exchange water users with water free of charge and that that obligation could be satisfied, as to each of those water users ranked 10th and above in superiority who joined the new district, by extending to them a credit against the water-use charges to be levied by the new district. The Supreme Court viewed the District Court's order as establishing terms for membership in the district for those exchange water users and further found that the District Court had the authority to set terms. In re Petition for Irrigation District in Ravalli County, 209 M 218, 680 P2d 944, 41 St. Rep. 658 (1984).

### 85-7-109. Irrigation district as public corporation.

#### Case Notes

*Irrigation District a Governmental Entity Immune From Suit:* The plaintiffs filed suit in August 1983, alleging that the irrigation district's actions had resulted in crop losses for the plaintiffs. In November 1989, the lower court allowed the defendant to amend its answer to include the defense that the irrigation district was a governmental entity immune from suit. After allowing the amendment, the lower court dismissed the suit on a summary judgment motion. The Supreme Court upheld the lower court's decision on the basis that it was within the lower court's discretion and that the plaintiffs had failed to show that they were prejudiced by the amendment. Love v. Harlem Irrigation District, 245 M 443, 802 P2d 611, 47 St. Rep. 2190 (1990), followed in Bozeman v. AIU Ins. Co., 272 M 349, 900 P2d 929, 52 St. Rep. 823 (1995). After the 1990 Love decision, supra, Loves filed another amended complaint alleging contractual violations, negligence, fraud, and additional damages. Following Whirry v. Swanson, 254 M 248, 836 P2d 1227 (1992), and Mills v. Lincoln County, 262 M 283, 864 P2d 1265 (1993), and distinguishing Boucher v. Dramstad, 522 F. Supp. 604 (D.C. Mont. 1981), the Supreme Court held that despite Loves' claims of issues of fundamental fairness and new theories of recovery, all four elements composing the doctrine of res judicata were met. The issues having been previously decided in the 1990 Love decision, judgment for the irrigation district on the issues raised by the amended complaint was granted. State ex rel. Harlem Irrigation District v. District Court, 271 M 129, 894 P2d 943, 52 St. Rep. 364 (1995).

**85-7-110. Districts organized under earlier laws.**

**Compiler's Comments**

*Section Not Codified:* Section 89-2110(part), R.C.M. 1947, a temporary and validation clause, was not codified in the MCA. This clause has not been repealed and is still valid law. Reference may be made to sec. 67, Ch. 146, L. 1909, reenacted by section 7263, R.C.M. 1921.

## Part 2
## Creation of Districts — Adjudicated Streams

**85-7-205. Duty of trustees, levy, and indebtedness.**

**Compiler's Comments**

*1981 Amendment:* Substituted "and may cover the expenses of such work by levy" for provision restricting levy to less than 25 cents per acre in any one year and made minor changes in phraseology at the end of the first sentence.

**85-7-206. Basis and apportionment of annual tax.**

**Compiler's Comments**

*2007 Amendment:* Chapter 93 at beginning deleted "Subject to 15-10-420" and near middle after "accordance with" inserted "85-7-2104 and"; and made minor changes in style. Amendment effective March 30, 2007.

*1999 Amendment:* Chapter 584 at beginning inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

*Severability:* Section 172, Ch. 584, L. 1999, was a severability clause.

*Retroactive Applicability:* Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

## Part 3
## Creation of Districts
## Common Water Supply

**85-7-301. Creation of district by owners of rights in common water supply.**

**Case Notes**

*Powers of District:* Where 100 owners of land and water rights organized an irrigation district in 1923 under then existing statutory provisions, without, however, conveying to the district their individual rights, and for the sole purpose of having a central control body to perform the functions of a Water Commissioner in the operation, maintenance, and management of its affairs, under Ch. 100, L. 1925 (this section), curative in character, it became a public corporation. The district was a legally organized entity in 1927 with power to operate, maintain, and manage its irrigation system. Maclay v. Missoula Irrigation District, 90 M 344, 3 P2d 286 (1921).

**85-7-304. Sections not applicable.**

**Compiler's Comments**

*2005 Amendment:* Chapter 130 after "85-7-2032" deleted "85-7-2141"; and made minor changes in style. Amendment effective October 1, 2005.

**85-7-306. Development of water supply — levy for expenses.**

**Compiler's Comments**

*1981 Amendment:* At the beginning of the last sentence, substituted "The board may levy" for language restricting levy to $4 per acre in any one year.

### 85-7-307. Tax levy.

**Compiler's Comments**

*1999 Amendment:* Chapter 584 at beginning inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

*Severability:* Section 172, Ch. 584, L. 1999, was a severability clause.

*Retroactive Applicability:* Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

## Part 4
## Subdistricts

**Part Compiler's Comments**

*Saving Clause:* Section 34, Ch. 439, L. 1989, was a saving clause.

*Severability:* Section 35, Ch. 439, L. 1989, was a severability clause.

*Effective Date:* Section 36, Ch. 439, L. 1989, provided that this part is effective April 4, 1989.

### 85-7-411. Alteration and determination of subdistrict acreage.

**Compiler's Comments**

*1997 Amendment:* Chapter 306 in (1) inserted reference to 85-7-1846 (now terminated). Amendment effective July 1, 1997, and terminates December 31, 1998.

*Termination:* Section 5, Ch. 306, L. 1997, provided that the 1997 amendments terminate December 31, 1998.

## Part 14
## Irrigation District Revenue Bond Act

### 85-7-1411. Authority to acquire, construct, maintain, operate, and lease various undertakings.

**Compiler's Comments**

*2017 Amendment:* Chapter 275 in (1)(b) near end substituted "Regulatory Policies Act" for "Regulatory Policy Act". Amendment effective October 1, 2017.

*2001 Amendment:* Chapter 125 in (2) near end inserted reference to Title 70, chapter 30; and made minor changes in style. Amendment effective October 1, 2001.

*Interim Study Bill — Eminent Domain:* Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

### 85-7-1436. Sale of bonds.

**Compiler's Comments**

*2011 Amendment:* Chapter 253 in (1) near middle substituted "price not less than 97% of face value" for "price less than face value"; in (2) after "sold at" inserted "public or" and after "private sale" substituted "as determined by the irrigation district pursuant to 17-5-107" for "to the United States or the state of Montana or an agency, instrumentality, or corporation thereof"; deleted former (2)(b) that read: "(b) If not sold to the United States or the state of Montana or an agency, instrumentality, or corporation thereof, the bonds must be sold at public sale after notice as provided in 85-7-1437"; and made minor changes in style. Amendment effective April 22, 2011.

*Severability:* Section 33, Ch. 253, L. 2011, was a severability clause.

*Applicability:* Section 35, Ch. 253, L. 2011, provided: "[This act] applies to local government actions commencing on or after [the effective date of this act]." Effective April 22, 2011.

### 85-7-1437. Notice of sale of bonds.

**Compiler's Comments**

*2011 Amendment:* Chapter 253 in (1) near middle after "85-7-1436" inserted "for bonds sold publicly". Amendment effective April 22, 2011.

*Severability:* Section 33, Ch. 253, L. 2011, was a severability clause.

*Applicability:* Section 35, Ch. 253, L. 2011, provided: "[This act] applies to local government actions commencing on or after [the effective date of this act]." Effective April 22, 2011.

## Part 15
## Organization of Districts

### 85-7-1501. Qualifications of commissioners and term of office.

**Compiler's Comments**

*2005 Amendment:* Chapter 402 in (1) substituted language establishing commissioner qualifications for former language that read: "A person may not be a commissioner unless he is an owner of irrigable land within the division of the district he is to represent and is a resident of the county in which the division of the district or some portion of the division is situated"; and inserted (3) defining entity. Amendment effective April 25, 2005.

*1989 Amendment:* In (1) substituted "owner of irrigable land within the division of the district he is to represent" for "owner of land within the district" and at end substituted "or some portion of the division is situated" for "or some portion thereof, for which the commissioner is elected, is situated"; in (2), after "hold their respective offices until", deleted "the second Saturday in December following their appointment and until"; and made minor changes in phraseology.

**Case Notes**

*Freeholder Requirement Constitutional — Reasonable Relationship Standard Applied:* A landowner within an irrigation district filed a petition seeking to have the election of an irrigation district commissioner set aside on the grounds that the elected commissioner did not own irrigable land within the district as required by this section (see 2005 amendment). The District Court set aside the election, and the commissioner appealed on the grounds that the land ownership requirement violates the equal protection clause of the United States Constitution. The Supreme Court affirmed and held that the freeholder requirement does not violate the right to equal protection under the federal constitution. Montana irrigation districts are special, limited-purpose units of government whose activities have a disproportionate effect on landowners in the districts as a group. It is appropriate to depart from the usual strict scrutiny standard applied to statutes impacting on a citizen's right to vote and to analyze the freeholder requirement of this section under the reasonable relationship standard. Johnson v. Killingsworth, 271 M 1, 894 P2d 272, 52 St. Rep. 274 (1995).

### 85-7-1504. Bonds for commissioner and secretary.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 85-7-1505. Compensation and expenses of commissioners.

**Compiler's Comments**

*2001 Amendment:* Chapter 387 in (1) near middle of first sentence after "compensation" substituted "at an amount determined by a majority vote of the board" for "of $25", and inserted second sentence providing that compensation may be no more than $100; and made minor changes in style. Amendment effective October 1, 2001.

*1983 Amendment:* Substituted "of $25 for each day they are actually and necessarily engaged in the performance of irrigation district duties" for "for board members as provided in 2-15-124".

*1981 Amendment:* Near the middle of the section, substituted the clause relating to compensation and expenses of members for clause limiting compensation to $20 a day and necessary expenses in attending meetings and made minor changes in phraseology; deleted the last clause relating to approval by the board of expenses and a mileage allowance of 12 cents a mile.

### 85-7-1506. Liability of officers.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 85-7-1507. Conflict of interest — criminal penalty.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 85-7-1508. Compensation and duties of secretary.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

## Part 16
## Joint Operations

### 85-7-1603. Withdrawal from joint operation.

**Compiler's Comments**

*1987 Amendment:* At end, after "withdrawal", inserted exception clause.

### 85-7-1611. Board of control — composition and vacancies.

**Compiler's Comments**

*1999 Amendment:* Chapter 143 in (1) at end of first sentence inserted "and one member at large", at beginning of second sentence inserted "Each irrigation commissioner must be", and at end of third sentence inserted "or a person representing any person or entity that receives water delivery from the irrigation project that delivers water to the member districts"; and made minor changes in style. Amendment effective March 23, 1999.

### 85-7-1612. Board of control — powers and duties.

**Compiler's Comments**

*1989 Amendment:* In (6), after "lease", substituted "or finance" for "and finance".

*1987 Amendment:* Inserted (6) authorizing Board of Control to plan, acquire, construct, operate, maintain, lease, and finance joint operations through issuance of revenue bonds; and made minor changes in phraseology.

### 85-7-1613. Board of control — per diem and expenses.

**Compiler's Comments**

*1983 Amendment:* Substituted "of $25 for each day they are actually and necessarily engaged in the performance of irrigation district duties" for "for board members as provided in 2-15-124".

*1981 Amendment:* Substituted the clause relating to compensation and expenses for clause limiting compensation to $15 per day and necessary expenses in attending meetings near the middle of the section; made minor changes in phraseology.

### 85-7-1615. Manager of operations.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 85-7-1616. Required records and audits.

**Compiler's Comments**

*2001 Amendment:* Chapter 483 near beginning of (1) and (2) after "department of" substituted "administration" for "commerce". Amendment effective July 1, 2001.

*1995 Amendment:* Chapter 179 in (2), at end, deleted "and to examine the same as provided by law for the examination of the affairs of county offices"; inserted (3) providing that the accounting records of boards of control be audited; and made minor changes in style. Amendment effective July 1, 1995.

*1983 Amendment:* Substituted references to department of commerce for references to department of administration.

*1981 Amendment:* Substituted "department of administration" for "department of community affairs" in (1) and (2).

### 85-7-1618. Custody and disbursement of funds.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

## Part 17
## Elections

**Part Attorney General's Opinions**

*Voter Qualifications — Irrigation District Election:* In order to vote in an irrigation district election under Title 85, ch. 7, part 17, an individual must be: (1) a landowner in the irrigation district; (2) a citizen of the United States; (3) 18 years of age or older; and (4) a resident of Montana and the county in which he offers to vote for at least 30 days. 42 A.G. Op. 47 (1987).

**85-7-1702. Election of commissioners — term of office.**

**Compiler's Comments**

*2017 Amendment:* Chapter 242 in (1) inserted last sentence regarding date of election; in (4) at beginning inserted exception clause and at end substituted "the date of the commissioner's election and continues for 3 years" for "the date of the election"; and made minor changes in style. Amendment effective May 3, 2017.

*2015 Amendment:* Chapter 49 in (1) before "election" deleted "regular" and substituted "Title 13, chapter 1, part 5" for "13-1-104 and 13-1-401"; in (2) substituted current language regarding the time period for submission of declaration of candidacy for former (2) that read: "(2) Candidates for the office of commissioner may be nominated by petition filed with the election administrator or deputy election administrator at least 75 days before the election and signed by at least five electors of the district. If no nominations are made, the following procedures must be followed:

(a) For elections held in accordance with 13-1-401(1), the electors of the district shall write on the ballots the name of the person or persons for whom they desire to vote.

(b) For elections held in accordance with 13-1-401(2), the electors of the district may either accept nominations from the floor or write on the ballots the name of the person or persons for whom they desire to vote"; deleted former (3) that read: "(3) If the number of candidates is equal to or less than the number of positions to be elected, the election administrator may cancel the election in accordance with 13-1-304. If an election is not held, the county governing body shall declare elected by acclamation the candidate who filed a nominating petition for the position. If no candidate filed a nominating petition for the position, the board of commissioners shall make an appointment to fill the position and the term is the same as if the commissioner were elected"; in (3) at end substituted "election" for "organizational meeting after the regular election and continues for 3 years and until the election and qualification of a successor"; and made minor changes in style. Amendment effective November 4, 2015.

*1999 Amendment:* Chapter 254 substituted current language in (3) authorizing cancellation of election, election by acclamation or appointment, and term of office for former (3) that read: "(3) If there is only one nominee for a ballot position, the nominee may be declared elected by acclamation or in accordance with 13-1-304"; and made minor changes in style. Amendment effective October 1, 1999.

*1991 Amendment:* Inserted (1) relating to annual elections; at end of (2) inserted "the following procedures must be followed"; in (2)(a), at beginning, inserted "For elections held in accordance with 13-1-401(1)" and near end substituted "the name of the person or persons" for "the name or names of the persons"; inserted (2)(b) relating to nominations made from the floor or on ballots; deleted former (2) that read: "(2) The regular election for commissioners in each district shall be held annually in accordance with 13-1-104 and 13-1-401"; inserted (3) relating to election by acclamation; and made minor changes in style.

*1985 Amendment:* In (1) substituted "75 days" for "30 days".

*1981 Amendment:* Inserted (1) relating to the nomination and election of candidates for the office of Commissioner; and inserted "13-1-401" in (2).

**Attorney General's Opinions**

*Commissioner Elections Conducted by Election Administrator:* Commissioner elections in drainage and irrigation districts must be conducted by the county's Election Administrator. 38 A.G. Op. 105 (1980).

*Officers to Remain Until Successors Properly Qualified:* Officers of hospital, fire, irrigation, and drainage districts whose terms were due to expire in the spring of 1980 are entitled to remain in office until their successors are properly qualified following an election held in November 1980. 38 A.G. Op. 74 (1980).

### 85-7-1703. Vacancies among commissioners.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

*1989 Amendment:* At end of first sentence substituted "by appointment by the board" for "by appointment by the judge of the district court of the county in which the division or major portion thereof is situated"; inserted second sentence relating to a quorum for filling a vacancy; in third sentence, at beginning, inserted clause relating to a vacancy for every position and at end, after "situated", inserted "shall make the appointments"; substituted fourth sentence relating to ownership requirements of irrigable land and residency for "The appointee shall be an owner of land within the district, shall be a resident of the county in which the division of the district (or some portion of the division for which such commissioner is so elected) is situated, and"; at beginning of last sentence inserted "A commissioner appointed under this section"; and made minor changes in phraseology.

*1981 Amendment:* Substituted "until the next regular or special election" for "for the remainder of the term" near the middle of the first sentence.

### 85-7-1710. Qualification of electors and nature of voting rights.

**Compiler's Comments**

*2019 Amendment:* Chapter 225 in (1)(b) substituted "state residency requirements, registration requirements, or county signature verification requirements" for "state residency or registration requirements"; in (3)(a) after "Whenever land is owned by co-owners" substituted "either owner may vote on behalf of the co-owners, the owners may vote based on an agreed-upon percentage ownership, or the owners may designate" for "the owners shall designate" and in last sentence at beginning substituted "Prior to" for "When", after "file with the secretary of the district a written" substituted "document indicating" for "instrument of", and after "the agent's authority, executed and" substituted "signed" for "acknowledged"; inserted (3)(b) regarding a change in the designated agent; inserted (3)(c) providing requirements for an irrigation district's notice of election; in (4)(b) substituted "irrigable acres" for "acres" and after "acres owned" inserted "within the district"; in (5)(a) substituted current text for former text that read: "(5) (a) Each holder of the title or evidence of title to irrigable land within the district who is qualified as an elector under subsection (1)(a) shall provide notice to the irrigation district in which the land is located designating the individual who will be voting in the election with respect to the irrigable land. If there is a change in the designation, a new notice must be provided to the irrigation district.

(b) The list of designated voters compiled under subsection (5)(a) and maintained and certified by the irrigation district must be provided to the county election office not less than 60 days before the election"; inserted (5)(b) through (5)(e) regarding an irrigation district's receipt of a valid change document regarding a qualified elector or designated agent; and made minor changes in style. Amendment effective May 1, 2019.

*2017 Amendment:* Chapter 145 in (1)(a) substituted "if, except as provided in subsection (1)(b), they are qualified electors under the constitution and general election laws of the state" for "all individuals having the qualifications of electors under the constitution and general election laws of the state, except that registration of electors and county residency may not be required"; inserted (1)(a)(ii) concerning landowners; inserted (1)(b) concerning exemptions from state residency or registration requirements; in (3) in first sentence before "designate" substituted "shall" for "may", in second sentence before "may" inserted "at the owner's discretion", in third sentence at end substituted "individual" for "co-owner or by an agent", in fourth sentence after "sale to a purchaser" deleted "residing within the state", and in fifth sentence after "district" deleted "or with the election officials"; inserted (5) requiring owners of land to notify the irrigation district of who is designated to vote; and made minor changes in style. Amendment effective April 3, 2017.

*One-Time Notification Requirement:* Section 2, Ch. 145, L. 2017, provided: "By December 31, 2017, the district shall notify each holder of a title or evidence of title to irrigable land within the district concerning the requirements under 85-7-1710(5)(a)." Effective April 3, 2017.

*2013 Amendment:* Chapter 134 in (2) in first sentence in three places and in (3) in third sentence in two places substituted references to an acre for references to 40 acres; in (3) deleted last sentence that read: "Whenever the total irrigable acreage within any one district has been platted or subdivided into lots or blocks to the extent of 5% or more of the total acreage of the district or whenever the majority of the district board adopts a resolution allowing it, each elector is permitted to cast one vote for each acre of irrigable land or major fraction of an acre of irrigable land owned by the elector within the district, irrespective of the location of the irrigable lands within the tracts designated by the commissioners for assessment and taxation purposes or within the congressional subdivisions, but any elector owning any less than 1 acre of irrigable land within the district is entitled to one vote"; and made minor changes in style. Amendment effective March 31, 2013.

*1993 Amendment:* Chapter 191 in (1)(a), after "registration of electors", inserted "and county residency"; in (3) inserted second sentence regarding designation of agent by single owner and in two places in fifth sentence, after "corporation", inserted reference to single owner; and made minor changes in style.

*1989 Amendment:* In (1), before "lands", inserted "irrigable"; at beginning of (4) substituted "The board of commissioners shall choose one of the following methods of balloting" for "The balloting shall take place in the following manner"; inserted (4)(b) relating to a ballot that includes number of acres owned and number of votes being cast; and made minor changes in form and phraseology.

*1983 Amendment:* In second to last sentence of (3), inserted "or whenever the majority of the district board adopts a resolution allowing it".

*1981 Amendment:* Substituted "election" for "and school" and inserted "except that no registration of electors may be required" in (1)(a); deleted "residing in the state" from the end of (1)(b); and deleted "The election shall otherwise conform with the provisions of Title 13." as the last sentence in (3).

**Case Notes**

*Voting Power:* Under this section a domestic corporation is treated as an individual, and a guardian, executor, administrator, or trustee residing in this state is authorized to exercise the voting power for his ward, estate, or beneficiary. In re Gallatin Irrigation District, 48 M 605, 140 P 92 (1914).

**Attorney General's Opinions**

*Voter Qualifications — Irrigation District Election:* In order to vote in an irrigation district election under Title 85, ch. 7, part 17, an individual must be: (1) a landowner in the irrigation district; (2) a citizen of the United States; (3) 18 years of age or older; and (4) a resident of Montana and the county in which he offers to vote for at least 30 days. 42 A.G. Op. 47 (1987).

*Voting Procedure Based on Land Ownership Not Violative of "One Man, One Vote" Constitutional Provisions:* Montana's weighting of votes according to the size of land holdings in irrigation district elections does not violate the "one man, one vote" requirement of the U.S. Constitution. In upholding the weighted voting scheme in a similar case, the U.S. Supreme Court held in Salyer Land Co. v. Tulare Lake Basin Water Storage District, 410 US 719 (1973), that where the tax burden fell unequally according to the size of the land holdings, it was not unreasonable for the votes to be weighted according to the size of the land holdings. 42 A.G. Op. 47 (1987).

### 85-7-1712. Call for election.

**Compiler's Comments**

*2015 Amendment:* Chapter 49 near beginning substituted "an election" for "a special election" and substituted "The election must be called by resolution and conducted in accordance with Title 13, chapter 1, part 5" for "Such election shall be called, noticed, and conducted and the result thereof determined and declared in the manner provided in Title 13"; and made minor changes in style. Amendment effective November 4, 2015.

### 85-7-1713. Where documents to be filed and proceedings to be held.

**Compiler's Comments**

*1981 Amendment:* Substituted "in which the office of the board is established" for "containing the greater portion of said district" at the end of the section.

## Part 18

## Alteration and Determination of District Acreage

### 85-7-1802. Elimination of lands from district.

**Compiler's Comments**

*1997 Amendment:* Chapter 306 in (1) inserted "in conformance with 85-7-1803 through 85-7-1807"; inserted (2) allowing the owner of a tract of land 3 acres or smaller in size to petition for elimination of the tract from a district if the tract is in a district partially within or adjacent to a first-class city with a population of between 40,000 and 55,000 under the 1990 census and is within 5 miles of the exterior boundary of an incorporated city and is not served by any district, canal, system, facility, or other undertaking; and made minor changes in style. Amendment effective July 1, 1997, and terminates December 31, 1998.

*Termination:* Section 5, Ch. 306, L. 1997, provided that the 1997 amendments terminate December 31, 1998.

**Case Notes**

*Affirmation or Reversal of Disputed Petitions for Irrigation District Exclusion Based on Access to or Use of District Water:* During 1997 and 1998, 549 parties petitioned to exclude their land from the Missoula Irrigation District (MID). The MID disputed 19 petitions on appeal, and the Supreme Court examined each disputed petition, using the MID's survey map. Based on the best available evidence to uphold a Standing Master's conclusions of whether each petitioner had access to district water that it was using, had access to district water but was not using it, or had no access and was not using district water, the Supreme Court first affirmed exclusions for 11 properties that the MID's own map indicated the petitioner had no access and was not using district water. Of the remaining eight properties, the court reversed two exclusions on grounds that the property owners could feasibly obtain water from the district, even though the owners chose not to. Petitioners I-549 v. Missoula Irrigation District, 2005 MT 100, 326 M 527, 111 P3d 664 (2005).

*Proper Grant of Undisputed Irrigation District Exclusion Petitions Without Hearing:* During 1997 and 1998, 549 parties petitioned to exclude their land from the Missoula Irrigation District (MID). The District Court consolidated the petitions to determine issues of law and develop a procedure to dispose of each petition. Of the 549 petitions, 119 were heard, and all the petitions were granted. Although many petitioners did not appear for a hearing, only petitions objected to by the MID required a hearing, and 85-7-1846 (now terminated) provides that a petition be granted if no objection is filed within 15 days of filing a petition. Thus, the undisputed petitions were properly granted, and the Supreme Court limited its review to only 19 petitions disputed by the MID. Petitioners I-549 v. Missoula Irrigation District, 2005 MT 100, 326 M 527, 111 P3d 664 (2005).

*Irrigation District Has Standing to Challenge Constitutionality of Legislation Affecting Land Included in District:* The Legislature enacted legislation primarily directed at the Missoula Irrigation District (MID) allowing certain landowners to opt out of MID. MID challenged Geil's petition for removal from MID on grounds that the legislation was unconstitutional. Geil argued that MID did not have standing to challenge the legislation. The Supreme Court, applying the law as it existed in 1997, held that MID did have standing because under 85-7-1846 (now terminated) and this section, only MID could object to a petition for removal and further that if certain individuals were allowed to withdraw from MID, the remaining members would be subject to pay an increased amount to maintain MID. Geil v. Missoula Irrigation District, 2002 MT 269, 312 M 320, 59 P3d 398 (2002).

*Legislation Crafted to Apply Only to Missoula Irrigation District Upheld as Constitutional:* The Legislature enacted legislation primarily directed at the Missoula Irrigation District (MID) allowing certain landowners to opt out of MID because they had no access to MID's water. MID challenged Geil's petition for removal from MID on grounds that the legislation was unconstitutional as a violation of equal protection because the legislation was narrowly crafted to apply only to MID. The Supreme Court noted that even a cursory glance at the legislation's history indicated that the Legislature intended for the relaxed land exclusion process to apply only to Missoula. However, the Supreme Court noted that whether the legislation applied to the whole state or only to Missoula, the objective was to offer persons not served by MID relief from assessments, and the Supreme Court held that that was a legitimate governmental objective. Geil v. Missoula Irrigation District, 2002 MT 269, 312 M 320, 59 P3d 398 (2002).

*Notice to Irrigation District Constitutionally Sufficient:* The Legislature enacted legislation primarily directed at the Missoula Irrigation District (MID) allowing certain landowners to opt out of MID because they had no access to MID's water. MID challenged Geil's petition for removal from MID on grounds that the legislation was unconstitutional as a violation of due process because the notice contemplated by the statute was insufficient to provide a reasonable opportunity for MID and other individual members of MID to be heard. The Supreme Court held that because an individual was required to send a copy of the petition to withdraw from MID to MID prior to filing the petition with the lower court, the requirement for an opportunity to be heard was met and a due process violation did not exist. Geil v. Missoula Irrigation District, 2002 MT 269, 312 M 320, 59 P3d 398 (2002).

## 85-7-1805. Notice requirements.

### Compiler's Comments

*2015 Amendment:* Chapter 95 in (1) after "court" deleted "or judge thereof"; in (2) and (3) substituted "petitioner" for "clerk of said court"; in (2) substituted "time and place of" for "time and place fixed by the district court when and where" and at end substituted "30 days before the hearing" for "30 days prior to the time mentioned in said notice for said hearing"; in (3) in second sentence substituted "affidavit of publication" for "certificate of the clerk of the district court, under the seal of the court"; and made minor changes in style. Amendment effective March 18, 2015.

## 85-7-1808. Extension of boundaries and addition of lands.

### Case Notes

*When Land Considered Susceptible of Irrigation:* A party objected to the extension of an irrigation district's boundaries on grounds that the land proposed for inclusion did not meet the definition of irrigable land and was not legally susceptible of irrigation. The Supreme Court noted that 85-7-1808 allows inclusion of lands susceptible of irrigation by the works of the district, which means that the land can physically receive irrigation water from the district's works. The court declined to redefine the statutory language "susceptible of irrigation" to mean only land that meets the definition of irrigable land or that is legally susceptible of irrigation. The land in question had been irrigated for decades from the irrigation district works and was therefore susceptible of irrigation for the limited purposes of the petition to extend the district boundaries. In re Formation of E. Bench Irrigation District, 2009 MT 135, 350 M 309, 207 P3d 1097 (2009).

*Pleadings:* In a special proceeding for the extension of an irrigation district, the petition, the jurisdictional notices with proof of service, the objections filed by protestants, and the final judgment serve the same function as the complaint, summons, answer, and judgment in an ordinary civil action. In re Bitter Root Irrigation District, 67 M 436, 218 P 945 (1923).

*Record on Appeal:* A proceeding for the extension of an irrigation district is neither an equity case nor a proceeding of an equitable nature, and therefore the testimony need not be presented in the transcript by question and answer, otherwise made necessary by subdivision 3 of Rule VII of the Supreme Court. In re Bitter Root Irrigation District, 67 M 436, 218 P 945 (1923).

*Constitutionality:* This section, prescribing the procedure for the extension of an irrigation district already created, when the act is viewed as a whole and liberally construed as provided in section 85-1-103, is not open to the objection that it operates to deprive the nonconsenting landowner of his property without due process of law, in that while providing for a hearing, it makes no provision for granting relief to him. In re Crow Creek Irrigation District, 63 M 293, 207 P 121 (1922).

## 85-7-1809. Notice of hearing for addition of lands.

### Case Notes

*When Land Considered Susceptible of Irrigation:* A party objected to the extension of an irrigation district's boundaries on grounds that the land proposed for inclusion did not meet the definition of irrigable land and was not legally susceptible of irrigation. The Supreme Court noted that 85-7-1808 allows inclusion of lands susceptible of irrigation by the works of the district, which means that the land can physically receive irrigation water from the district's works. The court declined to redefine the statutory language "susceptible of irrigation" to mean only land that meets the definition of irrigable land or that is legally susceptible of irrigation. The land in question had been irrigated for decades from the irrigation district works and was therefore susceptible of irrigation for the limited purposes of the petition to extend the district boundaries. In re Formation of E. Bench Irrigation District, 2009 MT 135, 350 M 309, 207 P3d 1097 (2009).

## 85-7-1810. Hearing and order on petition for addition of lands.

### Case Notes

*Determination That Land Susceptible of Irrigation and Inclusion in Irrigation District Not De Facto Adjudication of Water Rights:* The District Court held that certain land proposed for an extension of irrigation district boundaries was susceptible of irrigation and could be included in the irrigation district. The decision was affirmed by the Supreme Court. However, the decision was limited to the issues in contention and did not constitute a de facto adjudication of water rights in violation of the exclusive jurisdiction of the Water Court to interpret and determine existing water rights. Neither the petition to expand the irrigation district boundaries nor a pending contract between the irrigation district and the Bureau of Reclamation could be used as a vehicle to circumvent the authority of the Water Court to determine the priority of water rights, the availability of irrigation water in a particular area, or the appropriateness of any attempts to change the point of diversion or place of use of irrigation water. A party opposed to the petition to extend irrigation district boundaries was still entitled to attempt to establish through the Water Court that irrigation of the land with district water was illegal or infringed on that party's senior water rights. In re Formation of E. Bench Irrigation District, 2009 MT 135, 350 M 309, 207 P3d 1097 (2009).

*Sufficient Opportunity for Objection to Extension of Irrigation District Boundaries:* In deciding whether to extend the boundaries of an irrigation district, the District Court conducted the required public hearing. Open A Ranch, which disagreed with the proposed expansion, appeared and objected, arguing for consolidation of the hearing with a pending water contract proceeding. The court deferred resolution of the petitions to extend until the request for consolidation was considered and denied. The court then set a schedule for discovery and briefing. After discovery, both parties filed motions for summary judgment. Open A Ranch filed a consolidated answer to the extension petitioners' motions for summary judgment and a response brief to the petitioners' answer to Open A Ranch's motion for summary judgment. Open A Ranch attempted in each brief to convince the court that the petitions to extend district boundaries should be denied. The court then held a hearing on all pending motions, allowing Open A Ranch to argue extensively for denial of the extension petitions. The Supreme Court concluded that the District Court provided Open A Ranch with ample opportunity to object to the petition for boundary extension. In re Formation of E. Bench Irrigation District, 2009 MT 135, 350 M 309, 207 P3d 1097 (2009).

*When Land Considered Susceptible of Irrigation:* A party objected to the extension of an irrigation district's boundaries on grounds that the land proposed for inclusion did not meet the definition of irrigable land and was not legally susceptible of irrigation. The Supreme Court noted that 85-7-1808 allows inclusion of lands susceptible of irrigation by the works of the district, which means that the land can physically receive irrigation water from the district's works. The court declined to redefine the statutory language "susceptible of irrigation" to mean only land that meets the definition of irrigable land or that is legally susceptible of irrigation. The land in question had been irrigated for decades from the irrigation district works and was therefore susceptible of irrigation for the limited purposes of the petition to extend the district boundaries. In re Formation of E. Bench Irrigation District, 2009 MT 135, 350 M 309, 207 P3d 1097 (2009).

*Statutory Time Period for Filing Appeal of Petition for Adding Lands to Irrigation District Superseded by Rules of Appellate Procedure:* The District Court dismissed a petition to extend the boundaries of an irrigation district. One of the parties appealed, but the other party contended that the appeal should be dismissed because it was not filed within the 10-day statutory period set out in 85-7-1810. The Supreme Court disagreed. Under Art. VII, sec. 2, Mont. Const., the Supreme Court has rulemaking authority to govern the appellate process. The court established a 30-day period for filing civil appeals in Rule 4, M.R.App.P. (Title 25, ch. 21), so the statutory timeframe in 85-7-1810 has been superseded. Because the appeal in this case was filed within the 30-day period, the appeal was timely. In re Formation of E. Bench Irrigation District, 2008 MT 210, 344 M 184, 186 P3d 1266 (2008).

## 85-7-1811. Procedure to correct errors and omissions in orders or decrees.

### Compiler's Comments

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

## 85-7-1837. Limitation on irrigable acreage — special election or petition.

### Compiler's Comments

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 1, Ch. 198, L. 2023. Amendment effective October 1, 2023.

*2015 Amendment:* Chapter 49 in (2)(a) before "election" deleted "special". Amendment effective November 4, 2015.

*Saving Clause:* Section 3, Ch. 87, L. 1995, was a saving clause.

## 85-7-1845. Appeal to supreme court.

### Case Notes

*Collateral Attack:* Where plaintiff had not appealed from an order establishing an irrigation district, his action to enjoin a sale of its bonds on the ground that the order was void for failure to give accurate descriptions of the lands included in it was in the nature of a collateral attack maintainable only if the invalidity of the order on that ground appeared from its face. Walden v. Bitter Root Irrigation District, 68 M 281, 217 P 646 (1923).

*Appeal From Part of Judgment:*

An exception to the general rule that an appeal does not lie from a part of the judgment is that class of cases where an issue distinct, entire, and complete is formed between some of the parties to an action and upon which issue a final judgment is given affecting only the interests and rights of the parties to that issue. In re Bitter Root Irrigation District, 67 M 436, 218 P 945 (1923), explained in Wills v. Morris, 100 M 504, 50 P2d 858 (1935).

In a proceeding, special in its nature, for the extension of an irrigation district, in which an objecting landowner appeared and protested against the inclusion of his lands in the proposed extension and their exclusion was ordered, the appeal of petitioners from the order of exclusion was not subject to dismissal as from a portion of the judgment only, the issue between the protestant and the petitioners having been from the whole judgment so far as protestant and petitioners were concerned. In re Bitter Root Irrigation District, 67 M 436, 218 P 945 (1923), explained in Wills v. Morris, 100 M 504, 50 P2d 858 (1935).

## Part 19
## Operation of Districts

### Part Case Notes

*Lack of NPDES Permits — Motion by Irrigation Districts to Intervene as of Right Properly Denied:* In 1987, Congress added section 518(e) to the Clean Water Act, which authorized the Environmental Protection Agency to permit Indian tribes to be "treated as a state" (TAS) for purposes of promulgating water quality standards. The Flathead Joint Board of Control, two irrigation districts, and four individual irrigators who owned fee land on the reservation sought to intervene as of right, contending that the imposition of tribal water quality standards would violate their civil rights by subjecting them to tribal jurisdiction and would depress the value of their property. Because the intervenors held no National Pollutant Discharge Elimination System (NPDES) permits, they could not be subject to NPDES enforcement proceedings. TAS status does not confer enforcement authority on the tribes; it only allows the tribes to set the standards. Even if the tribes sought enforcement authority, NPDES permits would still be issued by the federal government and enforced in federal, not tribal, courts. Further, a speculative and purely economic interest did not create a protectable interest in litigation concerning a statute that regulates environmental rather than economic interests. Because the transfer of the right to establish water quality standards from the state to the tribes would have no immediate or foreseeable, demonstrable effect on the proposed intervenors, the application to intervene as of right was properly denied. Mont. v. U.S. Envtl. Protection Agency, 137 F3d 1135 (9th Cir. 1998), certiorari denied, 142 L Ed 2d 227, 119 S Ct 275 (1998).

### 85-7-1901. Board plan for acquisition and construction.

### Compiler's Comments

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### Case Notes

*Acquisition of Rights to Use Water:* Since an irrigation district is not a "subdivision" of the state within the meaning of Art. XIII, sec. 1, 1889 Mont. Const., providing that neither county, city, town, municipality, "nor other subdivision of the state" shall become a shareholder in or a joint owner with a company or corporation, its Board of Commissioners may acquire shares in a reservoir company or purchase rights to the use of water, as authorized by this section. Thaanum v. Bynum Irrigation District, 72 M 221, 232 P 528 (1925).

*Tax Levies:* The taxes which an irrigation district is authorized to levy upon the lands included in the district for the purpose of paying for property acquired are in the nature of special assessments as distinguished from general taxes, and by the expenditure of money authorized by this section, it obtains an equivalent in the value of the property purchased, hence does not come within the prohibition of Art. XIII, sec. 1, 1889 Mont. Const. Thaanum v. Bynum Irrigation District, 72 M 221, 232 P 528 (1925).

### 85-7-1902. Management of district by board.

**Compiler's Comments**

*1983 Amendment:* Near end of second sentence of (4), substituted "current and delinquent taxes and assessments and other financial obligations owing the district" for "taxes and assessments delinquent for not to exceed 2 years".

### 85-7-1904. Acquisition of water and waterworks by board.

**Compiler's Comments**

*2001 Amendment:* Chapter 125 in (1)(c) inserted reference to Title 70, chapter 30; and made minor changes in style. Amendment effective October 1, 2001.

*Interim Study Bill — Eminent Domain:* Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

*1989 Amendment:* In (1)(c)(ii) inserted "or subdistrict"; near beginning of (2) substituted "may contract" for "shall have the privilege, if desired, to contract"; in (3), near middle of first sentence, substituted "may not be entered into by the district" for "is final or binding upon the district, and no sum may be paid for such purchase, lease, or contract" and at end inserted clause relating to purchase, lease, or contract benefiting subdistrict; and made minor changes in phraseology. Amendment effective April 4, 1989.

*1987 Amendment:* In (3), near middle of first sentence after "$150,000", inserted "or 25% of the district's annual operation and maintenance budget, whichever is greater".

*1983 Amendment:* Near middle of (3) increased from $125,000 to $150,000 the amount to which an irrigation board may bind an irrigation district without the consent of the landowners in the district.

*1981 Amendment:* Increased the maximum nonwritten consent contract from $80,000 to $125,000 and made minor changes in phraseology near the middle of (3).

**Case Notes**

*Maintenance Done by United States:* Subsection (3) does not prevent an irrigation district from levying an assessment sufficient to reimburse the United States for maintenance work necessarily done by it. U.S. v. Fort Belknap Irrigation District, 197 F. Supp. 812 (D.C. Mont. 1961).

### 85-7-1906. Relations with United States.

**Case Notes**

*Maintenance Done by United States:* Section 85-7-1904(3) does not prevent an irrigation district from levying an assessment sufficient to reimburse the United States for maintenance work necessarily done by it. U.S. v. Fort Belknap Irrigation District, 197 F. Supp. 812 (D.C. Mont. 1961).

### 85-7-1907. Board power to provide sufficient water.

**Compiler's Comments**

*1989 Amendment:* In two places inserted references to subdistrict; and made minor changes in phraseology. Amendment effective April 4, 1989.

### 85-7-1908. Board powers over district property.

**Compiler's Comments**

*1989 Amendment:* In two places inserted references to subdistrict; and in (2), after "United States", deleted "insofar as the same may be needed"; and made minor changes in phraseology. Amendment effective April 4, 1989.

### 85-7-1910. Board power to dispose of district property.

**Compiler's Comments**

*1997 Amendment:* Chapter 42 in (1), in first sentence after "owners of lands within the subdistrict", deleted "to" and in last sentence, before "sufficient", deleted "good and"; and made minor changes in style. Amendment effective March 12, 1997.

*1989 Amendment:* In (1), near beginning and at end of first sentence, inserted clause referring to leased property benefiting subdistrict, in second sentence, after "district", inserted reference to subdistrict and after "declare" inserted "the availability of the lease", and near end of third sentence inserted clause relating to lease substantially benefiting subdistrict; and made minor changes in punctuation and phraseology. Amendment effective April 4, 1989.

### 85-7-1911. Apportionment of water by board.

**Compiler's Comments**

*1989 Amendment:* In (1) inserted reference to subdistrict; at end of (3) inserted clause relating to sale for benefit of subdistrict; and made minor changes in phraseology. Amendment effective April 4, 1989.

**Case Notes**

*Punitive Damages for Intentional Denial of Water:* This section's provision that "the board of commissioners shall apportion the water for irrigation among the lands in the district in a just and equitable manner" sets out a statutory duty that was clearly violated when defendant irrigation district, through two individual (defendant) employees of the district, failed to provide water to plaintiffs. The failure was arguably intentional and therefore unjustifiable. Therefore, it was impliedly malicious and thus constituted justification for punitive damages. Dvorak v. Huntley Project Irrigation District, 196 M 167, 639 P2d 62, 38 St. Rep. 2176 (1981).

*Sovereign Immunity Denied:* Irrigation district, a state government entity, was subject to punitive damages in tort action where action arose in and was limited to summer of 1974. The 1972 Montana Constitution provided that the state, counties, cities, towns, and all other local governmental entities have no immunity from suit for injury to person or property except as may be specifically provided by law by a two-thirds vote of each house of the Legislature, and the Legislature did not provide immunity for certain governmental entities until 1977 when it enacted 2-9-104 (now repealed) and 2-9-105, which cannot be retroactively applied. Dvorak v. Huntley Project Irrigation District, 196 M 167, 639 P2d 62, 38 St. Rep. 2176 (1981).

*Injunction to Prevent Diversion Outside District:* In a proceeding to enjoin water users in an irrigation district from interfering with the right of a like user, a plaintiff, to convey water from the district to lands owned by him outside the district, where plaintiff in so diverting water was injuring owners within the district and depriving them of water in which they had a vested right, the court correctly enjoined him, without passing on his right of assignment because none of his land in the district was unirrigated and there was nothing for him to assign within the meaning of this section. Koch v. Colvin, 110 M 594, 105 P2d 334 (1940).

### 85-7-1912. Exchange of water by board.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

**Case Notes**

*Historic Recognition of Right to Exchange or Substitute Water Upheld:* In a proceeding to establish an irrigation district organized to assume the operation and maintenance of an irrigation project from the State and its predecessors in interest, the Supreme Court found that the District Court did not err in holding that the newly organized district had an obligation to provide certain landowners with water from the Bitterroot River free of charge in exchange for water from Skalkaho Creek. The District Court found that the State and its predecessors in interest had for 81 years recognized the right of each of those exchange users to the other water. Thus, the Supreme Court found the existence of an obligation to provide exchange waters and further found that the applicable statutes contemplated exactly what the District Court had ordered. In re Petition for Irrigation District in Ravalli County, 209 M 218, 680 P2d 944, 41 St. Rep. 658 (1984).

### 85-7-1913. Board to maintain records.

**Compiler's Comments**

*2001 Amendment:* Chapter 483 in (1) at end of first sentence and near beginning of second sentence after "department of" substituted "administration" for "commerce"; and made minor changes in style. Amendment effective July 1, 2001.

*1995 Amendment:* Chapter 179 in (1), at end of second sentence, deleted "and examine them as provided by law for the examination of the affairs of county officers"; in (2) substituted "books and records of irrigation districts are subject to audit in accordance with 2-7-503" for "department of commerce shall notify the secretaries of the districts of the time of presenting the books and records at the courthouse for examination"; and made minor changes in style. Amendment effective July 1, 1995.

*1983 Amendment:* Substituted references to department of commerce for references to department of administration.

*1981 Amendment:* Substituted "department of administration" for "department of community affairs" in (1) and (2).

### 85-7-1921. Distribution system defined.

**Compiler's Comments**

*1989 Amendment:* Near end inserted reference to subdistricts; and made minor changes in phraseology. Amendment effective April 4, 1989.

### 85-7-1922. Regulation, supervision, apportionment, and control of water distribution.

**Compiler's Comments**

*1993 Amendment:* Chapter 136 inserted (2) clarifying irrigation district requirements regarding internal delivery systems and division of water after delivery; and made minor changes in style. Amendment effective March 19, 1993.

**Case Notes**

*No Negligence by Irrigation District for Failure to Warn of Unforeseeable Flood:* Plaintiffs' property was damaged by an unprecedented flood caused by an ice jam on the Clark Fork River. Plaintiffs alleged that the local irrigation district was liable for breaching its duty to construct and maintain an irrigation system that would protect the property and for failing to warn of the flooding conditions to allow plaintiffs the opportunity to protect their property. The District Court held that the irrigation district had no duty to prevent the flood or to warn of the impending natural disaster, and the Supreme Court affirmed. The first element that plaintiffs must establish in a negligence action is the existence of a duty of care, and the measure of a duty of care owed is the scope of the risk that the negligent conduct foreseeably entails. Thus, the primary factor in determining whether the irrigation district owed a duty of care was whether it was foreseeable, as a matter of law, that the district's acts or omissions would pose a risk of injury to plaintiffs. Here, substantial evidence supported the conclusion that the risk that flooding would damage plaintiffs' property was unforeseeable, so the district had no duty to erect or maintain flood control structures to prevent the unforeseeable event. The district also exercised reasonable care in the maintenance of the irrigation system that was in place. Further, plaintiffs failed to advance any applicable authority that would impose upon the district a duty to warn of the unforeseeable flood because mere knowledge of the dangerous situation, of which plaintiffs themselves had become aware the night of the flood, did not impose a legal duty to warn. Gaudreau v. Clinton Irrigation District, 2001 MT 164, 306 M 121, 30 P3d 1070 (2001), following Estate of Strever v. Cline, 278 M 165, 924 P2d 666 (1996).

*Importance of Control of Distribution by District:* The most important function of an irrigation district is the control, to the mutual advantage of all the members, of the irrigation system. Water rights remain with the private appropriator, but control lies exclusively with the district. In re Establishment & Organization of Ward Irrigation District, 216 M 315, 701 P2d 721, 42 St. Rep. 824 (1985).

*Purpose of Section:* This section does two things: first, it gives an irrigation district the exclusive right to regulate and control its distribution system; and second, it prohibits a district from controlling its distribution system in a manner that detrimentally affects water rights over which the district has no control. In re Establishment & Organization of Ward Irrigation District, 216 M 315, 701 P2d 721, 42 St. Rep. 824 (1985).

*Relationship Between District Rights and Nondistrict Rights:* A portion of the Fosses' ranch is included in the irrigation district and a portion is not. The part of the ranch not in the district has water rights, which precede the district rights, in two creeks, which during part of the year spill into the district's system. Further, a segment of the district's ditch follows the natural channel of one of the creeks. The Fosses habitually have conveyed their nondistrict water through the ditch, and the district has delivered water to Foss land not included within the district through a district headgate. In 1979, a dispute arose over control of the headgate. The District Court ruled that the Fosses had no legal right to use of the district's distribution system. The Supreme Court reversed and remanded the case for further proceedings in accordance with its ruling that the Fosses may convey their nondistrict water rights to the district and that the district has the obligation to deliver that water. If the ditch is too small to service the district and other water rights, the Fosses should not be required to bear any burden of expansion. In re Establishment & Organization of Ward Irrigation District, 216 M 315, 701 P2d 721, 42 St. Rep. 824 (1985).

### 85-7-1924. Interference with commissioners or distribution system — penalty.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 85-7-1925. Installing and assessing costs of distributing or measuring devices.

**Case Notes**

*Applicability of Section:* This section applies only to lands included within an irrigation district. In re Establishment & Organization of Ward Irrigation District, 216 M 315, 701 P2d 721, 42 St. Rep. 824 (1985).

### 85-7-1932. Noninterference with navigation or water rights.

**Compiler's Comments**

*2001 Amendment:* Chapter 125 in last sentence inserted reference to Title 70, chapter 30; and made minor changes in style. Amendment effective October 1, 2001.

*Interim Study Bill — Eminent Domain:* Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

### 85-7-1941. Contracts.

**Compiler's Comments**

*1981 Amendment:* In (1), substituted clause requiring works over $5,000 to be by contract for clause permitting works to be done by the district, private owners, or contract; substituted "provide surveys" for "employ competent engineers to make surveys" near the beginning of (2).

### 85-7-1951. United States contracts — loans, sinking fund, and investment.

**Compiler's Comments**

*1987 Amendment:* Substituted last sentence concerning Board's power and authority to invest surplus in sinking fund in legal investments for "The board shall also have the power and authority to invest any surplus in the sinking fund herein provided for in interest-bearing securities of the United States or of the states approved by the secretary of the interior and to deposit said securities with the federal reserve bank or branch thereof."

### 85-7-1953. Amount owed United States — lien and special tax.

**Compiler's Comments**

*2007 Amendment:* Chapter 93 at beginning of second sentence deleted "Subject to 15-10-420" and near middle after "assessment" inserted "authorized under 85-7-2104"; and made minor changes in style. Amendment effective March 30, 2007.

*1999 Amendment:* Chapter 584 at beginning of second sentence inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

*Severability:* Section 172, Ch. 584, L. 1999, was a severability clause.

*Retroactive Applicability:* Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

### 85-7-1956. Majority vote or petition necessary to contract with United States.

**Compiler's Comments**

*1983 Amendment:* In first sentence, inserted clause beginning with "upon approval" providing for an election to ratify authority to contract.

**Case Notes**

*Member Approval and Judicial Review of Contracts — Unnecessary for Water Use Agreement — Injunction Dissolved:* A group of irrigation districts entered into a water use agreement with the Confederated Salish and Kootenai Tribes and the United States. A group of landowners who claimed to possess some of the irrigation districts' water rights filed suit against the irrigation districts. The group claimed that the irrigation districts were required to seek member approval and judicial review prior to entering into the water use agreement. The District Court issued an injunction to prevent the irrigation districts from entering into the agreement or any similar agreement, and the irrigation districts appealed. After reviewing the plain language of the statutes, the Supreme Court reversed and dissolved the injunction based on its conclusion that only contracts with the United States for a loan of money require member approval and judicial review. W. Mont. Water Users Ass'n, LLC v. Mission Irrigation District, 2013 MT 92, 369 Mont. 457, 299 P.3d 346.

### 85-7-1957. United States contracts — court approval required.

**Case Notes**

*Member Approval and Judicial Review of Contracts — Unnecessary for Water Use Agreement — Injunction Dissolved:* A group of irrigation districts entered into a water use agreement with the Confederated Salish and Kootenai Tribes and the United States. A group of landowners who claimed to possess some of the irrigation districts' water rights filed suit against the irrigation districts. The group claimed that the irrigation districts were required to seek member approval and judicial review prior to entering into the water use agreement. The District Court issued an injunction to prevent the irrigation districts from entering into the agreement or any similar agreement, and the irrigation districts appealed. After reviewing the plain language of the statutes, the Supreme Court reversed and dissolved the injunction based on its conclusion that only contracts with the United States for a loan of money require member approval and judicial review. W. Mont. Water Users Ass'n, LLC v. Mission Irrigation District, 2013 MT 92, 369 Mont. 457, 299 P.3d 346.

*Determination That Land Susceptible of Irrigation and Inclusion in Irrigation District Not De Facto Adjudication of Water Rights:* The District Court held that certain land proposed for an extension of irrigation district boundaries was susceptible of irrigation and could be included in the irrigation district. The decision was affirmed by the Supreme Court. However, the decision was limited to the issues in contention and did not constitute a de facto adjudication of water rights in violation of the exclusive jurisdiction of the Water Court to interpret and determine existing water rights. Neither the petition to expand the irrigation district boundaries nor a pending contract between the irrigation district and the Bureau of Reclamation could be used as a vehicle to circumvent the authority of the Water Court to determine the priority of water rights, the availability of irrigation water in a particular area, or the appropriateness of any attempts to change the point of diversion or place of use of irrigation water. A party opposed to the petition to extend irrigation district boundaries was still entitled to attempt to establish through the Water Court that irrigation of the land with district water was illegal or infringed on that party's senior water rights. In re Formation of E. Bench Irrigation District, 2009 MT 135, 350 M 309, 207 P3d 1097 (2009).

### 85-7-1961. Districts organized prior to certain date — authority to continue electrical power operations.

**Compiler's Comments**

*1983 Amendment:* In (2), inserted "subsection (1) of" before "this section"; and inserted (3) authorizing irrigation districts or projects to construct, install, operate, and maintain facilities to generate, transmit, and sell electricity using the water power potential of irrigation projects or federally owned water impoundment projects where generation facilities have not been installed and licensed.

### 85-7-1973. Amount owed state — lien and special tax.

**Compiler's Comments**

*2007 Amendment:* Chapter 93 at beginning of second sentence deleted "Subject to 15-10-420" and near middle after "assessment" inserted "under 85-7-2104"; and made minor changes in style. Amendment effective March 30, 2007.

*1999 Amendment:* Chapter 584 at beginning of second sentence inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

*Severability:* Section 172, Ch. 584, L. 1999, was a severability clause.

*Retroactive Applicability:* Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

### 85-7-1974. Majority vote or petition necessary to contract with the state.

**Compiler's Comments**

*2015 Amendment:* Chapter 49 in (1)(a) substituted "in accordance with Title 13, chapter 1, part 5, and 85-7-1710" for "as prescribed in 85-7-1710"; and made minor changes in style. Amendment effective November 4, 2015.

## Part 20
## Indebtedness, Bonds, and Bankruptcy

**Part Case Notes**

*Effect of Confirmation:*

In an action to have a contract of sale of lands included in an irrigation district which had issued bonds reformed and liens against the lands arising from the bond issues canceled, on the ground of fraud in the creation of the district, where most of the bonds had been issued before plaintiffs made the purchase and no appeal had been taken from the judgment of the District Court confirming their validity, their legality cannot, under this section, be called in question thereafter, the bonds then constituting a lien upon all the lands in the district. Krueger v. Morris, 110 M 559, 107 P2d 142 (1940).

Under 85-7-2012 through 85-7-2018 (85-7-2016 through 85-7-2018 now repealed), a decree confirming bond proceedings, from which no appeal was taken, could not be set aside in an independent equitable action on the ground that the court exceeded its power in deciding that the tax levy was authorized by 85-7-2012 through 85-7-2015. Midland Dev. Co. v. Cove Irrigation District, 102 M 479, 58 P2d 1001 (1936).

Upon its creation an irrigation district becomes absolute as an entity and has the power of issuing bonds against the lands embraced in its confines for the purpose of carrying out the provisions of the act under which created, and if the Board of Commissioners orders bonds issued and no appeal is taken from the judgment of the District Court confirming and ratifying the proceedings of the Board, the judgment cannot thereafter be called in question in the absence of allegation and proof of fraud. Drake v. Schoregge, 85 M 94, 277 P 627 (1929).

In the absence of fraud in the proceedings, the order of the District Court establishing the district and that directing the issuance of bonds are, unless appeals are taken from the orders within the prescribed time, res judicata and constitute an estoppel against thereafter litigating the validity of district bonds. O'Neill v. Yellowstone Irrigation District, 44 M 492, 121 P 283 (1912).

*Effect of Failure to Appeal:* Landowners and mortgagees of land in district, who did not appeal from order and decree ratifying, approving, and confirming issuance of bonds for irrigation district under 85-7-2012 through 85-7-2018 (85-7-2016 through 85-7-2018 now repealed), could not question a decree in a suit to enjoin payment of bonds and collection of taxes for payment thereof. Tomich v. Union Trust Co., 31 F2d 515 (9th Cir. 1929).

*Effect of Failure to Object or Contest:* Landowner, whose land was described in a petition for organization of irrigation district under 85-7-104 through 85-7-109, 85-7-1501, 85-7-1502, and 85-7-1504(2), and for issuance of bonds under 85-7-2012 through 85-7-2018 (85-7-2016 through 85-7-2018 now repealed), and who had notice of proceedings but did not appear at hearing and object to inclusion of his land, could not question court's conclusion collaterally in a suit to enjoin collection or payment of bonds issued and to enjoin collection of taxes for payment. Tomich v. Union Trust Co., 31 F2d 515 (9th Cir. 1929).

*Appearance by Objectors:* In a proceeding by the Commissioners of an irrigation district to secure confirmation of a contemplated contract with the United States to take over irrigation works constructed by the federal government and to raise the necessary funds by assessments upon the irrigable lands in the district, verified objections of objecting owners, which in effect were answers by way of confession and avoidance, were properly treated as answers. In re Fort Shaw Irrigation District, 81 M 170, 261 P 962 (1927).

*Questions Considered on Appeal:* In a proceeding for the confirmation of a resolution passed by the Commissioners of an irrigation district for the execution of a contract with the United States to take over federal irrigation works, instituted pursuant to the provisions of this section, the question whether nonirrigable lands were subject to the contemplated tax levy was not one presented for determination and may not be considered on appeal, it being presumed that when the levy is made only irrigable lands will be included within the assessment. In re Fort Shaw Irrigation District, 81 M 170, 261 P 962 (1927).

*Pleading:* Plaintiff's allegations that there existed an encumbrance on land within an irrigation district by virtue of a bond issue and that such issue had been regularly made, levied, and issued were mere legal conclusions. To show the validity of the bond issue, proper pleading required a showing that the District Court had made an order of confirmation, which, if made, may be alleged as "having been duly given and made", under section 93-3806, R.C.M. 1947 (since repealed). Clark v. Demers, 78 M 287, 254 P 162 (1927).

## 85-7-2001. Limitations on debt-incurring power.

**Compiler's Comments**

*1989 Amendment:* At end of (2) substituted "subsection (4)" for "subsection (2)"; inserted (3) relating to limitation on debt for subdistrict; in (4)(b) substituted "limitations of subsections (2) and (3)" for "limitation of subsection (1)"; in (4)(c) substituted "limitations of subsections (1) through (3) do not apply" for "limitation of subsection (1) does not apply"; in (4)(d) substituted "limitations of subsections (1) through (3) do not apply" for "limitation of subsection (1) does not apply" and at end inserted clause relating to obligations issued to government entities; inserted (4)(d)(i) relating to legislatively authorized loan programs; inserted (4)(d)(ii) relating to legislatively authorized projects; in (4)(e) substituted reference to subsections (1) through (3) for reference to subsection (1); deleted former (4) that read: "(4) The limitation of subsection (1) does not apply to state or federal bonds used for a project authorized by the legislature"; and made minor changes in phraseology. Amendment effective April 4, 1989.

*1987 Amendment:* Inserted (4) providing exemption from debt limitation for state or federal bonds for project authorized by Legislature.

*1981 Amendment:* Increased 15% to 18.75% in (1) and (2)(b); and increased 10% to 12.5% in (2)(b).

*Validation:* Section 64, Ch. 614, L. 1981, provided: "Notwithstanding any provisions of this act, any outstanding indebtedness or bond issue on January 1, 1982, of any governmental subdivision is not invalidated because of any changes in the taxable valuation of the subdivision due to removal of automobiles and trucks having a rated capacity of three-quarters of a ton or less from the tax base."

*Effect of 1981 Amendment:* The primary purpose of Ch. 614, L. 1981, was to replace the system of taxation of automobiles and light trucks with a fee system. With the adoption of the fee system, automobiles and light trucks are no longer taxable property. The resulting loss of taxable valuation has a direct effect on the amount of indebtedness a political subdivision can incur. Thus it was necessary in Ch. 614 to increase the percentage of taxable valuation used as a limitation on indebtedness to offset the loss of taxable valuation attributable to automobiles and light trucks.

**Case Notes**

*Federal Court Required to Follow Montana Supreme Court Decisions:* The federal courts, in determining whether bonds issued by Montana irrigation district were general obligations of the district, were required to follow decisions of the Supreme Court of Montana holding that such bonds, issued pursuant to Montana statutes, were not general obligations of irrigation district but merely a charge against land within the district. Toole County Irrigation District v. Moody, 125 F2d 498 (9th Cir. 1942).

*Subsequent Agreement Void as to Making Bonds General Obligations of District:* Recovery could not be had against district in action on irrigation district bonds on ground that bonds, even if not general obligations of district when issued, had become so by reason of a subsequent agreement, where action was not based on the agreement and agreement, insofar as it purported to make the bonds general obligations of district, was void. Toole County Irrigation District v. Moody, 125 F2d 498 (9th Cir. 1942).

## 85-7-2011. Exemption of irrigation district property.

**Compiler's Comments**

*1987 Amendment:* Near end of section, after "municipal purposes", inserted remainder of sentence prohibiting the assessment of costs for improvement or maintenance district created under Business Improvement District Act.

**Case Notes**

*Subdivision of State:* Although the authority of the Legislature to declare by this section that irrigation districts shall not be taxed for state, county, or municipal purposes may be questioned, there is no doubt that the Legislature was dealing with a district as a part of the state itself rather than an enterprise fostered by the state. Crow Creek Irrigation District v. Crittenden, 71 M 66, 227 P 63 (1924), explained in Buffalo Rapids Irrigation District v. Colleran, 85 M 466, 279 P 369 (1929).

**Attorney General's Opinions**

*Irrigation District Property:* Irrigation district property that is not related to or used in irrigation work is not exempt from taxation under the general irrigation district exemptions in 15-6-201 and 85-7-2011. 41 A.G. Op. 17 (1985).

### 85-7-2012. Purposes for which bonds may be issued.

**Compiler's Comments**

*1989 Amendment:* In introductory clause, before "coupon bonds", inserted "fully registered bonds or negotiable"; in (5), before "bonds", deleted "negotiable coupon"; in (6) inserted "overdue claims for interest"; inserted (7) relating to establishment of a reserve for payment of bond principal and interest; and made minor changes in phraseology. Amendment effective April 4, 1989.

**Case Notes**

*Effect of confirmation:* Under 85-7-2012 through 85-7-2018 (85-7-2016 through 85-7-2018 now repealed), a decree confirming bond proceedings, from which no appeal was taken, could not be set aside in an independent equitable action on the ground that the court exceeded its power in deciding that the tax levy was authorized by 85-7-2012 through 85-7-2015. Midland Dev. Co. v. Cove Irrigation District, 102 M 479, 58 P2d 1001 (1936).

### 85-7-2013. Majority vote, petition, and protest requirements.

**Compiler's Comments**

*2021 Amendment:* Chapter 495 in (1)(b) in two places substituted "a majority in acreage" for "at least 60%, in number and acreage"; inserted (1)(d) regarding the adoption of a resolution approving special taxes or assessments to repay bonds; and made minor changes in style. Amendment effective May 12, 2021.

*2015 Amendment:* Chapter 49 in (1)(a) after "conducted" inserted "in accordance with Title 13, chapter 1, part 5, with votes cast and counted"; and made minor changes in style. Amendment effective November 4, 2015.

*2011 Amendment:* Chapter 164 inserted (1)(a) regarding majority vote for approval of bonds; in (1)(b) and (1)(c) at beginning inserted "receipt of"; inserted (3) regarding ownership of acreage in district; and made minor changes in style. Amendment effective April 8, 2011.

*1989 Amendment:* In (1) inserted clause relating to bonds issued on behalf of subdistrict; at end of (1)(a) and (1)(b) inserted clause referring to bonds or contract relating to subdistrict; in (2), at end of first sentence after "board", deleted "of commissioners"; and made minor changes in form and phraseology. Amendment effective April 4, 1989.

**Case Notes**

*Maintenance Done by United States:* This section is clearly limited to authorization for the original bond issue or contract with the United States and does not preclude the district from levying assessments to reimburse the United States for maintenance work necessarily done by it. U.S. v. Fort Belknap Irrigation District, 197 F. Supp. 812 (D.C. Mont. 1961).

*Effect of Federal Court's Application of Montana Decisions:* The federal courts, in determining whether bonds issued by Montana irrigation district constituted general obligations of district, were required to give effect to decisions of Montana Supreme Court holding that bonds, which had been issued prior to decisions, were not general obligations of district as against contention that such action would amount to giving the decisions a "retroactive" effect. Such application did not constitute an "impairment of obligation of contract", since the court's decision was merely that the obligation allegedly impaired did not exist, notwithstanding that those decisions were in conflict with earlier decisions of the Montana court. Toole County Irrigation District v. Moody, 125 F2d 498 (9th Cir. 1942).

*Extent of Liability:* Bonds issued by an irrigation district are not a general obligation of the district but are a charge against the lands within the district. State ex rel. Malott v. Bd. of County Comm'rs, 89 M 37, 296 P 1 (1930), overruling Cosman v. Chestnut Valley Irrigation District, 74 M 111, 238 P 879, 40 ALR 1344 (1925).

*Remedy for Enforcement:* While the law under which public bonds are issued becomes as much a part of the contract with the bondholders as though incorporated in the bonds, the Legislature may by subsequent statutes change the remedy given them to enforce payment, provided the new remedy is as efficacious as the one afforded under the original act. Otherwise the obligations of the contract would be impaired contrary to the provisions of Art. I, sec. 10, U.S. Const. State ex rel. Malott v. Bd. of County Comm'rs, 89 M 37, 296 P 1 (1930).

*Refunding Bonds:* In June 1929, proceedings for the refunding of irrigation district bonds were held under section 7210, R.C.M. 1921, as amended by Ch. 157, L. 1923, providing for the authorization of such bonds in the mode prescribed by section 7226, R.C.M. 1921, as amended by the same chapter. Section 7210, R.C.M. 1921, was amended by Ch. 185, L. 1929, which did not become effective until July 1, 1929. Since section 7226, R.C.M. 1921, was repealed by Ch.

155, L. 1929, and was not in effect when the bonds were authorized, the repeal of section 7226, incorporated by reference in section 7210, did not affect the latter section and the injunction was properly denied in an action to enjoin issuance of bonds. Gustafson v. Hammond Irrigation District, 87 M 217, 287 P 640 (1930).

*Effect of Final Judgment:* Upon its creation an irrigation district becomes absolute as an entity and has the power of issuing bonds against the lands embraced in its confines for the purpose of carrying out the provisions of the act under which it was created, and if the Board of Commissioners orders bonds issued and no appeal is taken from the judgment of the District Court confirming and ratifying the proceedings of the Board, the judgment cannot thereafter be called in question in the absence of allegation and proof of fraud. Drake v. Schoregge, 85 M 94, 277 P 627 (1929).

*Collection of Delinquent Assessments:* In the collection of tax or assessment levied by an irrigation district for the payment of the interest on bonds issued by it, the County Treasurer is not authorized to seize and sell personal property of a delinquent owner of lands within the district but must proceed in the manner prescribed by Ch. 173, part III, R.C.M. 1921, as amended by Ch. 96, L. 1923 (15-16-101, et seq.), for the collection of state and county taxes made a lien upon real property. State ex rel. Spokane & E. Trust Co. v. Nicholson, 74 M 346, 240 P 837 (1925).

## 85-7-2014. Procedure after election, petition, or resolution filed.

### Compiler's Comments

*2021 Amendment:* Chapter 495 near beginning after "pursuant to 85-7-2013" inserted "or the adoption of a resolution approving the levy of a special tax or assessment under 85-7-2048,"; in (1) at end after "petition" inserted "or resolution adopted pursuant to 85-7-2048"; and made minor changes in style. Amendment effective May 12, 2021.

*2011 Amendment:* Chapter 164 in first sentence after "Upon" inserted "an election or" and after "petition" inserted "pursuant to 85-7-2013"; in (1) following "specified in the" inserted "election or"; and made minor changes in style. Amendment effective April 8, 2011.

*1989 Amendment:* Near middle substituted "designate the place and method of payment of the bonds and the interest on the bonds" for "designate the place of payment of the bonds and the interest coupons"; after "prescribe the form of the bonds" deleted "and interest coupons to be attached thereto"; in clause relating to levies added two references to subdistrict; and made minor changes in phraseology. Amendment effective April 4, 1989.

## 85-7-2015. Effect of contracting with United States.

### Compiler's Comments

*2021 Amendment:* Chapter 495 deleted final sentence that read: "Such order or resolution shall also provide for the confirmation proceedings in the district court as provided in 85-7-2016 through 85-7-2018." Amendment effective May 12, 2021.

## 85-7-2019. Refunding bonds.

### Compiler's Comments

*2021 Amendment:* Chapter 495 in (2) at end of first sentence after "may be created" deleted "and funds in the treasury of the district are not available for the payment of the indebtedness", inserted third sentence regarding the filing of a petition with the board of commissioners prior to refunding, and in fourth sentence in two places substituted "a majority in acreage" for "at least 60% in number and acreage". Amendment effective May 12, 2021.

*1989 Amendment:* In (2), near end of introductory clause, inserted language relating to petition requirements for subdistrict; near middle of (3) inserted clause relating to bonds or contract on behalf of subdistrict; and made minor changes in phraseology. Amendment effective April 4, 1989.

*Section Not Codified:* Section 89-1711, R.C.M. 1947, a validation clause, was not codified in the MCA. This clause has not been repealed and is still valid law. Reference may be made to sec. 3, Ch. 71, L. 1933.

## 85-7-2020. Details relating to bonds.

### Case Notes

*Straight Maturity Bonds to Share Pro Rata in Funds Available for Payment:* Straight maturity bonds were issued by an irrigation district under section 7212, R.C.M. 1921, prior to amendment by Ch. 157, L. 1923. The fund from which they were payable was insufficient to make payment in full and could not be replenished by assessment. The money remaining in the fund was held properly distributed pro rata among the outstanding bonds, without regard to their numbering, since they were not to mature serially and neither Ch. 157, L. 1923, nor Ch. 155, L. 1929, indicates legislative intent that the bonds as issued did not rank equally in order of payment. State ex rel. Cent. Auxiliary Corp. v. Rorabeck, 111 M 320, 108 P2d 601 (1940).

### 85-7-2021. Liens of bonds.

**Compiler's Comments**

*1989 Amendment:* In (1), in three places, inserted references to subdistrict; in (2) substituted language relating to discharge of bond obligations for "All liens herein created remain upon the lands for a period of 8 years after the date of maturity of the obligation. Thereafter, the lands and the titles thereto shall be free from any such liens"; and made minor changes in phraseology. Amendment effective April 4, 1989.

**Case Notes**

*Statutory Provision Part of Bondholders' Contract:* The provision of section 7229, R.C.M. 1921 (now repealed), in force in 1919 when district organized, that issued bonds and any assessment made for payment thereon should be a lien upon the lands in the district against which levied, became a part of the bondholders' contract with the district, the same as though it had been incorporated in the bonds. Toole County Irrigation District v. St., 104 M 420, 67 P2d 989 (1937).

*Encumbrance:* This section, making bonds issued by an irrigation district a lien upon all the lands in the district, created a lien which constituted an encumbrance against them, within the meaning of the term "encumbrance" as used in 15-18-403 (now repealed), providing that a tax deed conveys to the grantee absolute title "free of all encumbrances". State ex rel. Malott v. Bd. of County Comm'rs, 89 M 37, 296 P 1 (1930), explained in U.S. v. Christensen, 218 F. Supp. 722 (D.C. Mont. 1963).

*Extinguishment of Lien:*

Under this section the lien of irrigation district bonds against the lands in the district for delinquent taxes is extinguished by the tax deed issued to the county. State ex rel. Malott v. Bd. of County Comm'rs, 89 M 37, 296 P 1 (1930), explained in U.S. v. Christensen, 218 F. Supp. 722 (D.C. Mont. 1963).

Where lands in an irrigation district were sold for delinquent taxes and tax deed was issued to the county, the purchaser from the county took title free of the lien of the bonds. Delinquent assessments for the payment of the bonds and interest may not be included in future assessments made against other lands in the district. The lands sold, however, remain liable to assessments for maintenance and repairs. State ex rel. Malott v. Bd. of County Comm'rs, 89 M 37, 296 P 1 (1930), explained in U.S. v. Christensen, 218 F. Supp. 722 (D.C. Mont. 1963).

*Charge Against Lands:* Bonds issued by an irrigation district are not a general obligation of the district but are a charge against the lands within the district. State ex rel. Malott v. Bd. of County Comm'rs, 89 M 37, 296 P 1 (1930), overruling Cosman v. Chestnut Valley Irrigation District, 74 M 111, 238 P 279 (1925).

### 85-7-2022. Sale of bonds.

**Compiler's Comments**

*2011 Amendment:* Chapter 253 in first sentence near end substituted "may not be sold for less than 97% of par value" for "shall never be sold for less than 90% of their par value"; and made minor changes in style. Amendment effective April 22, 2011.

*Severability:* Section 33, Ch. 253, L. 2011, was a severability clause.

*Applicability:* Section 35, Ch. 253, L. 2011, provided: "[This act] applies to local government actions commencing on or after [the effective date of this act]." Effective April 22, 2011.

**Case Notes**

*Unearned Interest:* Transfer of bonds of irrigation district, in which interest coupons remained on bond, not canceled, and unearned portion of them was repaid to district by transferee, was proper procedure under this section, requiring that irrigation district bonds should never be sold at less than 90% of value "and accrued interest thereon to date of delivery". Am. Sur. Co. of New York v. Cove Irrigation District, 24 F2d 18 (9th Cir. 1928).

*Amortization Bonds:* Chapter 38, L. 1923 (now repealed), providing that the state, municipal corporations, or districts in issuing bonds shall give preference to amortization bonds and accept serial bonds only when the former cannot be negotiated to good advantage, is inapplicable to the issuance of irrigation district bonds, and the provisions of the irrigation law dealing with the subject specially are controlling. Walden v. Bitter Root Irrigation District, 68 M 281, 217 P 646 (1923).

## 85-7-2023. Notice of sale of bonds.

**Compiler's Comments**

*2011 Amendment:* Chapter 253 in first sentence near beginning after "85-7-2033" inserted "regarding a private sale"; and made minor changes in style. Amendment effective April 22, 2011.

*Severability:* Section 33, Ch. 253, L. 2011, was a severability clause.

*Applicability:* Section 35, Ch. 253, L. 2011, provided: "[This act] applies to local government actions commencing on or after [the effective date of this act]." Effective April 22, 2011.

*1989 Amendment:* At beginning of first sentence inserted exception clause; at end of second sentence substituted "and the notice may be published in any other newspaper at the board's discretion" for "and in any other newspaper within or without the state at its discretion"; and made minor changes in punctuation and phraseology. Amendment effective April 4, 1989.

## 85-7-2027. Disposition of bond proceeds.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

*1987 Amendment:* Near end of third sentence, after "portion thereof", substituted language relating to legal investments backed, insured, or guaranteed by federal or state government for "in interest-bearing securities of the United States or of the state of Montana or in interest-bearing certificates of deposit of national or state banks approved by the department of commerce"; deleted former fourth sentence that read: "A bank shall furnish an indemnity bond to be approved by the board of commissioners and the department of commerce"; and near end of last sentence substituted "investments" for "money or securities".

*1983 Amendment:* Substituted references to department of commerce for references to department of administration.

*1981 Amendment:* Substituted "department of administration" for "department of community affairs" in two places.

## 85-7-2031. Amending or supplementing United States contracts — effect on indebtedness.

**Compiler's Comments**

*2021 Amendment:* Chapter 495 after first "85-7-2012 through" substituted "85-7-2015" for "85-7-2018". Amendment effective May 12, 2021.

## 85-7-2032. Amending or supplementing United States contracts — petition, election, or resolution not necessary.

**Compiler's Comments**

*2021 Amendment:* Chapter 495 near middle after "petition" inserted "or resolution"; at end of first sentence deleted "and the board of commissioners of the irrigation district is not required to proceed under 85-7-2016 through 85-7-2018 for a judicial confirmation of the making of the contract and the terms of the contract"; and made minor changes in style. Amendment effective May 12, 2021.

*2011 Amendment:* Chapter 164 in first sentence before "petition" inserted "an election or"; and made minor changes in style. Amendment effective April 8, 2011.

## 85-7-2033. Private sale of bonds.

**Compiler's Comments**

*2011 Amendment:* Chapter 253 near middle after "this part" substituted "at private sale" for "to the United States, the state of Montana, or any agency, department, or instrumentality of these governments" and at end inserted "pursuant to 17-5-107". Amendment effective April 22, 2011.

*Severability:* Section 33, Ch. 253, L. 2011, was a severability clause.

*Applicability:* Section 35, Ch. 253, L. 2011, provided: "[This act] applies to local government actions commencing on or after [the effective date of this act]." Effective April 22, 2011.

*Saving Clause:* Section 34, Ch. 439, L. 1989, was a saving clause.

*Severability:* Section 35, Ch. 439, L. 1989, was a severability clause.

*Effective Date:* Section 36, Ch. 439, L. 1989, provided that this section is effective April 4, 1989.

### 85-7-2041. Bankruptcy proceedings by irrigation districts.

**Compiler's Comments**

*Sections Not Codified:* Sections 89-1902 and 89-1903 (last part), R.C.M. 1947, validation clauses, were not codified in the MCA. These clauses have not been repealed and are still valid law. Reference may be made to sec. 2, Ch. 44, L. 1915, reenacted by section 7252, R.C.M. 1921, and to sec. 1, Ch. 110, L. 1939.

### 85-7-2042. Levy of special taxes or assessments by resolution.

**Compiler's Comments**

*Effective Date:* Section 18, Ch. 495, L. 2021, provided: "[This act] is effective on passage and approval." Approved May 12, 2021.

### 85-7-2043. Resolution of intent to levy special taxes or assessments — determination of irrigable acres.

**Compiler's Comments**

*Effective Date:* Section 18, Ch. 495, L. 2021, provided: "[This act] is effective on passage and approval." Approved May 12, 2021.

### 85-7-2044. Notice of resolution of intention for levy of special taxes or assessments — hearing — exception.

**Compiler's Comments**

*Effective Date:* Section 18, Ch. 495, L. 2021, provided: "[This act] is effective on passage and approval." Approved May 12, 2021.

### 85-7-2045. Right to protest levy of special taxes or assessments.

**Compiler's Comments**

*Effective Date:* Section 18, Ch. 495, L. 2021, provided: "[This act] is effective on passage and approval." Approved May 12, 2021.

### 85-7-2046. Hearing on protest.

**Compiler's Comments**

*Effective Date:* Section 18, Ch. 495, L. 2021, provided: "[This act] is effective on passage and approval." Approved May 12, 2021.

### 85-7-2047. Sufficient protest to bar issuance of bonds and to postpone further special tax or assessment proceedings.

**Compiler's Comments**

*Effective Date:* Section 18, Ch. 495, L. 2021, provided: "[This act] is effective on passage and approval." Approved May 12, 2021.

### 85-7-2048. Resolution authorizing special taxes or assessments.

**Compiler's Comments**

*Effective Date:* Section 18, Ch. 495, L. 2021, provided: "[This act] is effective on passage and approval." Approved May 12, 2021.

### 85-7-2049. Adjournment of hearings on resolutions for special taxes or assessments.

**Compiler's Comments**

*Effective Date:* Section 18, Ch. 495, L. 2021, provided: "[This act] is effective on passage and approval." Approved May 12, 2021.

### 85-7-2050. Collection of special taxes or assessments by county treasurer — delinquencies.

**Compiler's Comments**

*Effective Date:* Section 18, Ch. 495, L. 2021, provided: "[This act] is effective on passage and approval." Approved May 12, 2021.

## Part 21
## Taxes and Assessments

**Part Attorney General's Opinions**

*Irrigation Districts Not Subject to Property Tax Freeze:* Irrigation district special assessments and annual tax levies are not property taxes and are unrestricted by the property tax freeze instituted by Initiative No. 105. 42 A.G. Op. 21 (1987).

### 85-7-2101. Tax or assessment to pay bonds and interest.

**Compiler's Comments**

*1989 Amendment:* In (1), in three places, inserted references to subdistrict; in (2) inserted clause relating to bonds issued on behalf of subdistrict; and made minor changes in phraseology. Amendment effective April 4, 1989.

### 85-7-2102. Added lands to pay proportional share of bonded indebtedness.

**Compiler's Comments**

*1989 Amendment:* Throughout section inserted references to subdistrict; and made minor changes in phraseology. Amendment effective April 4, 1989.

### 85-7-2103. All irrigable lands chargeable alike.

**Compiler's Comments**

*2001 Amendment:* Chapter 392 inserted (1)(b) allowing administrative charge to exceed $75 based upon actual costs; and made minor changes in style. Amendment effective July 1, 2001.

*1993 Amendment:* Chapter 257 in second sentence of (1) increased maximum administrative charge from $25 to $75 and inserted third sentence clarifying that the administrative charge is additional to the annual tax levy; and made minor changes in style. Amendment effective July 1, 1993.

*Preamble:* The preamble attached to Ch. 257, L. 1993, provided: "WHEREAS, the development of subdivided farm units has greatly increased irrigation district costs to administer water, including the costs of splitting irrigated acres, establishing and operating new land and water accounts, revising maps and assessment lists, administering water in brief duration to multiple users who share a common point of delivery, instructing small tract landowners on policies and procedures, and settling disputes related to water delivery and accounting; and

WHEREAS, the $25 maximum administrative charge on irrigated property is not enough to make the delivery of water to a small acreage economically feasible; and

WHEREAS, the $25 maximum administrative charge was established in 1979, with no consideration given to the future rate of inflation."

*1989 Amendment:* Near beginning of (1) inserted reference to lands in each subdistrict; in (2), in two places, inserted reference to subdistrict and after "board" deleted "of commissioners"; in (3) inserted clause relating to contracts benefiting subdistrict and inserted reference to subdistrict; in (4) inserted clause relating to contracts benefiting subdistrict and inserted reference to subdistrict; in (6) inserted reference to subdistrict; and made minor changes in phraseology. Amendment effective April 4, 1989.

*1983 Amendment:* In (1), inserted "an administrative" before "charge of $5 to $25"; deleted from end of (2) "However, a separately owned tract of land of 1 acre or less and unable to receive water may be charged not more than the $5 minimum."; inserted (4) requiring payment by lands within an irrigation district in compliance with any contract made between the state and landowners and in compliance with a contract between the district and the state; and inserted (7) requiring that the costs to construct a gravity system installed to irrigate lands within a district be apportioned among and levied upon the lands irrigated by the system.

**Case Notes**

*Historic Recognition of Right to Exchange or Substitute Water Upheld:* In a proceeding to establish an irrigation district organized to assume the operation and maintenance of an irrigation project from the State and its predecessors in interest, the Supreme Court found that the District Court did not err in holding that the newly organized district had an obligation to provide certain landowners with water from the Bitterroot River free of charge in exchange for water from Skalkaho Creek. The District Court found that the State and its predecessors in interest had for 81 years recognized the right of each of those exchange users to the other water. Thus, the Supreme Court found the existence of an obligation to provide exchange waters and further found that the applicable statutes contemplated exactly what the District Court had ordered. In re Petition for Irrigation District in Ravalli County, 209 M 218, 680 P2d 944, 41 St. Rep. 658 (1984).

### 85-7-2104. Annual tax levy — apportionment when tracts divided.

**Compiler's Comments**

*2007 Amendment:* Chapter 93 in (1)(b) at beginning of first sentence deleted "Subject to 15-10-420"; inserted (4) prohibiting the levy of property taxes for district purposes; and made minor changes in style. Amendment effective March 30, 2007.

*2003 Amendment:* Chapter 34 in (1)(a) near beginning of introductory clause after "before the" substituted "first Monday in August" for "second Monday in July"; in (2)(a) near beginning after "before the" substituted "first Monday in August" for "second Monday in July"; and made minor changes in style. Amendment effective February 18, 2003.

*Retroactive Applicability:* Section 9(2), Ch. 34, L. 2003, provided: "[Section 6] [85-7-2104] applies retroactively, within the meaning of 1-2-109, to the annual levy of the board of commissioners of an irrigation district for calendar year 2003."

Section 9(4), Ch. 34, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to any assessment or levy by any taxing jurisdiction for calendar year 2003 for which an assessment or levy date is not specified."

*1999 Amendment:* Chapter 584 at beginning of (1)(b) inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

*Severability:* Section 172, Ch. 584, L. 1999, was a severability clause.

*Retroactive Applicability:* Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

*1993 Amendment:* Chapter 257 in last sentence of (1)(b) and (2)(b), after "may", inserted "also" and after "charge" substituted "the administrative charge authorized in 85-7-2103(1)" for language allowing a charge of $5 to $25 against each separately owned tract of land, regardless of its size; and made minor changes in style. Amendment effective July 1, 1993.

*Preamble:* The preamble attached to Ch. 257, L. 1993, provided: "WHEREAS, the development of subdivided farm units has greatly increased irrigation district costs to administer water, including the costs of splitting irrigated acres, establishing and operating new land and water accounts, revising maps and assessment lists, administering water in brief duration to multiple users who share a common point of delivery, instructing small tract landowners on policies and procedures, and settling disputes related to water delivery and accounting; and

WHEREAS, the $25 maximum administrative charge on irrigated property is not enough to make the delivery of water to a small acreage economically feasible; and

WHEREAS, the $25 maximum administrative charge was established in 1979, with no consideration given to the future rate of inflation."

*1989 Amendment:* In (1)(a)(ii), after "district", substituted "for" for "including any indebtedness incurred under any contract between the district and the United States, accompanying"; in first sentence of (1)(b), after "United States", substituted "government survey" for "public survey", before "bears" substituted "any tract or lot" for "any such tract", at end inserted "by the board", and near beginning of second sentence substituted "The board may charge" for "The board of commissioners may make a charge of"; inserted (1)(c) relating to exclusion of indebtedness incurred on behalf of a subdistrict; inserted (2) relating to special levies on property owners within a subdistrict; near beginning of (3) substituted "district or subdistrict is divided" for "district shall be divided"; and made minor changes in form and phraseology. Amendment effective April 4, 1989.

*1983 Amendment:* At end of both (1) and (2), deleted "However, a separately owned tract of land of 1 acre or less and unable to receive water may be charged not more than the $5 minimum."

**Case Notes**

*Amount of Levy:* The limitation on the amount of the levy set out in subsection (2) refers only to administrative expenses and the cost of maintenance and repairs incurred by the district, and it does not limit the amount that may be levied to reimburse the United States for maintenance necessarily undertaken by it pursuant to the original contract. U.S. v. Fort Belknap Irrigation District, 197 F. Supp. 812 (D.C. Mont. 1961).

*Authority to Tax:* The provision made by this section for the raising of revenue for the maintenance and operation of irrigation districts is sufficiently broad to enable them to meet exactions of the taxing power of the state. Buffalo Rapids Irrigation District v. Colleran, 85 M 466, 279 P 369 (1929).

*Apportionment of Assessments:* The apportionment of assessments for administrative expenses, maintenance, repairs, etc., of an irrigation district on the basis of the irrigable area in each tract of land of 40 acres or less, prescribed by this section, is neither unreasonable nor arbitrary in view of the fact that that method has had the benefit of long experience in other states and the consensus of opinion is that no fairer method has been devised. Walden v. Bitter Root Irrigation District, 68 M 281, 217 P 646 (1923).

*Ordinary Running Expenses:* Ordinary overhead or running expenses of a district are to be met by an annual levy of taxes. In re Gallatin Irrigation District, 48 M 605, 140 P 92 (1914).

**Attorney General's Opinions**

*Board of Commissioners — Authority to Directly Assess Irrigation Tax or Receive Direct Payment Prohibited:* The Board of Commissioners of an irrigation district may not, even with the consent of all water users within the district, bypass the annual tax levy procedure in 85-7-2104 and directly assess the water users' lands for amounts otherwise subject to levy under such provision. The County Treasurer may issue receipts of payment for amounts levied under 85-7-2104 but remitted directly to the Board of Commissioners of an irrigation district upon appropriate certification by the district of such payments. However, the practice of direct payments to the Commissioners must terminate, and all unexpended money so received must be remitted to the County Treasurer for deposit and supervision. 42 A.G. Op. 14 (1987).

### 85-7-2107. Procedure for the determination of irrigable area.

**Compiler's Comments**

*1989 Amendment:* Throughout section inserted references to subdistrict; in (1), near beginning of first sentence after "United States", substituted "government survey" for "public survey" and near middle of second sentence inserted clause relating to irrigable area of a subdistrict; and made minor changes in phraseology. Amendment effective April 4, 1989.

### 85-7-2108. Taxes to be lien upon land.

**Compiler's Comments**

*1989 Amendment:* Near beginning, after "United States", substituted "government survey" for "public survey" and near end inserted "or subdistrict"; and made minor changes in phraseology. Amendment effective April 4, 1989.

### 85-7-2109. List of all lands in district or subdistrict to be prepared.

**Compiler's Comments**

*1989 Amendment:* In two places inserted references to subdistrict; in second sentence, after "United States", substituted "government survey" for "public survey"; in third sentence, after "board", deleted "of commissioners"; and made minor changes in phraseology. Amendment effective April 4, 1989.

### 85-7-2110. Nonirrigable lands not to be taxed.

**Compiler's Comments**

*1989 Amendment:* At end inserted "or subdistrict"; and made minor changes in phraseology. Amendment effective April 4, 1989.

**Case Notes**

*Application:* The provisions of this section that no special assessment shall be levied for irrigation district purposes against any 40-acre tract found by the Board of Commissioners not to contain any irrigable land, etc., apply only to bonds issued after the irrigable area of the district has been determined and do not have reference to bonded obligations incurred prior to the order excluding nonirrigable lands from the district as organized. Drake v. Schoregge, 85 M 94, 277 P 627 (1929).

### 85-7-2112. Confirmation of board actions by district court.

**Compiler's Comments**

*1989 Amendment:* In (1), in middle of second sentence, inserted clause relating to review of irrigable area of subdistrict, substituted "determined" for "ascertained", after "board" deleted "of commissioners", and at beginning of fourth sentence deleted "Upon such proceeding"; and made minor changes in phraseology. Amendment effective April 4, 1989.

### 85-7-2114. Apportionment of costs when bonds issued.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

*1989 Amendment:* Throughout section inserted reference to subdistrict; in (1), near end of first sentence, inserted clause relating to land in a subdistrict and near beginning of third sentence, after "interest on the bonds", deleted "so authorized"; in (3), near beginning of first sentence, substituted "shall prepare a list of the irrigable area for filing" for "shall cause a list of such irrigable area to be made and filed", near beginning of third sentence, after "levied", deleted "for such purposes", and in fifth sentence, after "may not thereafter", deleted "be permitted to" and at end, after "board", deleted "of commissioners"; and made minor changes in phraseology. Amendment effective April 4, 1989.

### 85-7-2115. Objection by landowner.

**Compiler's Comments**

*2021 Amendment:* Chapter 495 at end of first and second sentences deleted language referring to repealed sections 85-7-2016 through 85-7-2018 (see 2021 Session Law for former text). Amendment effective May 12, 2021.

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

*1989 Amendment:* Inserted reference to subdistrict; and made minor changes in phraseology. Amendment effective April 4, 1989.

### 85-7-2116. Restrictions on reduction of taxable acreage.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

*1989 Amendment:* In two places inserted reference to subdistrict; near middle, after "bonds", deleted "thereafter authorized"; and made minor changes in phraseology. Amendment effective April 4, 1989.

### 85-7-2117. Conclusiveness of tax or assessment.

**Compiler's Comments**

*2007 Amendment:* Chapter 93 near middle after "mistake" deleted "and subject to 15-10-420". Amendment effective March 30, 2007.

*1999 Amendment:* Chapter 584 inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

*Severability:* Section 172, Ch. 584, L. 1999, was a severability clause.

*Retroactive Applicability:* Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

### 85-7-2133. Role of county officers in collection of tax or assessment.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

*1987 Amendment:* In (2), at end of second sentence after "invest the same in", substituted language concerning backed, insured, or guaranteed federal or state investments for "state or federal bonds or in savings certificates of institutions insured by the federal deposit insurance corporation".

**Case Notes**

*County Debtor of District:* When funds of an irrigation district are deposited with the County Treasurer they become county funds for which the district has a credit on the books of the Treasurer, i.e., the relation of debtor and creditor is created between the county and the district. State ex rel. Blenkner v. Stillwater County, 104 M 387, 66 P2d 788 (1937).

*Power to Levy Taxes:*

Authority to issue irrigation bonds implies an authority to levy a tax to pay them. Judith Basin Irrigation District v. Malott, 73 F2d 142, 97 ALR 504 (9th Cir. 1934).

An irrigation district organized under the laws of this state exercises some governmental functions; for example, it may levy taxes (this section), which is the exercise of one of the highest prerogatives of sovereignty. Crow Creek Irrigation District v. Crittenden, 71 M 66, 227 P 63 (1924).

### 85-7-2134. Levy of taxes and assessments by county commissioners.

**Compiler's Comments**

*2007 Amendment:* Chapter 93 in first sentence near beginning after "assessments" inserted "under 85-7-2104" and at beginning of second sentence deleted "Subject to 15-10-420" and after "levy" inserted "pursuant to 85-7-2104"; and made minor changes in style. Amendment effective March 30, 2007.

*1999 Amendment:* Chapter 584 at beginning of second sentence inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

*Severability:* Section 172, Ch. 584, L. 1999, was a severability clause.

*Retroactive Applicability:* Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

### 85-7-2135. Transmission of funds from other counties.

#### Compiler's Comments

*1987 Amendment:* Substituted "the 10th day of each month except June and December" for "January 1 of each year".

### 85-7-2136. Collection of taxes or assessment.

#### Compiler's Comments

*2017 Amendment:* Chapter 67 in (5) in two places after "tax lien" deleted "sale". Amendment effective March 2, 2017.

*Applicability:* Section 46(1), Ch. 67, L. 2017, provided: "(1) [This act] applies to tax delinquencies that begin on or after [the effective date of this act]. Effective March 2, 2017."

*2007 Amendments — Composite Section:* Chapter 93 in (1) at beginning of first sentence deleted "Subject to 15-10-420" and near end of second sentence after "county" inserted "subject to taxation or assessment under 85-7-2104"; and made minor changes in style. Amendment effective March 30, 2007.

Chapter 110 in (5) in first sentence substituted "tax lien sale certificate" for "tax certificate of sale" and in second sentence substituted "tax lien sale" for "tax sale"; and made minor changes in style. Amendment effective October 1, 2007.

*1999 Amendment:* Chapter 584 at beginning of (1) inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

*Severability:* Section 172, Ch. 584, L. 1999, was a severability clause.

*Retroactive Applicability:* Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

*1993 Special Session Amendment:* Chapter 27 in first sentence of (1), after "furnish", deleted "the agent of" and after "revenue" deleted "in each county in which any of the lands of the district are situated" and in second sentence, before "department", deleted "agent of the", after "revenue" deleted "in each county", after "list" deleted "and prior to the delivery of the assessment book to the county treasurer", and near end substituted "property tax record" for "assessment book"; and made minor changes in style. Amendment effective January 1, 1994.

*Applicability:* Section 171(2), Ch. 27, Sp. L. November 1993, provided that the amendments to this section apply to tax years after December 31, 1993.

*1993 Amendment:* Chapter 485 inserted (3) requiring County Treasurer during water delivery season to make available to commissioners of irrigation district notice of receipt of payments of district assessments by 9 a.m. of day following receipt of payment; and made minor changes in style.

*1993 Amendment:* Chapter 485 inserted (3) requiring County Treasurer during water delivery season to make available to commissioners of irrigation district notice of receipt of payments of district assessments by 9 a.m. of day following receipt of payment; and made minor changes in style.

*1989 Amendment:* Inserted (3) relating to receipt by a County Treasurer of assistance from an irrigation district employee or commissioner for certain district-related tax functions; and made minor changes in phraseology and punctuation.

#### Case Notes

*Collection of Taxes:* In the collection of tax or assessment levied by an irrigation district for the payment of the interest on bonds issued by it, the County Treasurer is not authorized to seize and sell personal property of a delinquent owner of lands within the district but must proceed in the manner prescribed by Ch. 173, part III, R.C.M. 1921, as amended by Ch. 96, L. 1923 (15-16-101, et seq.), for the collection of state and county taxes made a lien upon real property. State ex rel. Spokane & E. Trust Co. v. Nicholson, 74 M 346, 240 P 837 (1925).

### 85-7-2140. Investment of funds.

#### Compiler's Comments

*1987 Amendment:* In first sentence, after "sinking fund", substituted language concerning backed, insured, or guaranteed federal or state investments for "in interest-bearing securities whenever in their judgment the investment may be to the best interest of the district"; and near beginning of second sentence substituted "investments" for "securities".

#### Case Notes

*Distribution Pro Rata When Funds Insufficient — When Interest Should Be Retired First:* Where the bonds issued by an irrigation district were straight maturity and not serial bonds and the fund out of which they were payable was insufficient to make full payment of them all and could not be replenished by further assessments, the money remaining was properly distributed pro rata, irrespective of the fact that other holders had been paid in full. If the fund is insufficient to pay the principal but is sufficient to pay the only remaining unpaid coupon holder, his coupons should be paid first, placing all holders on a parity in that respect. State ex rel. Cent. Auxiliary Corp. v. Rorabeck, 111 M 320, 108 P2d 601 (1940).

## 85-7-2152. Proceeds of sale.

### Compiler's Comments

*2017 Amendment:* Chapter 67 in (2) at beginning substituted "When the county assigns a tax lien as provided in 15-17-323" for "When any of the lands are struck off at the tax lien sale to the county where they are situated pursuant to the provisions of 15-17-214", in (2) after "upon the issuance of the" substituted "assignment certificate to the assignee" for "tax lien sale certificate to the county", after "from the lands and premises" substituted "for which a tax lien was assigned" for "that were sold", after "upon the lands and premises" substituted "for which the county assigned the tax lien" for "that were struck off to the county at the tax lien sale", and at end after "the county with the tax lien" deleted "sale"; and made minor changes in style. Amendment effective March 2, 2017.

*Applicability:* Section 46(1), Ch. 67, L. 2017, provided: "(1) [This act] applies to tax delinquencies that begin on or after [the effective date of this act]." Effective March 2, 2017.

*2007 Amendment:* Chapter 110 throughout section substituted references to tax lien sale for references to tax sale; and made minor changes in style. Amendment effective October 1, 2007.

*1987 Amendment:* Near middle substituted "15-17-214" for "15-17-207".

## 85-7-2153. Assignment of debenture certificates.

### Compiler's Comments

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

## 85-7-2154. Redemption of lands sold.

### Compiler's Comments

*1987 Amendment:* Near middle substituted "Title 15, chapter 18" for "15-18-101".

## 85-7-2155. Sale by county commissioners when land not redeemed.

### Compiler's Comments

*2017 Amendment:* Chapter 67 at beginning substituted "When lands and premises with attached tax liens" for "When the lands and premises so sold for taxes". Amendment effective March 2, 2017.

*Applicability:* Section 46(1), Ch. 67, L. 2017, provided: "(1) [This act] applies to tax delinquencies that begin on or after [the effective date of this act]." Effective March 2, 2017.

*1987 Amendment:* Near beginning substituted "15-18-111" for "15-18-101".

## 85-7-2156. Proceedings in which county is possessor of tax lien and lien is not redeemed.

### Compiler's Comments

*2017 Amendment:* Chapter 67 substituted current language for former language that read: "In case the property so assessed for irrigation district purposes is struck off to the county, as provided for by law, and certificates of the taxes and assessments of said irrigation district issued thereon, as hereinbefore provided for, and the said lands and premises be not redeemed before the next annual assessment for irrigation purposes shall become delinquent thereon, then and in that event, like certificates for each year's irrigation district taxes and assessments shall be issued against said land and shall be included in and satisfied by any redemption thereof, with interest as hereinbefore provided for, and shall in like manner be paid from the proceeds of sale of said lands by the board of county commissioners, if the same be not redeemed as provided for by law". Amendment effective March 2, 2017.

*Applicability:* Section 46(1), Ch. 67, L. 2017, provided: "(1) [This act] applies to tax delinquencies that begin on or after [the effective date of this act]." Effective March 2, 2017.

*1987 Amendment:* Near middle, after "in that event", deleted "(whether said lands and premises be again sold by the county treasurer of said county or the sale thereof adjourned as provided for by 15-17-304 and 15-17-305)".

*Section Not Codified:* Section 89-1821, R.C.M. 1947, a temporary clause pertaining to duties of a County Treasurer, was not codified in the MCA. This clause has not been repealed and is still valid law. Reference may be made to sec. 2, Ch. 127, L. 1913, reenacted in section 7248, R.C.M. 1921.

### 85-7-2157. Purchase of lands by district — revolving fund, credits, and expenditures.

**Compiler's Comments**

*2017 Amendment:* Chapter 67 in (1) at beginning substituted "When a tax lien is attached to property for which" for "At all sales of all lands for delinquent taxes when all or", after "assessed by an irrigation district" deleted "against the lands to be sold", after "commissioners of the irrigation district" substituted "may take an assignment of the tax lien" for "if there is no other bidder for the land at the tax lien sale, may bid on the land", at beginning of second sentence deleted "If the commissioners are the only bidder", after "The county treasurer shall" substituted "assign the tax lien" for "strike off the lands", after "the irrigation district and issue" substituted "an assignment certificate" for "tax lien sale certificates", after "the irrigation district the same as" substituted "assignment certificates" for "tax lien sale certificates", after "issued to other" substituted "assignees" for "purchasers", and after "revolving fund for the purchase of" substituted "tax liens" for "tax lien sale certificates and titles"; in (2) in third sentence after "at the time of the" substituted "assignment" for "sale", after "district of the tax lien" deleted "sale certificate", and before "property obtained" inserted "sale of"; and in (3) near beginning substituted "assignment" for "sale", after "the district of the" substituted "tax lien certificate or sale of the property" for "tax lien sale certificate or of the property"; and made minor changes in style. Amendment effective March 2, 2017.

*Applicability:* Section 46(1), Ch. 67, L. 2017, provided: "(1) [This act] applies to tax delinquencies that begin on or after [the effective date of this act]." Effective March 2, 2017.

*2007 Amendment:* Chapter 110 throughout section substituted references to tax lien sale for references to tax sale; and made minor changes in style. Amendment effective October 1, 2007.

### 85-7-2158. Purchase of lands by district — tax lien assignments and payment.

**Compiler's Comments**

*2017 Amendment:* Chapter 67 in (1)(a) substituted "take an assignment of a tax lien" for "purchase the tax lien sale certificate issued to any county for lands sold at a tax lien sale against which any of its taxes and assessments are delinquent"; and in (2) after "assign the tax lien" deleted "sale certificate". Amendment effective March 2, 2017.

*Applicability:* Section 46(1), Ch. 67, L. 2017, provided: "(1) [This act] applies to tax delinquencies that begin on or after [the effective date of this act]." Effective March 2, 2017.

*2007 Amendment:* Chapter 110 throughout section substituted references to tax lien sale for references to tax sale; in (2) in last sentence after "irrigation district" deleted "as in the case of the purchase thereof by any other person"; and made minor changes in style. Amendment effective October 1, 2007.

### 85-7-2159. Issuance of tax deed.

**Compiler's Comments**

*2017 Amendment:* Chapter 67 substituted "If there has been no redemption of tax liens assigned" for "If there has been no redemption of lands sold at a tax lien sale to an irrigation district or by any other person or no redemption of lands struck off to the county for which a tax lien sale certificate has been assigned", after "as provided by law" substituted "and notice has been given as required in 15-18-212" for "for the redemption of lands from tax lien sales", and after "any other holder" substituted "an assignment certificate" for "a tax lien sale certificate". Amendment effective March 2, 2017.

*Applicability:* Section 46(1), Ch. 67, L. 2017, provided: "(1) [This act] applies to tax delinquencies that begin on or after [the effective date of this act]." Effective March 2, 2017.

*2007 Amendment:* Chapter 110 throughout section substituted references to tax lien sale for references to tax sale; and made minor changes in style. Amendment effective October 1, 2007.

*1997 Amendment:* Chapter 42 near middle, after "within the time allowed", deleted "by 85-7-2163"; and made minor changes in style. Amendment effective March 12, 1997.

### 85-7-2162. Powers of district commissioners to acquire and manage tax lien lands.

**Compiler's Comments**

*2017 Amendment:* Chapter 67 in (1)(a) near end substituted "take assignments of tax liens" for "purchase tax lien sale certificates of the land when struck off to the county"; and made minor changes in style. Amendment effective March 2, 2017.

*Applicability:* Section 46(1), Ch. 67, L. 2017, provided: "(1) [This act] applies to tax delinquencies that begin on or after [the effective date of this act]." Effective March 2, 2017.

*2007 Amendment:* Chapter 110 in (1)(a) substituted "tax lien sale certificates" for "certificates of tax sales"; in (1)(b) at end after "districts" deleted "upon such terms as shall, in the judgment of the board of commissioners of such irrigation district, be deemed most advantageous to the district"; and made minor changes in style. Amendment effective October 1, 2007.

### 85-7-2163. Granting of tax deed.

**Compiler's Comments**

*2017 Amendment:* Chapter 67 substituted "assignment certificate" for "tax lien sale certificate". Amendment effective March 2, 2017.

*Applicability:* Section 46(1), Ch. 67, L. 2017, provided: "(1) [This act] applies to tax delinquencies that begin on or after [the effective date of this act]." Effective March 2, 2017

*2007 Amendment:* Chapter 110 substituted "tax lien sale certificate" for "certificate of tax sale". Amendment effective October 1, 2007.

*1987 Amendment:* Substituted language concerning requirements for granting a tax deed for former section that read: "The holder of such certificate of tax sale of such land, whether said holder be an irrigation district or individual, may, at any time after the expiration of 2 years from the date of sale of said property for delinquency, if same has not been redeemed within said period of 2 years from date of sale of said lands for delinquency, apply to the county treasurer, as provided by law for the issuance of a tax deed to said property, and upon such application, the county treasurer shall issue such tax deed, in the manner and form provided by law, to said holder."

### 85-7-2166. Liability of county treasurers.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

**Case Notes**

*Limitation to Compel Payment of District Warrant:* The County Treasurer, by law custodian of the funds of an irrigation district the office of which is located in his county and therefore charged with duty not to pay out funds on claims believed by him to be invalid, could properly assert the defense of the 5-year limitation in a proceeding to compel payment of a registered district warrant under 27-2-215 (renumbered 27-2-231). State ex rel. DeKalb v. Ferrell, 105 M 218, 70 P2d 290 (1937).

*Right of Warrant Holder to Writ of Mandamus:* To entitle a registered warrant holder to a Writ of Mandate to compel payment thereon by the County Treasurer out of the funds of an irrigation district, he must show Treasurer's clear legal duty to pay and ability to comply with the Writ, with sufficient money on hand in the fund to pay outstanding unpaid prior registered warrants with interest (7-6-2605 and 7-6-2606). State ex rel. DeKalb v. Ferrell, 105 M 218, 70 P2d 290 (1937).

### 85-7-2167. Sale or transfer of lands.

**Case Notes**

*Highway Condemnation:* The state Highway Commission (now Transportation Commission) acquiring land for highway purposes is not liable for assessment and taxes by irrigation district since land taken will no longer benefit from services provided by district, notwithstanding the contention of district that takings so reduced total irrigable acreage of district as to increase per-acre cost of operation and maintenance of remainder. Helena Valley Irrigation District v. St. Highway Comm'n, 150 M 192, 433 P2d 791 (1967).

## Part 22
## Miscellaneous Provisions

### 85-7-2201. Limitation on actions attacking decrees.

**Compiler's Comments**

*Section Not Codified:* Section 89-1715 (part), R.C.M. 1947, a validation clause, was not codified in the MCA. This clause has not been repealed and is still valid law. Reference may be made to sec. 2, Ch. 54, L. 1923.

### 85-7-2203. Nonsubstantial errors disregarded — rules of practice — costs.

**Case Notes**

*Final Judgment:* Under 25-1-111 (since repealed), providing that the final determination of the rights of a party to a special proceeding is a judgment, an order of the District Court directing the exclusion of the lands of a protestant from a proposed extension of an irrigation district is a final judgment. In re Bitter Root Irrigation District, 67 M 436, 218 P 945 (1923), distinguished in In re Fort Shaw Irrigation District, 81 M 170, 261 P 962 (1927), and State ex rel. Bole v. Lay, 89 M 541, 300 P 238 (1931), explained in Wills v. Morris, 100 M 504, 50 P2d 858 (1935).

*Absence of Bill of Exceptions:* Where in a proceeding for the extension of an irrigation district, the evidence heard at the trial was not taken and preserved by the court stenographer as it should have been and the evidence was not incorporated in a bill of exceptions duly settled and allowed as it might have been as far as obtainable, it will be presumed on appeal, in the absence of the evidence, that the District Court heard and determined the question whether appellant's lands were benefited or not. In re Crow Creek Irrigation District, 63 M 293, 207 P 121 (1922).

### 85-7-2205. Definition of irrigable land.

**Case Notes**

*When Land Considered Susceptible of Irrigation:* A party objected to the extension of an irrigation district's boundaries on grounds that the land proposed for inclusion did not meet the definition of irrigable land and was not legally susceptible of irrigation. The Supreme Court noted that 85-7-1808 allows inclusion of lands susceptible of irrigation by the works of the district, which means that the land can physically receive irrigation water from the district's works. The court declined to redefine the statutory language "susceptible of irrigation" to mean only land that meets the definition of irrigable land or that is legally susceptible of irrigation. The land in question had been irrigated for decades from the irrigation district works and was therefore susceptible of irrigation for the limited purposes of the petition to extend the district boundaries. In re Formation of E. Bench Irrigation District, 2009 MT 135, 350 M 309, 207 P3d 1097 (2009).

### 85-7-2211. Irrigation ditches — duties relating to safety.

**Compiler's Comments**

*2021 Amendment:* Chapter 305 in introductory clause substituted "operating irrigation diversions, aqueducts, canals, ditches, drains, flumes, headgates, siphons, or other water conveyance structures or infrastructure shall keep these structures and infrastructure in good general repair and condition. For the purpose" for "operating irrigation ditches must keep irrigation ditches in good general repair and condition, but for the purpose" and near end after "damage" inserted "the irrigation district, private person, or entity"; in (1) at end inserted "or other security measures"; in (2) before "goes underground" substituted "conveyed water" for "a ditch"; and in (3) after "prevent access to" substituted "water conveyance structures or facilities" for "ditches". Amendment effective October 1, 2021.

### 85-7-2212. Irrigation ditches — limits of liability.

**Compiler's Comments**

*2021 Amendment:* Chapter 305 in introductory clause substituted "irrigation diversions, aqueducts, canals, ditches, drains, flumes, headgates, siphons, or other water conveyance structures or infrastructure" for "irrigation ditches"; and in (4) substituted "death of a person or animal from drowning or other causes" for "death from a drowning". Amendment effective October 1, 2021.

**Case Notes**

*Both Parties Equally Liable for Landslide Damage Caused by Ditch Seepage:* The hillside near parallel irrigation ditches owned by plaintiff and defendant gave way, causing damages. Each party blamed the other for engaging in activity that caused the landslide, presenting extensive exhibits and expert testimony. After a 4-day hearing, the District Court concluded that the activities of both parties jointly caused the landslide and that both parties were equally liable for the costs of the damages. After reviewing the voluminous transcript, the Supreme Court deferred to the discretion of the District Court in determining the weight of the evidence and credibility of the witnesses regarding the two credible though contradictory reports and declined to set aside the judgment. Graveley Simmental Ranch Co. v. Quigley, 2003 MT 34, 314 M 226, 65 P3d 225 (2003).

*Permanent Injunction Inappropriate Limitation of Lawful Irrigation Practices:* The Wellses built a home on property adjacent to land that had been flood irrigated by the Youngs for generations. Between 1994 and 1998, the Youngs' land was irrigated three times, and on each occasion, the Wellses experienced flooding in the crawl space of their home. The Wellses sought damages in excess of $80,000 based on tort theories of negligence, nuisance, and trespass. The District Court reasoned that because the irrigation practices predated the construction of the Wellses' home, they could not recover damages or recover on their trespass claim under this section. The court also concluded that the nuisance claim was barred by 27-30-101. The court held that the Youngs breached the general obligation imposed by 28-1-201 because their irrigation practices caused immediate, irreparable, and substantial harm to the Wellses' home, but the negligence claim was disposed of because the Wellses failed to establish that the irrigation practiced breached the standard of care of a reasonable farm irrigator engaged in flood irrigation. Nevertheless, the District Court permanently enjoined the Youngs from irrigating their property because future irrigation without modification of the head ditch would result in an unreasonable and substantial risk of continuing harm and irreparable injury to the Wellses' property. The Youngs moved to vacate the injunction based on the determination that their irrigation practices were lawful, but the motion was denied, so the Youngs appealed. The Supreme Court examined the record for abuse of discretion, noting that a District Court must find a breach of an obligation by the party sought to be enjoined before imposing a permanent injunction. The District Court's general finding that the Youngs breached the duty imposed under 28-1-201 conflicted with the specific findings that the Youngs did not trespass or create a nuisance and conformed to the applicable standard of care. Absent a specific breach of obligation, the District Court abused its discretion in issuing a permanent injunction enjoining the Youngs from engaging in lawful flood irrigation practices. Wells v. Young, 2002 MT 102, 309 M 419, 47 P3d 809 (2002), distinguishing Madison Fork Ranch v. L&B Lodge Pole Timber Prod., 189 M 292, 615 P2d 900 (1980).

*No Negligence by Irrigation District for Failure to Warn of Unforeseeable Flood:* Plaintiffs' property was damaged by an unprecedented flood caused by an ice jam on the Clark Fork River. Plaintiffs alleged that the local irrigation district was liable for breaching its duty to construct and maintain an irrigation system that would protect the property and for failing to warn of the flooding conditions to allow plaintiffs the opportunity to protect their property. The District Court held that the irrigation district had no duty to prevent the flood or to warn of the impending natural disaster, and the Supreme Court affirmed. The first element that plaintiffs must establish in a negligence action is the existence of a duty of care, and the measure of a duty of care owed is the scope of the risk that the negligent conduct foreseeably entails. Thus, the primary factor in determining whether the irrigation district owed a duty of care was whether it was foreseeable, as a matter of law, that the district's acts or omissions would pose a risk of injury to plaintiffs. Here, substantial evidence supported the conclusion that the risk that flooding would damage plaintiffs' property was unforeseeable, so the district had no duty to erect or maintain flood control structures to prevent the unforeseeable event. The district also exercised reasonable care in the maintenance of the irrigation system that was in place. Further, plaintiffs failed to advance any applicable authority that would impose upon the district a duty to warn of the unforeseeable flood because mere knowledge of the dangerous situation, of which plaintiffs themselves had become aware the night of the flood, did not impose a legal duty to warn. Gaudreau v. Clinton Irrigation District, 2001 MT 164, 306 M 121, 30 P3d 1070 (2001), following Estate of Strever v. Cline, 278 M 165, 924 P2d 666 (1996).

*Failure to Allege Error — Denial of New Trial:* Plaintiffs appealed from directed verdict and order by the District Court denying a new trial, claiming that the court erred in determining that plaintiffs had failed to establish a prima facie case against defendants for the overflow of a drainage ditch near plaintiffs' residence. The Supreme Court affirmed the lower court decision, holding that because subsection (2) of this section is an independent, sufficient, and clearly articulated ground for granting defendants' direct verdict motion, plaintiffs' failure to allege error under the subsection constituted a waiver of plaintiffs' claim. Schaubel v. Iversen, 257 M 164, 848 P2d 489, 50 St. Rep. 213 (1993).

*No Liability for Damage From Irrigation Ditch Seepage:* Home owners appealed a District Court order granting the irrigation ditch owners summary judgment, alleging that the ditch owners negligently diverted water through the ditch, resulting in ground saturation and subsequent flood damage to the home owner's property. Although the home owners asserted that no seepage occurred before the ditch owners overused the ditch, the undisputed facts established that the damage occurred either because of weather conditions or from the same kind of seepage from the ditch that had existed for at least 53 years before the home owners arrived or obtained an interest in the land. Alexander v. McCauley, 250 M 216, 819 P2d 176, 48 St. Rep. 798 (1991).

# CHAPTER 8
# DRAINAGE DISTRICTS

## Part 1
## Creation of Districts

### 85-8-101. Petition for creation of district.

**Case Notes**

*County Subject to Assessment for Benefits:* A drainage district created in 1921 under the provisions of 85-8-101, et seq., could recover assessments made against the county for benefits accruing to its highways from its system, since the act, as it existed prior to amendment by Ch. 169, L. 1929 (85-8-307, 85-8-341, 85-8-350, and 85-8-351), was broad enough to authorize such assessments, as against contention that the county could not be held for costs unless it owned lands in the district. State ex rel. Valley Center Drain District v. Bd. of County Comm'rs, 100 M 581, 51 P2d 635 (1935), explained in Burke v. Sullivan, 127 M 374, 265 P2d 203 (1954).

### 85-8-111. Notice of hearing.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 85-8-115. Insufficient service.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

**Case Notes**

*Defective Service:* Where the bill of exceptions prepared by appellant himself recited that the notice of an adjourned hearing pertaining to the organization of a drainage district had been given and served as provided by law, his contention that the service was defective did not merit consideration. In re Valley Center Drain District, 64 M 545, 211 P 218 (1922).

### 85-8-118. Determination of sufficiency of petition.

**Case Notes**

*Writ of Supervisory Control:* The Writ of Supervisory Control does not lie to review an intermediary order made by the District Court pursuant to this section relating to determination of the sufficiency of a petition opposing the creation of a drainage district, where every question raised by the application for the Writ may be reviewed on appeal from the final order establishing the district. State ex rel. Hall v. District Court, 109 M 228, 95 P2d 438 (1939).

### 85-8-119. Receiving affidavits on question of petition sufficiency.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 85-8-121. Court determination.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

**Case Notes**

*Disqualification:* Since drainage District Commissioners act only in an advisory capacity and their assessments of benefits and damages are reviewable on appeal after notice to all interested parties, the provision of this section that the fact that a person owns land in the proposed district shall not disqualify him from acting as Commissioner does not violate the principle that no one shall be the judge of his own cause. In re Valley Center Drain District, 64 M 545, 211 P 218 (1922).

## Part 3
## Organization and Operation

### 85-8-302. Election of commissioners — regular term of office.

**Compiler's Comments**

*2015 Amendment:* Chapter 49 in (1) substituted "13-1-502(4)" for "subsection (2)", before "election of" deleted "regular", after "annually" inserted "and conducted", substituted "Title 13, chapter 1, part 5" for "13-1-104 and 13-1-401", and substituted "the day of their election" for "the first Tuesday in May following their election"; in (2)(a) substituted "primary or general" for "regular" and after "divisions" deleted "at the first regular election following the date of the order making the division"; in (2)(c) substituted "for 1 year" for "until the first Tuesday in May in the year following election", substituted "for 2 years" for "until the first Tuesday in May in the second year following election", and substituted "for 3 years" for "until the first Tuesday in May in the third year following election"; in (3) in second sentence after "Commissioners" inserted "elected after the initial election" and after "3 years" deleted "and until a successor is elected and qualified"; deleted former (2) that read: "(2) If the number of candidates is equal to or less than the number of positions to be elected, the election administrator may cancel the election in accordance with 13-1-304. If an election is not held as provided in this subsection, the county governing body shall declare elected by acclamation the candidate who filed a nominating petition for the position. If no candidate filed a nominating petition for the position, the board of commissioners shall make an appointment to fill the position, and the term is the same as if the commissioner were elected"; and made minor changes in style. Amendment effective November 4, 2015.

*2003 Amendment:* Chapter 349 in (1) at beginning of first sentence inserted exception clause; inserted (2) providing that if the number of candidates is equal to or less than the number of positions to be elected, the election administrator may cancel the election, providing for a declaration of election by acclamation, and providing for an appointment to fill a position if there are no candidates; and made minor changes in style. Amendment effective April 15, 2003.

The amendments to this section made by Ch. 367, L. 2003, were rendered void by sec. 5, Ch. 367, L. 2003, a coordination section.

*1981 Amendment:* Added "and 13-1-401" at end of first sentence; substituted "first Tuesday in May" for "first Monday in January" throughout section.

### 85-8-304. Results of election.

**Compiler's Comments**

*1981 Amendment:* Substituted "secretary" for "clerk" and "commissioners" for "directors"; substituted "first Tuesday in May" for "first Monday in January".

*Composite Section:* This section was amended by Ch. 171 and Ch. 571, L. 1979, and a composite section has been prepared by the Code Commissioner, 1979. Ch. 171 extended the closing time for the polls to 8 p.m., while Ch. 571 rewrote the section as part of a general revision of the election laws. Under this revision, drainage district elections are subject to the general election laws, including a provision for polls remaining open until 8 p.m. Consequently the language in Ch. 171, which is covered in 13-1-106, is not incorporated into the composite.

### 85-8-306. Commissioner candidate filing.

**Compiler's Comments**

*2015 Amendment:* Chapter 49 substituted "A person eligible to vote in the district may file a declaration of candidacy" for "Candidates", substituted "within the time period specified in 13-1-502" for "to be filled by election may be nominated by petition filed with the election administrator or deputy election administrator at least 75 days before the election and signed by at least five electors of the district", substituted "If a write-in candidate has filed pursuant to 13-1-502, the elector may" for "If no nominations are made, the electors of the district shall", and deleted last sentence that read: "This section does not prevent an elector from voting for any qualified person, although the name does not appear on the official ballot"; and made minor changes in style. Amendment effective November 4, 2015.

*1985 Amendment:* In first sentence substituted "75 days" for "30 days".

*1981 Amendment:* Deleted "under the provisions of this part", substituted "election administrator or deputy" for "county", and inserted "at least 30 days before the election" in the first sentence.

### 85-8-307. Vacancies.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 85-8-308. Oath and bond of commissioners — quorum.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 85-8-312. Custody of funds.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 85-8-314. Court control and compensation of commissioners.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 85-8-321. Organization, appointments, and preliminary report.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 85-8-341. Preparation of report — contents.

**Case Notes**

*Improvements:* Special assessments for flood control purposes are limited to land exclusive of improvements. In re W. Great Falls Flood Control & Drainage District, 159 M 277, 496 P2d 1143 (1971). (Decision prior to 1973 amendment.)

*Commission Property:* A flood control district could assess property and improvements consisting of graded land, drainage culverts, highway bridges, roadbeds, and pavement, within the district's exterior boundaries, that were owned or under lease by State Highway Commission (now Transportation Commission). State ex rel. St. Highway Comm'n v. W. Great Falls Flood Control & Drainage District, 155 M 157, 468 P2d 753 (1970), explained in In re W. Great Falls Flood Control & Drainage District, 159 M 277, 496 P2d 1143 (1971).

*County Subject to Assessment for Benefits:* This section, both before and after amendment by Ch. 169, L. 1929, was broad enough to authorize assessments against a county for benefits to highways resulting from the system of a drainage district although the county did not own land within the district. State ex rel. Valley Center Drain District v. Bd. of County Comm'rs, 100 M 581, 51 P2d 635 (1935), explained in Burke v. Sullivan, 127 M 374, 265 P2d 203 (1954).

### 85-8-345. Notice of hearing of report.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 85-8-350. Judgment on dismissal of proceedings — assessment of costs.

**Compiler's Comments**

*1987 Amendment:* In (2), near beginning of first sentence before "85-8-327", deleted "subsections (1) and (2) of".

### 85-8-361. Contracts.

**Compiler's Comments**

*2013 Amendment:* Chapter 79 in first sentence substituted "$15,000" for "$10,000"; in last sentence substituted "award contracts" for "continue the awarding of contracts from time to time"; and made minor changes in style. Amendment effective October 1, 2013.

*1999 Amendment:* Chapter 96 in first sentence substituted "$10,000" for "$2,500"; and made minor changes in style. Amendment effective July 1, 1999.

*Applicability:* Section 3, Ch. 96, L. 1999, provided: "[This act] applies to contracts awarded after July 1, 1999."

### 85-8-362. Interest of commissioners in contracts forbidden.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 85-8-364. Payment or tender of damages.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

**Case Notes**

*Constitutionality:* The fact that the drainage statute by this section permits the Commissioners to go upon a landowner's property, in advance of an award, for the purpose of necessary investigation to determine the special benefits received or damages suffered by it does not render it violative of the constitutional provision that private property shall not be taken or damaged for public use without compensation having been first made to or paid into court for the owner. In re Valley Center Drain District, 64 M 545, 211 P 218 (1922).

## Part 4

## Alteration of District

### 85-8-402. Hearing — notice and service.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 85-8-403. Court order — dismissal of petition.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 85-8-404. Appeals and assessments.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

## Part 5

## Bonds and Revenue

### 85-8-503. Sale of notes or bonds.

**Compiler's Comments**

*2011 Amendment:* Chapter 253 in fourth sentence near end substituted "97% of face value" for "90% of their face value"; and made minor changes in style. Amendment effective April 22, 2011.

*Severability:* Section 33, Ch. 253, L. 2011, was a severability clause.

*Applicability:* Section 35, Ch. 253, L. 2011, provided: "[This act] applies to local government actions commencing on or after [the effective date of this act]." Effective April 22, 2011.

## Part 6

## Taxes and Assessments

### 85-8-601. Certification and collection of district taxes.

**Compiler's Comments**

*2017 Amendment:* Chapter 67 in (2) in third sentence near beginning inserted "a county is the possessor of a tax lien for", after "assessments have been levied" deleted "has been sold to the county and the tax lien sale certificate is held by the county", and after "redemption of the property from the tax lien deleted "sale". Amendment effective March 2, 2017.

*Applicability:* Section 46(1), Ch. 67, L. 2017, provided: "(1) [This act] applies to tax delinquencies that begin on or after [the effective date of this act]." Effective March 2, 2017.

*2007 Amendment:* Chapter 110 in (2) in third and fourth sentences substituted references to tax lien sale for references to tax sale; and made minor changes in style. Amendment effective October 1, 2007.

*1999 Amendment:* Chapter 584 at beginning of (1) inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

*Severability:* Section 172, Ch. 584, L. 1999, was a severability clause.

*Retroactive Applicability:* Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

*1993 Special Session Amendment:* Chapter 27 in (1), near beginning of first sentence after "certify to", deleted "the agent of" and after "revenue" deleted "in each county wherein the lands of the district are situate" and in second sentence, before "department", deleted "agent of the", after "revenue" deleted "in each county", and after "assessment roll" substituted "in the property tax record of the county for each year" for "to be entered in the assessment book of said county for each year and prior to the delivery of the assessment book to the county treasurer"; and made minor changes in style. Amendment effective January 1, 1994.

*Applicability:* Section 171(2), Ch. 27, Sp. L. November 1993, provided that the amendments to this section apply to tax years after December 31, 1993.

### 85-8-612. Lien of assessments — payment of assessments against state lands.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

*1995 Amendment:* Chapter 325 in (2), near beginning, substituted "state treasurer" for "state auditor", after "certified" substituted "the department of administration" for "the auditor", and after "warrant on the" substituted "treasury" for "treasurer"; and made minor changes in style. Amendment effective July 1, 1995.

**Case Notes**

*Commission Property:* Flood control district could assess property and improvements consisting of graded land, drainage culverts, highway bridges, roadbeds, and pavement, within exterior boundaries of district, that were owned or under lease by state Highway Commission (now Transportation Commission). State ex rel. St. Highway Comm'n v. W. Great Falls Flood Control & Drainage District, 155 M 157, 468 P2d 753 (1970), explained in In re W. Great Falls Flood Control & Drainage District, 159 M 277, 496 P2d 1143 (1971).

*Legislature's Authority to Include State Lands:* The Legislature has authority to include state lands not used for governmental purposes within special improvement or drainage districts and to make them subject to assessments to the extent they are benefited. Such assessments are not "taxes" within the meaning of constitutional and statutory provisions. State ex rel. Freebourn v. Yellowstone County, 108 M 21, 88 P2d 6 (1939).

### 85-8-615. Procedure to levy additional assessments.

**Compiler's Comments**

*1999 Amendment:* Chapter 584 at beginning inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

*Severability:* Section 172, Ch. 584, L. 1999, was a severability clause.

*Retroactive Applicability:* Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

### 85-8-618. Assessment of unassessed, benefited lands.

**Compiler's Comments**

*1999 Amendment:* Chapter 584 at beginning of second sentence inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

*Severability:* Section 172, Ch. 584, L. 1999, was a severability clause.

*Retroactive Applicability:* Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

### 85-8-619. Assessments to have effect of judgment.

**Case Notes**

*Liquidated Claims Against County:* Under this section assessments made by a drainage district, levied against a county for benefits accruing to its highways, are liquidated claims that do not require an audit by the Board of County Commissioners, but in their payment, provisions of the budget law must be observed, under 7-6-2311 through 7-6-2319 and 7-6-2303 (all sections now repealed). State ex rel. Valley Center Drain District v. Bd. of County Comm'rs, 100 M 581, 51 P2d 635 (1935), explained in Burke v. Sullivan, 127 M 374, 265 P2d 203 (1954).

**85-8-623. Assessments not to be obstructed by preliminary defects.**

**Compiler's Comments**

*Section Not Codified:* Section 89-2820, R.C.M. 1947, a validation clause for holders of bonds, warrants, or other evidence of indebtedness, was not codified in the MCA. This clause has not been repealed and is still valid law. Reference may be made to sec. 100, Ch. 129, L. 1921.

**85-8-624. Assessments on improvements — taxpayers' approval, limitations, and election procedures.**

**Compiler's Comments**

*2015 Amendment:* Chapter 49 in (3)(a) substituted "13-1-108" for "13-1-401(4)"; in (3)(b) substituted "The election must be conducted in accordance with Title 13, chapter 1, part 5" for "The manner of conducting the election must be as provided in 13-1-401 and as nearly as practicable in accordance with the provisions of the general election laws of the state in Title 13" and before "registration" inserted "voter"; in (3)(c) near end after "list of persons" inserted "entitled to vote", after "election administrator" deleted "or deputy election administrator", and substituted "13-1-108" for "13-1-401(4)"; in (3)(d) substituted "13-1-108" for "13-1-401(4)"; and made minor changes in style. Amendment effective November 4, 2015.

*2003 Amendment:* Chapter 367 in (3)(b) substituted "13-1-401" for "85-8-302" and after "state" inserted "in Title 13"; and made minor changes in style. Amendment effective October 1, 2003.

*1987 Amendment:* At end of (3)(a) and (3)(c) and second sentence of (3)(d) changed "13-1-401(3)" to "13-1-401(4)"; and in (3)(b) changed "85-8-304" to "85-8-302".

*1985 Amendment:* In (3) changed "85-8-303" to "13-1-401(3)" in three places; near end of (3)(c) before "give them notice", inserted "the election administrator or deputy election administrator shall"; and in (3)(d) in second sentence substituted "and the summary must be included in the notice" for "and shall include the summary as part of the notice".

*1981 Amendment:* Deleted brackets around "85-8-303" in (3)(a); deleted "except that the form of the ballot shall be as hereinafter provided" at the end of (3)(a); in (3)(b), deleted brackets around "85-8-304" and following the reference inserted language relating to the applicability of state general election laws.

# CHAPTER 9
# CONSERVANCY DISTRICTS

## Part 1
## General Provisions

**85-9-103. Definitions.**

**Compiler's Comments**

*2015 Amendment:* Chapter 49 deleted definition that read: ""Notice" means publication at least once each week for 3 consecutive weeks in a newspaper published in each county or, if a newspaper is not published in a county, in a newspaper of general circulation in the county or counties in which a district is or will be located. The last published notice must appear not less than 5 days prior to any hearing or election held under this chapter"; and made minor changes in style. Amendment effective November 4, 2015.

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

**85-9-104. Limitations.**

**Compiler's Comments**

*2001 Amendment:* Chapter 7 at end of (1) substituted "electrical energy" for "electric energy". Amendment effective October 1, 2001.

*1995 Amendment:* Chapter 418 in (2) substituted "department of environmental quality" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

## Part 2
## Creation of Districts

### 85-9-202. Action by department upon receipt of request.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 in (1)(g) substituted "department of environmental quality" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

### 85-9-203. Hearing by department.

**Compiler's Comments**

*2015 Amendment:* Chapter 49 in (1) in second sentence after "department shall" inserted "provide notice as required in 7-1-2121 and then", substituted "no later than" for "sooner", and deleted last sentence that read: "Notice of the hearing shall be given in accordance with 85-9-103(9)"; and made minor changes in style. Amendment effective November 4, 2015.

### 85-9-204. Feasibility study and report — adjustment of proposed boundaries.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 in second sentence substituted "department of environmental quality" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

### 85-9-206. Court hearing on petition — election — limits on court jurisdiction.

**Compiler's Comments**

*2015 Amendment:* Chapter 49 in (1)(c) substituted "Title 13, chapter 1, part 5" for "the provisions of Title 13"; in (2) deleted last sentence that read: "The election must be conducted by mail ballot, as provided in Title 13, chapter 19, or must be held in conjunction with a regular or primary election"; and made minor changes in style. Amendment effective November 4, 2015.

*1997 Amendment:* Chapter 234 in (2), in second sentence, inserted "conducted by mail ballot, as provided in Title 13, chapter 19, or must be". Amendment effective April 11, 1997.

*1995 Amendment:* Chapter 387 in (2), at end, inserted "The election must be held in conjunction with a regular or primary election"; and made minor changes in style.

## Part 3
## Dissolution of Districts

### 85-9-302. Dissolution election.

**Compiler's Comments**

*2015 Amendment:* Chapter 49 in (1) substituted "to be conducted in accordance with Title 13, chapter 1, part 5" for "in the way provided by 85-9-422". Amendment effective November 4, 2015.

### 85-9-304. Appointment of receiver — assessments.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

## Part 4
## Organization and Procedure

### 85-9-401. District directors — appointment, term of office, vacancies, first meeting, and bond.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

**85-9-402. Officers and meetings.**

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

**85-9-406. Directors' powers over finance.**

**Compiler's Comments**

*2001 Amendment:* Chapter 29 in (2) after "exceed" substituted "0.23% of the total assessed value of taxable real property, determined as provided in 15-8-111, within the district, as ascertained by the last assessment for state and county taxes prior to the issuance of the bonds" for "5% of the taxable valuation of real property in the district"; and made minor changes in style. Amendment effective July 1, 2001.

*Saving Clause:* Section 33, Ch. 29, L. 2001, was a saving clause.

*Applicability:* Section 35, Ch. 29, L. 2001, provided: "(1) [This act] applies to the authorization and issuance of bonds occurring on or after July 1, 2001.

(2) Debt limits established under [this act] do not apply to bonds authorized before July 1, 2001, regardless of when the bonds are issued."

**85-9-408. Contracts and agreements by directors.**

**Compiler's Comments**

*2015 Amendment:* Chapter 49 in (3) and (4) substituted "conducted in accordance with Title 13, chapter 1, part 5" for "held as provided in 85-9-422"; and made minor changes in style. Amendment effective November 4, 2015.

**85-9-410. Condemnation authorized.**

**Compiler's Comments**

*2001 Amendment:* Chapter 125 in first sentence substituted "Title 70, chapter 30" for "the law to take private property for public use, with just compensation"; and made minor changes in style. Amendment effective October 1, 2001.

*Interim Study Bill — Eminent Domain:* Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

**85-9-421. Persons entitled to vote.**

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

## Part 5
## Alteration of Districts

**85-9-501. Merger of districts.**

**Compiler's Comments**

*2015 Amendment:* Chapter 49 in (2) substituted "as provided in 7-1-2121 and also notify by mail" for "as specified in 85-9-103(9), as well as by mail to"; and made minor changes in style. Amendment effective November 4, 2015.

**85-9-502. Annexation of property.**

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

**85-9-504. Procedure to exclude lands.**

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

## Part 6
## Finance

### 85-9-602. Notice of public budget hearing.

**Compiler's Comments**

*2015 Amendment:* Chapter 49 in (1) substituted "in accordance with 7-1-2121" for "as provided in 85-9-103(9)"; and made minor changes in style. Amendment effective November 4, 2015.

### 85-9-603. Directors to provide financial information.

**Compiler's Comments**

*2003 Amendment:* Chapter 34 in (1) at beginning after "Before the" substituted "first Monday in August" for "second Monday in July". Amendment effective February 18, 2003.

*Retroactive Applicability:* Section 9(3), Ch. 34, L. 2003, provided: "[Section 7] [85-9-603] applies retroactively, within the meaning of 1-2-109, to the annual assessment provided in 85-9-601 for calendar year 2003 of a conservation district for which the directors shall provide the information specified in 85-9-603."

Section 9(4), Ch. 34, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to any assessment or levy by any taxing jurisdiction for calendar year 2003 for which an assessment or levy date is not specified."

*1993 Special Session Amendment:* Chapter 27 in (1), in introductory clause, substituted "department of revenue" for "county assessor" and before "treasurer" inserted "county"; in (2) substituted "department of revenue and each of the affected county treasurers" for "each of the county assessors and treasurers"; and made minor changes in style. Amendment effective January 1, 1994.

*Applicability:* Section 171(2), Ch. 27, Sp. L. November 1993, provided that the amendments to this section apply to tax years after December 31, 1993.

### 85-9-604. Collection and investment of assessments.

**Compiler's Comments**

*1993 Amendment:* Chapter 10 in (3), in first sentence, deleted reference to Federal Savings and Loan Insurance Corporation; and made minor changes in style.

*1985 Amendment:* In (3), in first sentence, after "bank", inserted "savings and loan association, or credit union", and after "federal deposit insurance corporation", inserted "federal savings and loan insurance corporation, or national credit union administration".

### 85-9-623. Issuance of bonds — resolution and election.

**Compiler's Comments**

*2015 Amendment:* Chapter 49 in (2) substituted "in accordance with 7-1-2121" for "as provided in 85-9-103(9)"; in (3) substituted "conducted in accordance with Title 13, chapter 1, part 5" for "as provided by 85-9-422"; and made minor changes in style. Amendment effective November 4, 2015.

*1997 Amendment:* Chapter 234 in (2), at end, inserted "unless the election is conducted by mail ballot, as provided in Title 13, chapter 19"; and made minor changes in style. Amendment effective April 11, 1997.

*1995 Amendment:* Chapter 387 in (2), after "places", deleted "and hours when the polls will be open"; and made minor changes in style.

### 85-9-625. Issuance of bonds — details of sale.

**Compiler's Comments**

*2011 Amendment:* Chapter 253 in (1) inserted second sentence regarding issuance of bonds at public or private sale and in third sentence at beginning inserted "If the directors conduct a public sale"; in (2) in first sentence near middle substituted "for a price that is not less than 97% of par or face value" for "for not less than their par value" and at end deleted "at par"; and made minor changes in style. Amendment effective April 22, 2011.

*Severability:* Section 33, Ch. 253, L. 2011, was a severability clause.

*Applicability:* Section 35, Ch. 253, L. 2011, provided: "[This act] applies to local government actions commencing on or after [the effective date of this act]." Effective April 22, 2011.

### 85-9-628. Bond registration — copy to county.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

**85-9-629. Disposition and investment of sale proceeds.**

**Compiler's Comments**

*1993 Amendment:* Chapter 10 in (3), in first sentence, deleted reference to Federal Savings and Loan Insurance Corporation; and made minor changes in style.

*1985 Amendment:* In (3), in first sentence, after "bank", inserted "savings and loan association, or credit union", and after "federal deposit insurance corporation", inserted "federal savings and loan insurance corporation, or national credit union administration".

# CHAPTER 15
# DAM SAFETY ACT

**Chapter Administrative Rules**

Title 36, chapter 14, ARM Dam safety rules.

## Part 1
## General Provisions

**Part Administrative Rules**

Title 36, chapter 14, ARM Dam safety rules.

**85-15-106. Definitions.**

**Compiler's Comments**

*1993 Amendment:* Chapter 418 in definition of dam, after "or divert water", deleted "with an impounding capacity of 50 acre-feet or greater measured at maximum normal operating pool"; in definition of high-hazard dam inserted reference to impounding capacity at maximum normal operating pool; in definition of reservoir, after "that contains", deleted "50 acre-feet or more of" and after "impounded water" deleted "measured at maximum normal operating pool"; and made minor changes in style.

*1993 Statement of Intent:* The statement of intent attached to Ch. 418, L. 1993, provided: "A statement of intent is required to provide guidance to the department of natural resources and conservation in adopting rules to implement this bill. It is the intent of the legislature to provide a uniform process for complaints regarding unsafe dams and to reduce the potential for nuisance actions against dam owners. It is further the intent of the legislature to authorize the department to investigate all complaints regarding unsafe dams."

*1991 Amendment:* At end of definitions of dam and reservoir inserted "measured at maximum normal operating pool". Amendment effective April 6, 1991.

**85-15-107. Exemptions.**

**Compiler's Comments**

*2003 Amendment:* Chapter 217 in (1)(d) near middle after "certificate of" substituted "compliance" for "environmental compatibility and public need". Amendment effective April 3, 2003.

*Saving Clause:* Section 19, Ch. 217, L. 2003, was a saving clause.

*Severability:* Section 20, Ch. 217, L. 2003, was a severability clause.

*Coordination Instruction:* Section 11, Ch. 418, L. 1993, provided: "If House Bill No. 121 is passed and approved and if it includes a section amending 85-15-107 and instituting a civil penalty for a violation of the dam safety act, then [sections 2 [85-15-107] and 8 of this act] are void." House Bill No. 121 was passed and approved as Ch. 612, L. 1993.

*1993 Amendment:* Chapter 612 in (1), after "of", deleted "85-15-105, 85-15-106", after "85-15-401" deleted "85-15-501, and", and after "85-15-502" inserted "and 85-15-503"; in (1)(b), at beginning, deleted "The provisions of 85-15-108 through 85-15-110, 85-15-209 through 85-15-216, 85-15-305, 85-15-401, 85-15-501, and 85-15-502 do not apply to" and after "reservoirs" deleted "to nonfederal dams and reservoirs located on federal lands if they are subject to a dam safety review by a federal agency, or to"; in (1)(c), after "commission", deleted language that read: "The provisions of 85-15-105, 85-15-106, 85-15-108 through 85-15-110, 85-15-209 through 85-15-216, 85-15-305, 85-15-401, 85-15-501, and 85-15-502 do not apply to"; deleted former last sentence of (1)(d) that read: "In addition, the provisions of 85-15-108 through 85-15-110, 85-15-209 through 85-15-216, 85-15-305, 85-15-401, 85-15-501, and 85-15-502 do not apply until July 1, 1990, to high-hazard dams that have been inspected by the U.S. army corps of engineers pursuant to P.L. 92-367 and for which resultant dam safety reports have been submitted to the owner"; inserted

(2) relating to inapplicability of provisions to nonfederal dams and reservoirs on federal lands; inserted (3) relating to dams and reservoirs at national priority list site; and made minor changes in style.

*Applicability:* Section 8, Ch. 612, L. 1993, provided: "[This act] applies to causes of action accruing on or after October 1, 1993."

*1991 Amendment:* Near middle of second sentence inserted "to nonfederal dams and reservoirs located on federal lands if they are subject to a dam safety review by a federal agency". Amendment effective April 6, 1991.

*Retroactive Applicability:* Section 3, Ch. 366, L. 1991, provided: "[Section 2] [85-15-107] applies retroactively, within the meaning of 1-2-109, to all nonfederal dams and reservoirs located on federal lands if a federal agency provides a dam safety review for the nonfederal dams or reservoirs."

*1987 Amendment:* Inserted third sentence concerning certificate of environmental compatibility.

*1985 Amendment:* Substituted language concerning provisions of state law inapplicable to dams, dikes, and reservoirs licensed and subject to inspections by the Federal Energy Regulatory Commission for "The provisions of 85-15-102 and 85-15-103 shall not apply to dams, dikes, and reservoirs which are subject to federal power commission inspections under federal laws."

## 85-15-110. Rules.

### Compiler's Comments

*Statement of Intent:* The statement of intent attached to Ch. 501, L. 1985, which enacted this section, provided: "A statement of intent is required for this bill because it delegates rulemaking authority to the department of natural resources and conservation in section 20 [85-15-110].

It is the intent of the legislature that the department adopt rules relating to the classification of dams and reservoirs to determine whether dams and reservoirs are to be classified as high-hazard under the bill; rules governing the content, form, and procedure for applications for dam and reservoir classification and permits to be issued under the bill; rules governing criteria to be used by the owners of dams and reservoirs when conducting inspections of the high-hazard dams and reservoirs and submitting reports to the department; rules establishing safety standards for the design, construction, operation, and maintenance of high-hazard dams and reservoirs; rules establishing emergency preparedness and warning procedures to be implemented by owners of high-hazard dams and reservoirs in cases of danger to people or property; and other rules as may be necessary for the department to implement the bill."

## 85-15-115. Purpose.

### Compiler's Comments

*Applicability:* Section 8, Ch. 612, L. 1993, provided: "[This act] applies to causes of action accruing on or after October 1, 1993."

# Part 2
# Construction, Inspection, and Repair of Dams

### Part Administrative Rules

Title 36, chapter 14, ARM Dam safety rules.

## 85-15-207. Dams and reservoirs — how constructed.

### Compiler's Comments

*1985 Amendment:* Inserted "dam or" before "reservoir".

### Case Notes

*Common-Law Negligence:* An instruction in the precise language of this section should not be given where the plaintiff is suing on the theory of common-law negligence. Richland County v. Anderson, 129 M 559, 291 P2d 267 (1955).

*Measurement of Water in Reservoir:* Devices for measuring the water in a storage reservoir should be such that at a glance anyone may tell the exact number of acre-feet therein at any time, thus obviating the necessity of calling in engineers or others to measure it. The details of operation present a practical or engineering problem rather than a judicial one, and therefore should properly be left to the parties interested. If the court's intervention or assistance is required in that behalf, a motion for modification of the decree should suffice. Fed. Land Bank v. Morris, 112 M 445, 116 P2d 1007 (1941).

*Rights of Person Reservoiring Water:* Briefly stated, the rights of a person to reservoir water are as follows: He may, in any one year, store for use in that or succeeding years what he has a right to use and also any additional amounts which others would not have the right to use and which otherwise would go to waste. The appropriation and use of water, as well as the sites for reservoirs for collecting it, constitute a public use under Art. III, sec. 15, 1889 Mont. Const. (Art. IX, sec. 3, 1972 Mont. Const.), since it is in the interest of the public that water be conserved rather than wasted, so that arid lands may be made productive. Fed. Land Bank v. Morris, 112 M 445, 116 P2d 1007 (1941).

*Storage of Flood Water:* Under Title 85, ch. 15, et seq., reservoirs may be constructed for the purpose of storing flood water, in the course or at the headwaters of an adjudicated stream, provided their construction does not interfere with the use by prior appropriators of the natural flow in the stream to the extent of their appropriations. Donich v. Johnson, 77 M 229, 250 P 963 (1926).

## 85-15-208. Construction in a secure manner.

### Compiler's Comments

*1985 Amendment:* After "person" deleted "association, or corporation"; after "dam" deleted "dike"; and deleted former (2) and (3) that read: "(2) The department of natural resources and conservation may at any time on its own motion, and it shall, upon complaint on oath being made to the department by three or more persons residing or having property in such location that their homes or property would be in danger of destruction or damage in event of flood occurring on account of the breaking of any dam, dike, or reservoir within the state and that they have reason to believe said dam, dike, or reservoir is in an unsafe condition or that it is diverting or is being filled with water to such an extent as to render it unsafe, immediately examine or cause to be examined the dam, dike, or reservoir. If, upon the examination, the department finds that the dam, dike, or reservoir is unsafe or is diverting or is being filled with water to such an extent as to render it unsafe, it shall notify the county attorney of the county in which the dam, dike, or reservoir is located, setting forth its findings, and the county attorney shall immediately take the necessary steps to abate the danger and make the structure safe.

(3) If either party is dissatisfied with the findings of the department, it may appeal to the district court of the district wherein the dam, dike, or reservoir is located, and the court shall hear and determine the matter at the earliest practical time, subject to the right of either party to appeal as in other civil cases; however, the judgment of the department shall control until the final determination of the case."

## 85-15-209. High-hazard dam — determination.

### Compiler's Comments

*1993 Amendment:* Chapter 418 near beginning inserted reference to impounding capacity measured at maximum normal operating pool; and made minor changes in style.

*1993 Statement of Intent:* The statement of intent attached to Ch. 418, L. 1993, provided: "A statement of intent is required to provide guidance to the department of natural resources and conservation in adopting rules to implement this bill. It is the intent of the legislature to provide a uniform process for complaints regarding unsafe dams and to reduce the potential for nuisance actions against dam owners. It is further the intent of the legislature to authorize the department to investigate all complaints regarding unsafe dams."

## 85-15-211. Inspection and reports during construction.

### Compiler's Comments

*1993 Amendment:* Chapter 418 in (4), before "dam", inserted "high-hazard".

*1993 Statement of Intent:* The statement of intent attached to Ch. 418, L. 1993, provided: "A statement of intent is required to provide guidance to the department of natural resources and conservation in adopting rules to implement this bill. It is the intent of the legislature to provide a uniform process for complaints regarding unsafe dams and to reduce the potential for nuisance actions against dam owners. It is further the intent of the legislature to authorize the department to investigate all complaints regarding unsafe dams."

## 85-15-212. Operating permit.

### Compiler's Comments

*1993 Amendment:* Chapter 418 in three places, before "dam", inserted "high-hazard".

*1993 Statement of Intent:* The statement of intent attached to Ch. 418, L. 1993, provided: "A statement of intent is required to provide guidance to the department of natural resources and conservation in adopting rules to implement this bill. It is the intent of the legislature to provide a uniform process for complaints regarding unsafe dams and to reduce the potential for nuisance actions against dam owners. It is further the intent of the legislature to authorize the department to investigate all complaints regarding unsafe dams."

### 85-15-213. Periodic inspections after construction.

**Compiler's Comments**

*1993 Amendment:* Chapter 418 in four places, before "dam", inserted "high-hazard"; inserted (1)(b) regarding Department determination of inspection frequency; and made minor changes in style.

*1993 Statement of Intent:* The statement of intent attached to Ch. 418, L. 1993, provided: "A statement of intent is required to provide guidance to the department of natural resources and conservation in adopting rules to implement this bill. It is the intent of the legislature to provide a uniform process for complaints regarding unsafe dams and to reduce the potential for nuisance actions against dam owners. It is further the intent of the legislature to authorize the department to investigate all complaints regarding unsafe dams."

### 85-15-216. High-hazard dam permit cancellation.

**Compiler's Comments**

*1993 Amendment:* Chapter 418 at end of first sentence, before "dam", inserted "high-hazard".

*1993 Statement of Intent:* The statement of intent attached to Ch. 418, L. 1993, provided: "A statement of intent is required to provide guidance to the department of natural resources and conservation in adopting rules to implement this bill. It is the intent of the legislature to provide a uniform process for complaints regarding unsafe dams and to reduce the potential for nuisance actions against dam owners. It is further the intent of the legislature to authorize the department to investigate all complaints regarding unsafe dams."

## Part 3
## Court Proceedings

### 85-15-305. Liability of owners for damage.

**Compiler's Comments**

*1993 Amendment:* Chapter 612 in (1), after "(2)", inserted "and (3)" and near end, after "failure", deleted "or rupture"; in (2), after "chapter", inserted "or that was designed and constructed under the supervision of an engineer and properly maintained", after "damages" inserted "to persons or property", after "water from" inserted "failure of", and at end, after "reservoir", deleted "which are of sufficient magnitude to exceed the limits of the 100-year floodplain as defined in 76-5-103"; in (3), after "chapter", inserted "or that was designed and constructed under the supervision of an engineer and properly maintained"; and made minor changes in style.

*Two-Thirds Vote Required:* Section 7, Ch. 612, L. 1993, provided that if [this act] received a two-thirds vote, then the bracketed language in [section 3(4)] [85-15-305(4)] that read: "(4) The limitation on liability provided in subsection (2) does not apply to a nonpermitted state-owned dam" was void. House Bill No. 121 (Ch. 612, L. 1993) received the required two-thirds vote of each house; therefore, the bracketed language in 85-15-305(4) was void.

*Applicability:* Section 8, Ch. 612, L. 1993, provided: "[This act] applies to causes of action accruing on or after October 1, 1993."

## Part 5
## Penalties

### 85-15-502. Deposit of penalties and costs.

**Compiler's Comments**

*1987 Amendment:* After "chapter" inserted "other than those collected in a justice's court".

### 85-15-503. Civil penalty.

**Compiler's Comments**

*Applicability:* Section 8, Ch. 612, L. 1993, provided: "[This act] applies to causes of action accruing on or after October 1, 1993."

# CHAPTER 20
# WATER COMPACTS

**Chapter Law Review Articles**

Indian Aboriginal and Reserved Water Rights, an Opportunity Lost, Carter, 64 Mont. L. Rev. 377 (2003).

The Interaction of U.S. Public Lands, Water, and State Sovereignty in the West: A Reassessment and Celebration, Leshy, 41 Pub. Land & Resources L. Rev. 1 (2019).

Protecting Traditional Water Resources: Legal Options for Preserving Tribal Non-Consumptive Water Use, Guarino, 37 Pub. Land & Resources L. Rev. 89 (2016).

When Good Streams Go Dry: United States v. Adair and the Unprincipled Elimination of a Federal Forum for Treaty Reserved Rights, Sudbury, 25 Pub. Land & Resources L. Rev. 147 (2004).

The Yellowstone River Compact: An Overview, 3 Pub. Land L. Rev. 179 (1982).

## Part 1
## Yellowstone River Compact

**Part Case Notes**

*Commerce Clause Immunity:* The Yellowstone River Compact was approved by Congress. Because it was approved by Congress, it is federal, not state, law for purposes of Commerce Clause objections. Therefore, the Compact cannot by definition be a state law impermissibly interfering with commerce but is instead a federal law, immune from attack. Intake Water Co. v. Yellowstone River Compact Comm'n, (D.C. Mont. 1983, cv 1184, apparently not reported), affirmed 769 F2d 568 (1985).

*Compact Applies to All Waters of Yellowstone River Basin:* A diversion of water from the Yellowstone River at a point on the river that is not specifically apportioned by Article V of the Yellowstone River Compact is subject to the terms of the Compact because the proposed diversion is within the Yellowstone River Basin and is on the Yellowstone River system. Intake Water Co. v. Yellowstone River Compact Comm'n, (D.C. Mont. 1983, cv 1184, apparently not reported), affirmed 769 F2d 568 (1985).

*Compact Not in Violation of Equal Protection:* In a suit for declaratory and injunctive relief, Intake Water Company challenged the Yellowstone River Compact, claiming that it was a violation of equal protection under the Fourteenth Amendment for the Compact to restrict interbasin transfer of Yellowstone River water, while other water appropriations from other river basins in Montana do not require consent of all the signatory states to the compact. A three-judge panel (required under 28 U.S.C. § 2281 repealed by Act of August 12, 1976, 90 Stat. 1119) upheld the Compact, ruling: (1) it is well settled that the Fourteenth Amendment does not prohibit legislation that operates on a limited geographical area within a state; (2) differing conditions in different geographic areas may provide a reasonable basis for different legislative treatment; and (3) Intake cannot meet its required heavy burden to show that the Compact is not rationally related to a legitimate government purpose. Intake Water Co. v. Yellowstone River Compact Comm'n, (D.C. Mont. 1983, cv 1184, apparently not reported), affirmed 769 F2d 568 (1985).

*Jurisdiction of Federal and State Courts Concurrent:* Where the defendant private corporation appropriating water from the Yellowstone River in Wyoming for use in Montana brought an action in state court in Montana to compel certain actions of the Department of Natural Resources and Conservation under the Yellowstone River Compact and the plaintiff subsequently brought an action in the federal District Court in Montana under 28 U.S.C. §§ 1331(2) and 2201 to declare the rights of the parties under the Yellowstone River Compact, both the state courts of Wyoming and Montana had subject matter jurisdiction to construe the terms of the Compact and enforce its provisions. Utah Int'l, Inc. v. Intake Water Co., 484 F. Supp. 36, 36 St. Rep. 2270 (D.C. Mont. 1979).

*Jurisdiction of Federal Court — Abstention in Favor of State Court Proceedings:* Where the defendant private corporation had instituted an action in state District Court to compel certain actions of the Department of Natural Resources and Conservation under the Yellowstone River Compact and the plaintiff water company subsequently brought an action in federal District Court under 28 U.S.C. §§ 1331(2) and 2201 to declare the rights of the parties to waters appropriated by each under the Compact, the assumption of jurisdiction of the federal court was discretionary and the court should, in accordance with the principles of abstention announced in Colorado River Water Conservation District v. U.S., 424 US 800 (1976), abstain from exercising its jurisdiction, as there were significant questions of state policy which would appropriately be determined in the case pending before the state District Court. Utah Int'l, Inc. v. Intake Water Co., 484 F. Supp. 36, 36 St. Rep. 2270 (D.C. Mont. 1979).

*Jurisdiction of Federal Court — Compact Law as Federal Question:* Where the defendant private corporation had instituted an action in state District Court to compel certain action of the Department of Natural Resources and Conservation and where the plaintiff subsequently brought an action in federal District Court for a declaratory judgment under 28 U.S.C. §§ 1331(2) and 2201 to declare the rights of the parties to waters appropriated by each under the Yellowstone River Compact, the Compact constituted a law of the United States under 28 U.S.C. § 1331(2), giving the federal District Court jurisdiction to declare its terms and enforce its provisions. Utah Int'l, Inc. v. Intake Water Co., 484 F. Supp. 36, 36 St. Rep. 2270 (D.C. Mont. 1979).

### 85-20-101. Approval of compact.

**Compiler's Comments**

*Commissioner Correction:* The Code Commissioner, 1979, has restored the numbering system and paragraph nomenclature used in the Yellowstone River Compact to avoid confusion with the compact as adopted by the other signatory states and the United States.

**Administrative Rules**

Title 36, chapter 26, subchapter 1, ARM Yellowstone River Compact — dispute resolution.

**Case Notes**

*Commerce Clause Immunity:* The Yellowstone River Compact was approved by Congress. Because it was approved by Congress, it is federal, not state, law for purposes of Commerce Clause objections. Therefore, the Compact cannot by definition be a state law impermissibly interfering with commerce but is instead a federal law, immune from attack. Intake Water Co. v. Yellowstone River Compact Comm'n, (D.C. Mont. 1983, cv 1184, apparently not reported), affirmed 769 F2d 568 (1985).

*Compact Applies to All Waters of Yellowstone River Basin:* A diversion of water from the Yellowstone River at a point on the river that is not specifically apportioned by Article V of the Yellowstone River Compact is subject to the terms of the Compact because the proposed diversion is within the Yellowstone River Basin and is on the Yellowstone River system. Intake Water Co. v. Yellowstone River Compact Comm'n, (D.C. Mont. 1983, cv 1184, apparently not reported), affirmed 769 F2d 568 (1985).

*Compact Not in Violation of Equal Protection:* In a suit for declaratory and injunctive relief, Intake Water Company challenged the Yellowstone River Compact, claiming that it was a violation of equal protection under the Fourteenth Amendment for the Compact to restrict interbasin transfer of Yellowstone River water, while other water appropriations from other river basins in Montana do not require consent of all the signatory states to the compact. A three-judge panel (required under 28 U.S.C. § 2281 repealed by Act of August 12, 1976, 90 Stat. 1119) upheld the Compact, ruling: (1) it is well steeled that the Fourteenth Amendment does not prohibit legislation that operates on a limited geographical area within a state; (2) differing conditions in different geographic areas may provide a reasonable basis for different legislative treatment; and (3) Intake cannot meet its required heavy burden to show that the Compact is not rationally related to a legitimate government purpose. Intake Water Co. v. Yellowstone River Compact Comm'n, (D.C. Mont. 1983, cv 1184, apparently not reported), affirmed 769 F2d 568 (1985).

*Diversion in Wyoming — Use in Montana — Priority Dates:* Corporation filed a Wyoming application to appropriate water, as required by the Yellowstone River Compact, because Wyoming was the state of diversion (Montana being the state of ultimate use of the water). Corporation then filed the same information in Montana, which assigned the date of the Wyoming filing as the priority date in conformity with Wyoming law. Water company did not attack the Wyoming filing but claimed mandamus should issue requiring Montana to assign the Montana filing date as the priority date. Montana correctly assigned the Wyoming filing date as the priority date, as required by the Compact, and mandamus would not issue, since there was no clear legal duty for Montana to assign the Montana filing date as the priority date. State ex rel. Intake Water Co. v. Bd. of Nat'l Resources & Conserv., 197 M 482, 645 P2d 383, 39 St. Rep. 717 (1982).

*Appropriation Filing — Correction of Defect — Priority Date:* Corporation filed application in Wyoming, as required by the Yellowstone River Compact, to appropriate water in Wyoming for use in Montana. Montana notified corporation that it should also file the same information on Montana forms and that if it did so the corporation would retain the priority date of the date it filed in Wyoming. The corporation filed in Montana within 18 months of its Wyoming filing. Since 85-2-302 gives Montana discretion of allowing up to 18 months for a correction of a defective filing without the applicants losing the original filing date as the priority date, corporation was entitled to have Montana, in its discretion, assign as a priority date the date of the Wyoming filing. Montana had no clear legal duty to do otherwise and was not subject to a mandate that it assign as the priority date the date of the Montana filing. State ex rel. Intake Water Co. v. Bd. of Nat'l Resources & Conserv., 197 M 482, 645 P2d 383, 39 St. Rep. 717 (1982).

*Compact as Treaty — State Law Subordinate:* The Yellowstone River Compact, signed by Wyoming, North Dakota, and Montana and ratified by Congress, has the status of a treaty; and state law, including Montana's water law statutes, is subordinate to it. State ex rel. Intake Water Co. v. Bd. of Nat'l Resources & Conserv., 197 M 482, 645 P2d 383, 39 St. Rep. 717 (1982).

**Attorney General's Opinions**

*Yellowstone River Compact:* Article X of the Yellowstone River Compact requires the consent of the states of Montana and North Dakota before water from the Little Bighorn River in Wyoming may be exported from the Yellowstone River Basin by a coal slurry pipeline. 38 A.G. Op. 18 (1979).

## 85-20-102. Purpose of the part.

**Compiler's Comments**

*Section Not Codified:* Section 89-904, R.C.M. 1947, a temporary clause pertaining to congressional approval and legislative approval of other states, was not codified in the MCA. This clause has not been repealed and is still valid law. Reference may be made to sec. 2, Ch. 39, L. 1951.

## 85-20-104. Filing written statement with department.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

**Case Notes**

*Diversion in Wyoming — Use In Montana — Priority Dates:* Corporation filed a Wyoming application to appropriate water, as required by the Yellowstone River Compact because Wyoming was the state of diversion (Montana being the state of ultimate use of the water). Corporation then filed the same information in Montana, which assigned the date of the Wyoming filing as the priority date in conformity with Wyoming law. Water company did not attack the Wyoming filing but claimed mandamus should issue requiring Montana to assign the Montana filing date as the priority date. Montana correctly assigned the Wyoming filing date as the priority date, as required by the Compact, and mandamus would not issue, since there was no clear legal duty for Montana to assign the Montana filing date as the priority date. State ex rel. Intake Water Co. v. Bd. of Nat'l Resources & Conserv., 197 M 482, 645 P2d 383, 39 St. Rep. 717 (1982).

*Appropriation Filing — Correction of Defect — Priority Date:* Corporation filed application in Wyoming, as required by the Yellowstone River Compact, to appropriate water in Wyoming for use in Montana. Montana notified corporation that it should also file the same information on Montana forms and that if it did so the corporation would retain the priority date of the date it filed in Wyoming. The corporation filed in Montana within 18 months of its Wyoming filing. Since 85-2-302 gives Montana discretion of allowing up to 18 months for a correction of a defective filing without the applicants losing the original filing date as the priority date, corporation was entitled to have Montana, in its discretion, assign as a priority date the date of the Wyoming filing. Montana had no clear legal duty to do otherwise and was not subject to a mandate that it assign as the priority date the date of the Montana filing. State ex rel. Intake Water Co. v. Bd. of Nat'l Resources & Conserv., 197 M 482, 645 P2d 383, 39 St. Rep. 717 (1982).

## 85-20-105. Duty to install measuring devices.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

## 85-20-106. Duty to measure water.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

**85-20-109. Department to make rules.**

**Compiler's Comments**

*1995 Amendment:* Chapter 418 at beginning substituted "department" for "board" and after "adopt and" deleted "the department shall". Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

**Administrative Rules**

Title 36, chapter 26, subchapter 1, ARM Yellowstone River Compact — dispute resolution.

## Part 2
## Fort Peck-Montana Compact

**85-20-201. Fort Peck-Montana compact ratified.**

**Compiler's Comments**

*Resolution Submitted to Congress:* Article XII. B. Petition to Congress provides in paragraph 2 that ". . . this compact shall have no force and effect until the resolution set forth in paragraph 1 of this section is approved by the Montana Legislature and submitted to Congress." Senate Joint Resolution 41 entitled: "A JOINT RESOLUTION OF THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA URGING CONGRESS TO ADOPT LEGISLATION AUTHORIZING THE ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK INDIAN RESERVATION TO ENTER WATER AGREEMENTS FOR THE DELIVERY, USE, OR TRANSFER OF WATER WITHIN OR OUTSIDE THE RESERVATION" was approved by the Montana Legislature and filed with the Secretary of State on April 30, 1985, who then submitted copies to Montana's Congressional Delegation, the Committee on Indian Affairs of the United States Senate, and the Committee on Interior and Insular Affairs of the United States House of Representatives on June 12, 1985.

**Law Review Articles**

Water Use Efficiency: The Value of Water in the West, Getches, 8 Pub. Land L. Rev. 1 (1987).

## Part 3
## Northern Cheyenne-Montana Compact

**85-20-301. Northern Cheyenne-Montana compact ratified.**

**Compiler's Comments**

*Effective Date:* Section 2, Ch. 812, L. 1991, provided that this section is effective on passage and approval. Approved May 17, 1991.

**85-20-302. Consent to federal act and modification of compact.**

**Compiler's Comments**

*Preamble:* The preamble attached to Ch. 7, Sp. L. November 1993, provided: "WHEREAS, in accordance with section 85-2-702, MCA, the 52nd Montana Legislature ratified the Northern Cheyenne-Montana Compact as Chapter 812, Laws of 1991; and

WHEREAS, by its terms, the Compact required the participation of the United States in the project to repair and rehabilitate the Tongue River Dam in southeastern Montana, which required certain authorizations and appropriations by the Congress of the United States; and

WHEREAS, in the Northern Cheyenne Indian Reserved Water Rights Settlement Act of 1992, referred to in this preamble as the federal act (Public Law 102-374, 106 Stat. 1186), Congress approved the Compact and obligated, under certain terms and conditions, the federal government and the state to provide funding for the project; and

WHEREAS, because of a clerical error in the federal act Montana may lose some of the federal funding for the project, and accordingly, Congress, in S. 1654 (103d Cong. 1st Sess.), is considering an amendment to correct that error; and

WHEREAS, some of the terms of the federal act and the pending amendment vary from the Compact, thereby creating uncertainty in efforts to obtain federal funding for the project and secure judicial approval of the Compact; and

WHEREAS, the Northern Cheyenne Tribe, the Montana Reserved Water Rights Compact Commission, and the Montana Department of Natural Resources and Conservation have given their consent to, adopted, and ratified the terms of the federal act and the pending amendment; and

WHEREAS, the judicial confirmation of the Compact and timely completion of the project is of high priority to the State of Montana, the Northern Cheyenne Tribe, and the United States.

THEREFORE, the 53rd Legislature of the State of Montana, meeting in special session, finds it appropriate to give its consent to, adopt, and ratify the terms and conditions of the federal act and the pending amendment and to modify the Compact to the extent necessary to conform therewith."

*Effective Date:* Section 3, Ch. 7, Sp. L. November 1993, provided: "[This act] is effective on passage and approval." Approved December 17, 1993.

## Part 4
## United States Park Service-Montana Compact

### 85-20-401. United States National Park Service-Montana compact ratified.

**Compiler's Comments**

*1995 Amendment:* Chapter 149 after Compact title inserted second paragraph relating to Bighorn Canyon National Recreation Area and Little Bighorn Battlefield National Monument; in Article I DEFINITIONS, in definition of abstract, inserted "[and] the copy of the document entitled "Abstract of National Park Service Water Rights - BCNRA and LBBNM" referenced in this Compact as Appendix 2", in definition of consumptive use adjusted subsection reference, in definition of current consumptive use inserted "[with respect to BHNB, GNP, or YNP and] on or before the effective date of the compact [with respect to BCNRA and LBBNM]", in definition of future consumptive use inserted "[with respect to BHNB, GNP, or YNP and] after the effective date of the compact [with respect to BCNRA and LBBNM]", inserted definition of Crow Tribal water rights, inserted definition of curtailment, at end of definition of Little Bighorn Battlefield National Monument inserted "and by Act of March 22, 1946, 60 Stat. 59", in definition of non-consumptive use, in three places, inserted "[with respect to BHNB, GNP, or YNP and]" and reference to the effective date of this Compact with respect to BCNRA and LBBNM, inserted definition of Parkman sandstone, inserted definition of quaternary alluvium, and inserted definition of quaternary terrace deposits; in Article II IMPLEMENTATION, under "Abstract" near middle of first sentence, inserted "[for Big Hole National Battlefield, Glacier National Park, and Yellowstone National Park, and] Appendix 2, which is a specific listing of all of the United States' water rights for Bighorn Canyon National Recreation Area and the Little Bighorn Battlefield National Monument"; in II, B. Method of Allocation of Water on Category 3 and 4 Streams and of Determining Rights Subject to Curtailment on the Little Bighorn River and its Tributaries, in catchline, inserted "and of Determining Rights Subject to Curtailment on the Little Bighorn River and its Tributaries" and at end of second sentence inserted "and whether a water right on the Little Bighorn River and its tributaries upstream from the LBBNM shall be subject to curtailment to satisfy the reserved instream flow water right for LBBNM"; in II, B., 1. Allocation to Instream Flow, at beginning of introductory paragraph, inserted "With the exception of the reserved instream flow rights for LBBNM"; in II, B., 2., b. Groundwater inserted introductory paragraph, inserted iv. relating to calculation of total future consumptive use on Category 3 or 4 streams at BCNRA, and inserted v. relating to determination of whether an appropriation of groundwater after effective date of Compact is subject to curtailment to satisfy the instream flow water right at LBBNM; in II, C. Subordination of Instream Flow Right, in 1. at end, substituted "sections I and K" for "section I" and in 2. inserted reference to 85-2-212 and at end inserted "provided that water allocated to future consumptive use pursuant to Article III [B.] of this Compact may be used to satisfy claims filed pursuant to 85-2-221(3), MCA in order of priority"; in II, F. Prohibition on Future Impoundments, near end of first sentence, inserted "[and] no new impoundments may be permitted on the mainstem of the Little Bighorn River in Montana upstream of the LBBNM"; in II, G. Management to Maximize Use by Montana Water Users of the Water Allocated to Consumptive Use Rights Recognized Under State Law, near middle after "January 1, 1993", inserted "[with respect to BHNB, GNP, and YNP and] before the effective date of this compact [with respect to BCNRA and LBBNM]"; in II, H. Basin Closure inserted "Big Horn Canyon National Recreation Area: Dry Head, Deadman, Davis and Layout Creeks"; in II, I. Enforcement of Water Right, in 5. at end, inserted last four sentences requiring United States to install and maintain rated gauge to measure instream flows in Little Bighorn River and restricting curtailment of junior water uses; inserted II, K. Administration of Little Bighorn Instream Flow relating to administration of instream flow rights of United States on Little Bighorn River; in Article III WATER RIGHT, in introductory paragraph, inserted second sentence recognizing that water rights for certain NPS Units are junior to Crow Tribal water rights; in III, B. Bighorn Canyon National Recreation Area substituted current Compact language relating to Bighorn Canyon National Recreation Area water rights, including Table 3 and Table 4, for former language that read: "B. Bighorn Canyon National Recreation Area

The parties were unable to finalize agreement on quantification of the water rights for BCNRA prior to the effective date of this Compact. The parties agree to continue to pursue, in good faith, quantification of water rights, and further agree that all other relevant provisions of this Compact apply to a settlement of this water right through this process. In the event the parties are unable to agree on quantification, the United States retains its right to have the quantity of any reserved water right for BCNRA adjudicated in a state or federal court of competent jurisdiction"; in III, E. Little Bighorn Battlefield National Monument substituted current Compact language relating to Little Bighorn Battlefield National Monument water rights, including Table 7, for former language that read: "E. Little Bighorn Battlefield National Monument

The parties were unable to finalize agreement on quantification of the water rights for LBBNM prior to the effective date of this Compact. For the purposes of settlement of the reserved water rights for land administered by the National Park Service in Montana, the parties agree that a water right for instream flow is necessary for the historic purposes of LBBNM. The parties agree to continue to pursue, in good faith, quantification of water rights and further agree that all other relevant provisions of this Compact apply to a settlement of this water right through this process. In the event the parties are unable to agree on quantification, the United States retains its right to have the quantity of any reserved water right for LBBNM adjudicated in a state or federal court of competent jurisdiction"; and throughout Article III WATER RIGHT renumbered existing Tables to reflect insertion of new Tables and changed internal references to Tables, as appropriate; in Article V GENERAL PROVISIONS, in V, A. No Effect on Tribal Rights or Other Federal Reserved Water Rights, in 1. near middle of first sentence, inserted "[with respect to BHNB, GNP, and YNP or] the nature or extent of the rights to water or the right to administer water [with respect to BCNRA and LBBNM]" and inserted last sentence recognizing seniority of Crow Tribal water rights; in V, C. General Disclaimers inserted 10. relating to alteration or amendment of Yellowstone River Compact; in V, G. Severability, at end, inserted "provided that for the purposes of Sec. 85-2-702(3) MCA, the water rights described in this Compact for the LBBNM and BCNRA Units shall be considered as separate Compacts"; in VI FINALITY OF COMPACT AND DISMISSAL OF PENDING CASES, in B., 2. Disposition of Federal Suits, at end of first sentence, inserted "and any claims made by the United States for LBBNM or BCNRA in federal court"; in VI, C. Settlement of Claims, in first paragraph in second sentence, substituted "retained in Article III, sections D. and F. in the Compact for YNP, GNP, and BHNM" for "retained in Article III, sections B., D., E, and F." and inserted last paragraph exempting water rights Claims No. 43P-W-162354-00 and 43P-W-162348-00, relating to Big Horn Canal and Pete's Spring, from this Compact; adjusted internal references to reflect codification of new material within existing compact; and made minor changes in style.

*Codification Instruction — Explanation:* Section 2, Ch. 149, L. 1995, provided: "[Section 1] is intended to be codified as an integral part of the United States National Park Service-Montana Water Rights Compact, as provided in 85-20-401, and the provisions of the United States National Park Service-Montana Water Rights Compact, as provided in 85-20-401, apply to [section 1]." Accordingly, the Code Commissioner has inserted portions of [this act] into 85-20-401, and those changes are reported in the 1995 amendment note.

*Effective Date — Applicability:* Section 3, Ch. 149, L. 1995, provided: "(1) [This act] is effective upon signature by the parties as provided in [this act].

(2) Because [this act] requires Montana and United States approval and incorporates provisions of the existing water rights compact between the United States National Park Service and the State of Montana as provided in 85-20-401, [this act] applies only to the Bighorn Canyon National Recreation Area and the Little Bighorn Battlefield National Monument. The provisions of the existing compact, as provided in 85-20-401, continue in effect and are not affected by [this act] and are incorporated into [this act]."

**Administrative Rules**

Title 36, chapter 12, subchapter 12, ARM Yellowstone controlled ground water area.

**85-20-402. Accounting for federal funds.**

**Compiler's Comments**

*1999 Amendment:* Chapter 389 in (2) following "accounts" deleted "are statutorily appropriated, as provided in 17-7-502, and". Amendment effective July 1, 1999.

## Part 5
## United States Bureau of Land Management-Montana Compact

**Part Compiler's Comments**

*Ratification Date:* This compact was ratified upon filing with the Secretary of State on March 28, 1997.

## Part 6
## Chippewa Cree Tribe-Montana Compact

### 85-20-601. Chippewa Cree Tribe-Montana compact ratified.

**Compiler's Comments**

*Ratification Date:* This compact was ratified upon filing with the Secretary of State on April 15, 1997.

*Provision Exception:* Section 2, Ch. 265, L. 1997, provided: "Notwithstanding the provisions of 7-6-204, Hill County may apply the interest accrued on the $50,000 water purchase contract with the state of Montana toward operation, maintenance, and future repairs to the Lower Beaver Creek reservoir. The Department is authorized to execute a contract with Hill County for the purchase of 800 acre-feet of water stored in Lower Beaver Creek Reservoir. The Department is authorized to assist the Tribe, Hill County, and any appropriate federal agency in drafting an Operating Agreement for coordination of release of the purchased water from Lower Beaver Creek Reservoir with reductions in the natural flow of Beaver Creek due to diversion and impoundment of water on the Reservation."

## Part 8
## United States Fish and Wildlife Service, Red Rock Lakes-Montana Compact

### 85-20-801. United States Fish and Wildlife Service, Red Rock Lakes-Montana compact ratified.

**Compiler's Comments**

*2001 Amendment:* Chapter 187 in Article II.A.1. substituted text of chart for former text (see 2001 Session Law for former text) and in II.A.4. in second sentence at end after "East Bench Irrigation District" inserted "and state water right permit number 65254-S41A". Amendment effective April 3, 2001.

*Effective Date:* This section is effective October 1, 1999.

## Part 9
## Crow Tribe-Montana Compact

**Part Case Notes**

*Water Court's Dismissal of Objections to Crow Water Compact Proper — No Error in Refusal to Stay Proceedings:* A group of Crow tribal members holding interests in parcels of former tribal land appealed the Water Court's dismissal of their objections to the Crow Water Compact (Compact) and the Water Court's refusal to stay the proceedings pending the resolution of a lawsuit that the tribal members filed in federal court, arguing that the Water Court erred in treating them as represented parties for the purposes of considering the Compact; that the Water Court should have stayed the proceedings until the resolution of the federal lawsuit; and that a current use list of the tribal water rights is a prerequisite to the validity of the Compact. The Supreme Court affirmed, finding that the Water Court properly determined that the adequacy of the tribal members' representation was not within the scope of its review and, following Officers for Justice v. Civil Service Comm'n, 688 F.2d 615 (9th Cir. 1982), properly limited its review to determining whether the Compact was the product of fraud, collusion, or overreaching. The Water Court acted within its discretionary powers in denying the stay because staying the proceedings until the federal lawsuit was resolved would work a hardship and injustice on the parties who negotiated the Compact and potentially risk the repeal of the Compact. The Compact and the congressional ratification do not require that the specific water rights of the tribal members be quantified prior to implementing the Compact; therefore, there are no grounds for concluding that the Water Court should have deferred action on the Compact. In re Crow Water Compact, 2015 MT 217, 380 Mont. 168, 354 P.3d 1217.

**85-20-901. Crow Tribe-Montana compact ratified.**

**Compiler's Comments**

*2009 Amendment:* Chapter 44 in Article VI A.3. at end inserted exception clause concerning interest earned on funds in escrow account; and made minor changes in style. Amendment effective on signature of parties as provided in 85-20-901.

*Effective Date:* Section 3, Ch. 3, Sp. L. June 1999, provided that this section is effective on passage and approval. Approved June 22, 1999.

**Case Notes**

*Petition to Adjudicate Water Rights — Reversed and Remanded to Allow Owner to File Exempt Claim:* A ranch acquired Indian allotment land that had been previously held in trust by the United States and was later converted to fee status. The ranch petitioned the Water Court for adjudication of existing water rights appurtenant to the lands. The Water Court denied the petition, holding that the lands did not require a separate adjudication because they were part of the Crow Water Compact. On appeal, the Supreme Court reversed and remanded the case with instructions that the petition be dismissed without prejudice so that the ranch could timely file an exempt claim with the Department of Natural Resources and Conservation. In re Scott Ranch, LLC, 2017 MT 230, 388 Mont. 509, 402 P.3d 1207.

*Crow Compact Upheld — Compact Held Reasonable — Public Property and Water Rights Reasonable Under Compact — Public Comment Satisfied Due Process:* Individual objectors to the Crow Water Compact appealed to the Supreme Court following the Water Court's determination that the Compact was valid. This action was subsequent to In re Crow Water Compact, 2015 MT 217, 380 Mont 168, 354 P.3d 1217. The objectors, who were not parties to the Compact but who owned land and water rights near the reservation, argued that the Water Court did not apply the proper legal standard, that they sustained injury because the Compact was unreasonable, and that their due process rights were violated during the Compact negotiation process. The Supreme Court disagreed with the objectors, holding that the Water Court correctly applied the correct standard articulated in Crow I, that the Compact was reasonable and had reasonable protection of state water and property rights, that the objectors' argument of future potential problems was beyond the scope of its review, that reservation of water for public recreation, wildlife, and aquatic life was for the benefit of the public, and that the record demonstrated sufficient opportunities for public comment during the Compact approval process. In re Crow Water Compact, 2015 MT 353, 382 Mont. 46, 364 P.3d 584.

*Water Court's Dismissal of Objections to Crow Water Compact Proper — No Error in Refusal to Stay Proceedings:* A group of Crow tribal members holding interests in parcels of former tribal land appealed the Water Court's dismissal of their objections to the Crow Water Compact (Compact) and the Water Court's refusal to stay the proceedings pending the resolution of a lawsuit that the tribal members filed in federal court, arguing that the Water Court erred in treating them as represented parties for the purposes of considering the Compact; that the Water Court should have stayed the proceedings until the resolution of the federal lawsuit; and that a current use list of the tribal water rights is a prerequisite to the validity of the Compact. The Supreme Court affirmed, finding that the Water Court properly determined that the adequacy of the tribal members' representation was not within the scope of its review and, following Officers for Justice v. Civil Service Comm'n, 688 F.2d 615 (9th Cir. 1982), properly limited its review to determining whether the Compact was the product of fraud, collusion, or overreaching. The Water Court acted within its discretionary powers in denying the stay because staying the proceedings until the federal lawsuit was resolved would work a hardship and injustice on the parties who negotiated the Compact and potentially risk the repeal of the Compact. The Compact and the congressional ratification do not require that the specific water rights of the tribal members be quantified prior to implementing the Compact; therefore, there are no grounds for concluding that the Water Court should have deferred action on the Compact. In re Crow Water Compact, 2015 MT 217, 380 Mont. 168, 354 P.3d 1217.

**85-20-902. Findings and purpose.**

**Compiler's Comments**

*Nonseverability:* Section 7, Ch. 1, Sp. L. June 1999, was a nonseverability clause.

*Effective Date:* Section 9, Ch. 1, Sp. L. June 1999, provided that this section is effective upon the later of passage and approval of [this act] or passage and approval of Senate Bill No. 1. Both bills were approved June 22, 1999.

### 85-20-903. Definitions.

**Compiler's Comments**

*Nonseverability:* Section 7, Ch. 1, Sp. L. June 1999, was a nonseverability clause.

*Effective Date:* Section 9, Ch. 1, Sp. L. June 1999, provided that this section is effective upon the later of passage and approval of [this act] or passage and approval of Senate Bill No. 1. Both bills were approved June 22, 1999.

### 85-20-904. Payment of settlement funds into escrow — requirements for escrow agreement — notice from attorney general.

**Compiler's Comments**

*2009 Amendment:* Chapter 44 in (1) in second sentence near middle after "agreement" inserted "and any changes to the agreement authorized by law" and in fourth sentence near end after "and that" inserted "except as provided in subsection (4)"; in (3) near end substituted "principal and any interest remaining in the escrow fund" for "contents of the escrow fund, including funds paid into the escrow fund by the state and any interest earned on the escrow fund"; inserted (4) concerning payment of interest earned on escrow fund; and made minor changes in style. Amendment effective March 20, 2009.

*Retroactive Applicability:* Section 4, Ch. 44, L. 2009, provided: "[Section 2] applies retroactively, within the meaning of 1-2-109, to interest earned on or after July 1, 2008."

*Appropriation of Settlement Funds — Timing of Payments:* Section 5, Ch. 1, Sp. L. June 1999, provided: "(1) There is appropriated to the department of natural resources and conservation from the general fund $1.5 million in fiscal year 2000 and $1.5 million in fiscal year 2001, together with any interest earned on the amounts appropriated between July 1, 1999, and the date the funds are paid into escrow as provided in subsection (2) at the rate of interest earned on the permanent coal severance tax trust fund, for the purpose of funding the first 2 years' payments under the compact and the completion of the settlement provided for in [section 4] [85-20-905].

(2) On July 1, 1999, or as soon after that date as the escrow agreement provided for in [section 3] [85-20-904] is reached, the department of natural resources and conservation shall pay the funds appropriated for fiscal year 2000, together with any interest on the appropriated funds, into the escrow account established pursuant to [section 3] [85-20-904]. On July 1, 2000, or as soon after that date as the escrow agreement provided for in [section 3] [85-20-904] is reached, the department of natural resources and conservation shall pay the funds appropriated for fiscal year 2001, together with any interest on the appropriated funds, into the escrow account established pursuant to [section 3] [85-20-904]."

*Nonseverability:* Section 7, Ch. 1, Sp. L. June 1999, was a nonseverability clause.

*Effective Date:* Section 9, Ch. 1, Sp. L. June 1999, provided that this section is effective upon the later of passage and approval of [this act] or passage and approval of Senate Bill No. 1. Both bills were approved June 22, 1999.

### 85-20-905. Settlement of litigation — disposition of production taxes collected on coal owned in trust for Crow Tribe.

**Compiler's Comments**

*Nonseverability:* Section 7, Ch. 1, Sp. L. June 1999, was a nonseverability clause.

*Effective Date:* Section 9, Ch. 1, Sp. L. June 1999, provided that this section is effective upon the later of passage and approval of [this act] or passage and approval of Senate Bill No. 1. Both bills were approved June 22, 1999.

## Part 10

## Fort Belknap-Montana Compact

**Part Compiler's Comments**

*Effective Date:* This part is effective on the date of filing.

### 85-20-1004. Mitigation account.

**Compiler's Comments**

*2009 Amendment:* Chapter 440 in (2) near middle following "available to the" substituted "department of natural resources and conservation" for "United States bureau of reclamation" and near end following "review" deleted "by the bureau of reclamation". Amendment effective July 1, 2009.

*Preamble:* The preamble attached to Ch. 440, L. 2009, provided: "WHEREAS, it is the policy of the state to seek negotiated settlements of federal and Indian reserved water rights claims in Montana under Title 85, chapter 2, part 7, MCA; and

WHEREAS, pursuant to this policy, the State of Montana entered into a water rights compact with the Fort Belknap Indian Community of the Fort Belknap Reservation, which was ratified by the Legislature in 2001 and is codified at 85-20-1001; and

WHEREAS, the compact contains provisions requiring state and federal cost sharing; and

WHEREAS, under the cost-sharing provisions of the compact, the state has agreed to contribute $5 million to the Fort Belknap Tribes for the construction of a dam and reservoir on Peoples Creek; and

WHEREAS, the state anticipates that the planning, design, and construction of the reservoir on Peoples Creek may commence in the 2011 biennium."

*2003 Amendment:* Chapter 114 in (1) at beginning substituted "A private purpose trust account" for "An expendable trust account". Amendment effective October 1, 2003.

**85-20-1005. Watershed improvement trusts.**

**Compiler's Comments**

*2003 Amendment:* Chapter 114 in (1) and (2) at beginning substituted "A permanent fund account" for "A nonexpendable trust fund account". Amendment effective October 1, 2003.

**85-20-1007. Peoples Creek minimum flow account.**

**Compiler's Comments**

*2011 Amendment:* Chapter 47 in (1) near beginning substituted "state special revenue account" for "private purpose trust account" and after "interest on funds" deleted "appropriated by the state". Amendment effective March 24, 2011.

*2003 Amendment:* Chapter 114 in (1) at beginning substituted "A private purpose trust account" for "An expendable trust account". Amendment effective October 1, 2003.

**85-20-1008. Economic development plan.**

**Compiler's Comments**

*Appropriation:* Section 9, Ch. 256, L. 2001, provided: "There is appropriated to the department of natural resources and conservation from the general fund $50,000 in the 2003 biennium for the purpose of facilitating the development of the economic development plan provided for in [section 8] [85-20-1008]."

## Part 11

## United States of America, Department of Agriculture, Agricultural Research Service, Fort Keogh Livestock and Range Research Laboratory-Montana Compact

**85-20-1101. United States of America, Department of Agriculture, Agricultural Research Service, Fort Keogh Livestock and Range Research Laboratory-Montana compact ratified.**

**Compiler's Comments**

*Ratification Date:* This compact was ratified upon filing with the secretary of state on March 27, 2007.

## Part 12

## United States of America, Department of Agriculture, Agricultural Research Service, Sheep Experiment Station-Montana Compact

**85-20-1201. United States of America, Department of Agriculture, Agricultural Research Service, Sheep Experiment Station-Montana Compact ratified.**

**Compiler's Comments**

*Ratification Date:* This compact was ratified upon filing with the secretary of state on March 27, 2007.

## Part 13
## United States of America, Fish and Wildlife Service, Bowdoin National Wildlife Refuge-Montana Compact

**85-20-1301. United States of America, fish and wildlife service, Bowdoin national wildlife refuge-Montana compact ratified.**

**Compiler's Comments**

*Effective Date:* Section 3, Ch. 161, L. 2007, provided: "[This act] is effective on passage and approval." Approved April 6, 2007.

## Part 14
## United States of America, Department of Agriculture, Forest Service-Montana Compact

**85-20-1401. United States of America, department of agriculture, forest service-Montana compact ratified.**

**Compiler's Comments**

*Ratification Date:* This compact was ratified upon filing with the secretary of state on April 17, 2007.

## Part 15
## Blackfeet Tribe-Montana-United States Compact

**Part Compiler's Comments**

*Preamble:* The preamble attached to Ch. 489, L. 2007, provided: "WHEREAS, it is the policy of the state to seek negotiated settlements of federal and Indian reserved water rights claims in Montana under Title 85, chapter 2, part 7, MCA; and

WHEREAS, pursuant to this policy, the Montana Reserved Water Rights Compact Commission, under 85-2-702(1), MCA, is authorized to negotiate the settlement of water rights claims filed by Indian tribes or on their behalf by the United States claiming reserved waters within the state of Montana; and

WHEREAS, the Montana Reserved Water Rights Compact Commission, the Blackfeet Tribe, and the United States are near final agreement on a water rights compact; and

WHEREAS, a final Blackfeet Tribe-Montana water rights compact is essential to provide legal certainty with regard to the water rights of Indian and non-Indian water rights holders; and

WHEREAS, implementation of the compact will require state and federal cost-sharing, in amounts to be determined by future negotiation among the parties, for the renovation and upgrading of infrastructure on the reservation, which may include but is not limited to the Four Horns Reservoir; and

WHEREAS, state law requires legislative ratification of any compact entered into pursuant to 85-2-702, MCA; and

WHEREAS, a compact is expected to be agreed upon between the Blackfeet Tribe and the state of Montana shortly, and state legislative ratification is necessary."

*Effective Date:* Section 8(1), Ch. 489, L. 2007, provided that this part is effective on passage and approval. Approved May 14, 2007.

**85-20-1501. Water rights compact entered into by the Blackfeet Tribe of the Blackfeet Indian Reservation, the State of Montana, and the United States ratified.**

**Compiler's Comments**

*Preamble:* The preamble attached to Ch. 204, L. 2009, provided: "WHEREAS, it is the policy of the state to seek negotiated settlements of federal and Indian reserved water rights claims in Montana under Title 85, chapter 2, part 7, MCA; and

WHEREAS, pursuant to this policy, the Montana Reserved Water Rights Compact Commission, under 85-2-702(1), MCA, is authorized to negotiate the settlement of water rights claims filed by Indian tribes or on their behalf by the United States claiming reserved waters within the state of Montana; and

WHEREAS, the Montana Reserved Water Rights Compact Commission and the Blackfeet Tribe have reached agreement on a water rights compact; and

WHEREAS, a Blackfeet Tribe-Montana water rights compact is essential to provide legal certainty with regard to the water rights of Indian and non-Indian water rights holders; and

WHEREAS, implementation of the compact will require state and federal cost sharing; and

WHEREAS, the State of Montana has expressed a commitment to share the costs of the construction, renovation, and upgrade of infrastructure relating to Four Horns Reservoir in the amount of $20 million; and

WHEREAS, state law requires legislative ratification of any compact entered into pursuant to 85-2-702, MCA."

*Effective Date:* Section 7, Ch. 204, L. 2009, provided: "[This act] is effective on passage and approval." Approved April 15, 2009.

### **85-20-1504. Blackfeet Tribe water rights compact mitigation account — use.**

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 1, Ch. 623, L. 2023. Amendment effective July 1, 2023.

*Contingent Effective Date:* Section 3, Ch. 209, L. 2017, provided: "[This act] is effective on the date the governor certifies to the code commissioner that the United States has ratified the Blackfeet Tribe-Montana-United States Compact, that the legislation references the Birch Creek Agreement as amended in February 2009, and that the United States contributes at least $14 million for projects related to the Four Horns Project." In a letter dated February 12, 2020, the governor certified to the code commissioner that the bureau of reclamation confirmed that each of the three contingencies had been met.

*2017 Amendment:* Chapter 209 inserted (4)(b) regarding the use of $14 million to mitigate impacts of development pursuant to agreement between the Blackfeet Tribe and the state regarding Birch Creek water use; and made minor changes in style. Amendment effective on occurrence of contingency.

*2011 Amendment:* Chapter 57 deleted former (3)(a) that read: "(a) The department may expend up to $500,000 of the account to conduct preliminary feasibility studies and an associated environmental review for water compact purposes"; in (3) inserted last sentence providing for statutory appropriation; and made minor changes in style. Amendment effective March 25, 2011.

### **85-20-1505. Blackfeet Tribe water rights compact infrastructure account — use.**

**Compiler's Comments**

*2011 Amendment:* Chapter 147 inserted (5) relating to deposit of bond proceeds; and inserted (6) providing for a statutory appropriation of funds for the Four Horns Project. Amendment effective April 8, 2011.

*Severability:* Section 6, Ch. 147, L. 2011, was a severability clause.

*2009 Amendment:* Chapter 204 inserted (4) requiring that interest and other income earned on money in the account be deposited in the account. Amendment effective April 15, 2009.

*Preamble:* The preamble attached to Ch. 204, L. 2009, provided: "WHEREAS, it is the policy of the state to seek negotiated settlements of federal and Indian reserved water rights claims in Montana under Title 85, chapter 2, part 7, MCA; and

WHEREAS, pursuant to this policy, the Montana Reserved Water Rights Compact Commission, under 85-2-702(1), MCA, is authorized to negotiate the settlement of water rights claims filed by Indian tribes or on their behalf by the United States claiming reserved waters within the state of Montana; and

WHEREAS, the Montana Reserved Water Rights Compact Commission and the Blackfeet Tribe have reached agreement on a water rights compact; and

WHEREAS, a Blackfeet Tribe-Montana water rights compact is essential to provide legal certainty with regard to the water rights of Indian and non-Indian water rights holders; and

WHEREAS, implementation of the compact will require state and federal cost sharing; and

WHEREAS, the State of Montana has expressed a commitment to share the costs of the construction, renovation, and upgrade of infrastructure relating to Four Horns Reservoir in the amount of $20 million; and

WHEREAS, state law requires legislative ratification of any compact entered into pursuant to 85-2-702, MCA."

### **85-20-1511. Authorization of bonds — condition.**

**Compiler's Comments**

*Severability:* Section 6, Ch. 147, L. 2011, was a severability clause.

*Effective Date:* Section 8, Ch. 147, L. 2011, provided that this section is effective on passage and approval. Approved April 8, 2011.

## Part 16
## United States of America, Fish and Wildlife Service, National Bison Range-Montana Compact

**85-20-1601. United States of America, fish and wildlife service, national bison range-Montana compact ratified.**

**Compiler's Comments**

*Effective Date:* Section 3, Ch. 280, L. 2009, provided that this section is effective April 17, 2009.

## Part 17
## United States of America, Fish and Wildlife Service, Charles M. Russell National Wildlife Refuge-Montana Compact

**85-20-1701. United States of America, fish and wildlife service, Charles M. Russell national wildlife refuge-Montana compact ratified.**

**Compiler's Comments**

*Effective Date:* Section 3, Ch. 227, L. 2013, provided that this section is effective on passage and approval. Approved April 18, 2013.

## Part 18
## United States of America, Bureau of Land Management, Upper Missouri River Breaks National Monument-Montana Compact

**85-20-1801. United States of America, Bureau of Land Management, Upper Missouri River Breaks National Monument-Montana compact ratified.**

**Compiler's Comments**

*Effective Date:* Section 3, Ch. 224, L. 2013, provided that this section is effective on passage and approval. Approved April 18, 2013.

## Part 19
## Confederated Salish and Kootenai-Montana Compact

**85-20-1901. Water rights compact entered into by the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, the State of Montana, and the United States ratified.**

**Compiler's Comments**

*Effective Date:* Section 14, Ch. 294, L. 2015, provided: "[This act] is effective on passage and approval." Approved April 24, 2015.

**Case Notes**

*Immunity — Compact Provisions Did Not Require Two-Thirds Vote of Legislature — One Provision Waived Immunity Instead of Granting Immunity — Other Provision Only Provided Immunity to Individuals:* After many years of negotiation, representatives of the state of Montana, through the Reserved Water Rights Compact Commission, the Confederated Salish and Kootenai Tribes, and the United States agreed to the terms of a compact as a means of settling water rights disputes involving the tribes. In 2015, the Montana Legislature approved the Compact and concurrently enacted separate administrative and management provisions. After approval by the Legislature, the plaintiffs challenged specific sections of the Compact and administrative provisions based on an argument that Art. II, sec. 18, Mont. Const., required the Legislature to approve the Compact or its administrative provisions by a two-thirds vote of each house because they granted new immunities to the state. The Supreme Court held that none of the provisions required a two-thirds vote. As to the challenged provision in the Compact, the Supreme Court upheld the District Court and determined that the Compact provision at issue provided for a waiver of immunity, not a grant of new immunity. As such, the Compact on its face did not create any new immunity from suit and could be enacted by less than a two-thirds majority of each house. As to the challenged provision of the administrative provisions, the Supreme Court reversed the District Court and determined that the provisions did not establish or alter any immunity as to the state, counties, cities, towns, or other local governmental entities. To the contrary, the new immunities were specifically applied to designated individuals, including members of a board, an engineer, a designee, water commissioners, and any staff. Flathead Joint Bd. of Control v. St., 2017 MT 277, 389 Mont. 270, 405 P.3d 88.

**85-20-1902. Unitary administration and management ordinance.**

**Compiler's Comments**

*Effective Date:* Section 14, Ch. 294, L. 2015, provided: "[This act] is effective on passage and approval." Approved April 24, 2015.

**Case Notes**

*Immunity — Compact Provisions Did Not Require Two-Thirds Vote of Legislature — One Provision Waived Immunity Instead of Granting Immunity — Other Provision Only Provided Immunity to Individuals:* After many years of negotiation, representatives of the state of Montana, through the Reserved Water Rights Compact Commission, the Confederated Salish and Kootenai Tribes, and the United States agreed to the terms of a compact as a means of settling water rights disputes involving the tribes. In 2015, the Montana Legislature approved the Compact and concurrently enacted separate administrative and management provisions. After approval by the Legislature, the plaintiffs challenged specific sections of the Compact and administrative provisions based on an argument that Art. II, sec. 18, Mont. Const., required the Legislature to approve the Compact or its administrative provisions by a two-thirds vote of each house because they granted new immunities to the state. The Supreme Court held that none of the provisions required a two-thirds vote. As to the challenged provision in the Compact, the Supreme Court upheld the District Court and determined that the Compact provision at issue provided for a waiver of immunity, not a grant of new immunity. As such, the Compact on its face did not create any new immunity from suit and could be enacted by less than a two-thirds majority of each house. As to the challenged provision of the administrative provisions, the Supreme Court reversed the District Court and determined that the provisions did not establish or alter any immunity as to the state, counties, cities, towns, or other local governmental entities. To the contrary, the new immunities were specifically applied to designated individuals, including members of a board, an engineer, a designee, water commissioners, and any staff. Flathead Joint Bd. of Control v. St., 2017 MT 277, 389 Mont. 270, 405 P.3d 88.

## CHAPTER 25
## COLUMBIA RIVER TREATY ACCOUNT

**Chapter Compiler's Comments**

*Preamble:* The preamble attached to Ch. 383, L. 2015, provided: "WHEREAS, Libby Dam, located in Lincoln County, Montana, is the fourth dam constructed under the Columbia River Treaty, which the Canadian government and the United States government entered into in 1964, and is located on the Kootenai River, which is the third largest tributary to the Columbia River and contributes almost 20% of the total water in the lower Columbia River; and

WHEREAS, Libby Dam was dedicated on August 24, 1975, and spans the Kootenai River 17 miles upstream from the town of Libby, Montana; and

WHEREAS, Lake Koocanusa, the reservoir behind Libby Dam, extends 90 miles north of the dam, with 48 miles of Lake Koocanusa located in Lincoln County and the remainder in British Columbia, Canada; and

WHEREAS, Libby Dam, in Montana's northwest corner, and three dams in Canada were constructed to protect downstream areas from flooding, and Libby Dam holds back an average of 5,800,000 acre-feet of water; and

WHEREAS, economic benefits have been derived from the storage of these floodwaters and the coordinated, timely release of those waters through generation of electricity, irrigation, navigation, and recreation; and

WHEREAS, the construction of Libby Dam placed many thousands of acres of land in Lincoln County underwater, leading to decreased real property tax revenues for the county and a loss of timber sales and wildlife and fish habitat, among other losses; and

WHEREAS, the Canadian government was compensated for construction of the dams and storage of floodwaters through a sharing of dollars on electricity from additional power generated at downstream dams and hydropower generating facilities, leading to the formation of the Columbia Basin Trust; and

WHEREAS, citizens of Lincoln County did not participate in the negotiations for the terms of the Columbia River Treaty and no compensation has been received by Lincoln County; and

WHEREAS, the renegotiation of the treaty is currently being considered, and there is a possibility that compensation could be provided to Lincoln County as a result of federal legislation, litigation, determination of regulations, and the renegotiation of the treaty; and

WHEREAS, the purpose of this legislation is to address how, if the compensation is paid directly to the state instead of to Lincoln County, the compensation should be distributed."

## Part 1
## General Provisions

**Part Law Review Articles**

A Sacred Responsibility: Governing the Use of Water and Related Resources in the International Columbia Basin Through the Prism of Tribes and First Nations, McKinney, Paisley, & Stenovec, 37 Pub. Land. & Resources L. Rev. 157 (2016).

# TITLE 86
# RESERVED

WHEREAS, citizens of Lincoln County did not participate in the negotiations for the terms of the Columbia River Treaty and no compensation has been received by Lincoln County; and

WHEREAS, the renegotiation of the treaty is currently being considered, and there is a possibility that compensation could be provided to Lincoln County as a result of federal legislation, litigation, determination of regulations, and the renegotiation of the treaty; and

WHEREAS, the purpose of this legislation is to address how, if the compensation is paid directly to the state instead of to Lincoln County, the compensation should be distributed."

## Part 1
## General Provisions

**Part Law Review Articles**

A Sacred Responsibility: Governing the Use of Water and Related Resources in the International Columbia Basin Through the *Prism* of Tribes and First Nations, McKinney, Paisley, & Stenovec, 37 Pub. Land. & Resources L. Rev. 157 (2016).

# TITLE 87
# FISH AND WILDLIFE

**Title Administrative Rules**
Title 12, ARM Department of Fish, Wildlife, and Parks.

## CHAPTER 1
## ORGANIZATION AND OPERATION

### Part 1
### General Provisions

**87-1-101. Definitions.**

**Compiler's Comments**

*2013 Amendment:* Chapter 235 inserted definition of board; in definition of commission substituted "fish and wildlife commission" for "fish, wildlife, and parks commission"; and made minor changes in style. Amendment effective July 1, 2013.

*Saving Clause:* Section 40, Ch. 235, L. 2013, was a saving clause.

*1991 Name Change:* Section 2, Ch. 28, L. 1991, directed the Code Commissioner to change the name of the Fish and Game Commission to the Fish, Wildlife, and Parks Commission wherever the name appears in the MCA. Accordingly, the name was changed in this section as directed.

*Redundant Language Not Codified:* The language contained in section 26-1802(1), (2), R.C.M. 1947, was not codified in the MCA because it is redundant with 87-1-101. The language not codified is still valid law. Citation may be made to sec. 2, Ch. 461, L. 1973. See 1-2-208.

**87-1-103. Fines, bonds, and penalties.**

**Attorney General's Opinions**

*Fines by District Court in Game Violation Case:* A court imposing a fine in a fish and game violation case must pay the money collected to the Fish and Game Commission (now Fish, Wildlife, and Parks Commission). 36 A.G. Op. 39 (1975).

**87-1-104. Payment of cost bill to county.**

**Compiler's Comments**

*1983 Amendment:* Substituted reference to state special revenue fund for reference to earmarked revenue fund.

**Attorney General's Opinions**

*Payment of Medical Expenses Incurred by Fish and Game Violator:* Medical expenses incurred by a prisoner incarcerated in a county jail for a violation of state fish and game laws are not chargeable against the state or county, with two exceptions: (1) if the medical condition threatens the health or well-being of other prisoners or persons present in the jail and the county incurs expenses pursuant to section 16-2822, R.C.M. 1947 (7-32-2204, MCA), such expenses are "costs" as defined in section 26-1002, R.C.M. 1947 (87-1-104, MCA), and should be borne by the state; and (2) if a prisoner is financially unable to provide such necessities for himself, in which case the provisions of Title 71, ch. 3, R.C.M. 1947 (Title 53, ch. 3, part 3, MCA), apply. 30 A.G. Op. 36 (1964). (Annotator's note: An amendment to section 16-2818, R.C.M. 1947 (7-32-2222, MCA), by sec. 1, Ch. 179, L. 1965, provided that medical expenses "shall be borne by the agency or authority at whose instance the prisoner is detained". The applicability of this provision to fish and game violations was affirmed in 34 A.G. Op. 24 (1971). An amendment to 7-32-2222 by sec. 1, Ch. 768, L. 1991, provided that medical expenses must be borne by the arresting agency and made an exception for arrests by the Department of Corrections and Human Services (now Department of Corrections).)

**87-1-106. Fish, wildlife, and parks offices.**

**Compiler's Comments**

*2013 Amendment:* Chapter 235 after "commission" inserted "the board"; and made minor changes in style. Amendment effective July 1, 2013.

*Saving Clause:* Section 40, Ch. 235, L. 2013, was a saving clause.

*1985 Amendment:* Deleted former second and third sentences that read: "Rental shall be charged therefor at a rate not to exceed $4 per square foot per year for the total space occupied. Such rental collected shall be deposited to the credit of the state general fund".

### 87-1-107. Right to harvest — legislative intent.

**Compiler's Comments**

*Effective Date:* This section is effective October 1, 2015.

**Law Review Articles**

A Solution in Search of a Problem: The Difficulty with State Constitutional "Right to Hunt" Amendments, Gordon, 35 Pub. Land & Resources L. Rev. 3 (2014).

### 87-1-120. Remedial hunter education program.

**Compiler's Comments**

*2011 Amendment:* Chapter 258 in (2) at end substituted "87-6-905 through 87-6-908" for "87-1-111 through 87-1-113". Amendment effective October 1, 2011.

*Preamble:* The preamble attached to Ch. 258, L. 2011, provided: "WHEREAS, the 2007 Legislature passed House Joint Resolution No. 16, urging that revision of the criminal codes within Title 87 of the Montana Code Annotated be given priority; and

WHEREAS, House Joint Resolution No. 16 noted that practitioners, judges, and citizens find that the criminal codes intertwined within the fish and game laws in Title 87 are difficult to read, understand, and prosecute; and

WHEREAS, House Joint Resolution No. 16 directed that revision of the Title 87 criminal code should not include policy changes to current laws and should adhere to the intent of the legislatures that crafted the laws; and

WHEREAS, in 2008, the Director of Fish, Wildlife, and Parks appointed a Title 87 criminal code revision working group, consisting of Justices of the Peace, County Attorneys, an Assistant Attorney General, legal counsel and the enforcement administrator of the Department of Fish, Wildlife, and Parks, and legislative staff; and

WHEREAS, the working group met numerous times and spent countless hours crafting a revision that makes the Title 87 criminal code more understandable without making substantive or policy changes to present law; and

WHEREAS, revision of the fish and game criminal statutes will benefit the hunting and fishing public, magistrates, and prosecutors by codifying crimes and penalties in a separate chapter of Montana law, rather than being intertwined throughout Title 87."

*Saving Clause:* Section 131, Ch. 258, L. 2011, was a saving clause.

*Severability:* Section 132, Ch. 258, L. 2011, was a severability clause.

*Saving Clause:* Section 10, Ch. 499, L. 1999, was a saving clause.

*Effective Date:* Section 11, Ch. 499, L. 1999, provided that this section is effective July 1, 1999.

### 87-1-126. Use of exploding targets prohibited — definition — penalty.

**Compiler's Comments**

*Effective Date:* Section 5, Ch. 513, L. 2021, provided: "[This act] is effective on passage and approval." Approved May 14, 2021.

## Part 2

## Department of Fish, Wildlife, and Parks

### 87-1-201. Powers and duties.

**Compiler's Comments**

*2023 Amendments — Composite Section:* Section 1, Ch. 117, L. 2023, in (6)(a) after "may not issue" deleted "permits to carry"; in (6)(a)(i) substituted "wardens" for "regularly appointed officers or"; inserted (6)(b)(ii) regarding other qualified employees; inserted (6)(b) regarding wardens; inserted (7) regarding issuance of firearms; and made minor changes in style. Amendment effective April 18, 2023.

Section 1, Ch. 212, L. 2023, inserted subsection (14) regarding an annual report concerning the number of licenses sold to nonresidents. Amendment effective March 1, 2024.

*2021 Amendments — Composite Section:* Chapter 232 in (12)(a) at end inserted "and the special muzzleloader heritage hunting season established in 87-1-304". Amendment effective October 1, 2021.

Chapter 261 in (11) near end of first sentence substituted "in accordance with 5-11-210" for "established in 5-16-101"; and made minor changes in style. Amendment effective April 20, 2021.

*2017 Amendment:* Chapter 109 inserted (11) requiring report on sage grouse population numbers; and made minor changes in style. Amendment effective October 1, 2017.

*2011 Amendments — Composite Section:* Chapter 370 in (1), (2), and (7) at beginning inserted exception clause; inserted (11) prohibiting regulation of firearms; and made minor changes in style. Amendment effective October 1, 2011.

Chapter 395 in (9)(a)(iv) at beginning inserted "in accordance with the forest management plan required by 87-1-622". Amendment effective July 1, 2011.

*2011 Code Commissioner Correction:* In (11)(c) the Code Commissioner substituted "87-6-401(1)(f)" for "87-3-301" and in (11)(e) substituted "87-6-401(1)(g) or (1)(h)" for "87-3-401". Sections 87-3-301 and 87-3-401 were repealed by Ch. 258, L. 2011. Subsections (1)(f), (1)(g), and (1)(h) of 87-6-401, enacted by Ch. 258, deal with the same subject matter as the repealed section. The authority for the correction is contained in sec. 49, Ch. 19, L. 2011.

*2009 Amendments — Composite Section:* Chapter 10 in (3) near end of second sentence after "sources is" deleted "appropriated to and" and after "department" inserted "and is available for appropriation to the department"; and made minor changes in style. Amendment effective October 1, 2009.

Chapter 330 inserted (9)(a)(iv) requiring department to address fire mitigation, pine beetle infestation, and wildlife habitat enhancement; and made minor changes in style. Amendment effective July 1, 2009.

*2007 Amendment:* Chapter 262 in (9)(a)(iii) inserted second sentence requiring department to request, as part of elk management plan, that public lands and public roads remain open to public access during big game hunting season. Amendment effective April 26, 2007.

*Termination Provision Deleted:* Sections 2 and 3, Ch. 235, L. 2005, amended sec. 6, Ch. 544, L. 1999, and sec. 18, Ch. 459, L. 1995, removing the provision that terminated amendments to this section March 1, 2006. Effective April 15, 2005.

*2003 Amendments — Composite Section:* Chapter 454 inserted (10) requiring department to publish annual game count in state hunting districts and administrative regions, authorizing department to incorporate field observations, hunter reporting statistics, or other suitable method of determining game numbers, and requiring publication to explain basis used in determining game count. Amendment effective April 21, 2003.

Chapter 461 inserted (9)(c) providing that management plans developed by department are subject to Montana Environmental Policy Act; and made minor changes in style. Amendment effective April 21, 2003.

Chapter 553 in (2), (3), and (5) after "preservation" inserted "management"; inserted (9)(a)(iii) relating to management of elk, deer, and antelope populations; and made minor changes in style. Amendment effective May 5, 2003.

*Applicability:* Section 3, Ch. 461, L. 2003, provided: "[This act] applies to all management plans that have not been finalized by the department of fish, wildlife, and parks prior to January 1, 2003."

*1999 Amendment:* Chapter 369 inserted (9) requiring department programs that manage fish and wildlife so as to prevent the need for listing under 87-5-107 or the Endangered Species Act and that manage listed, sensitive, or potentially listed species under 87-5-107 or the Endangered Species Act so as to assist in their maintenance or recovery, requiring department to balance maintenance or recovery with social and economic impacts of maintenance or recovery, and providing that subsection (9) does not affect ownership or possession of a privately held listed, sensitive, or potentially listed species; and made minor changes in style. Amendment effective April 20, 1999.

*Extension of Termination Date:* Section 6, Ch. 544, L. 1999, amended sec. 18, Ch. 459, L. 1995, by extending the termination date imposed by Ch. 459 to March 1, 2006.

*1995 Amendment:* Chapter 459 in temporary version in (1), at end of first sentence, inserted clause authorizing implementation of voluntary programs to encourage hunting access and to promote harmonious relations between landowners and public; and made minor changes in style. Amendment terminates October 1, 2001.

*Preamble:* The preamble attached to Ch. 459, L. 1995, provided: "WHEREAS, Montana has a cherished hunting heritage based on a deep knowledge of and respect for wildlife and the land; and

WHEREAS, private landowners provide wildlife habitat and hunting opportunities, the hunting public provides financial and political support for sound wildlife management, and the combined efforts of landowners and the hunting public have sustained Montana's hunting and wildlife heritage; and

WHEREAS, landowner/outfitter/sportsperson relations have become increasingly strained over the past several years, leading to increased polarization between the groups; and

WHEREAS, the 1993 Legislature addressed this problem through the passage of House Joint Resolution No. 24, which requested the Governor, through the Department of Fish, Wildlife, and Parks, to coordinate a sustained, ongoing, cooperative effort to address these issues by establishing statewide, regional, and local groups to develop mutually satisfactory solutions that would preserve Montana's hunting and wildlife heritage and encourage the continuance of a viable outfitting industry; and

WHEREAS, in response to that request, the Governor appointed the Advisory Council on Private Land/Public Wildlife, consisting of representatives of the affected groups, to study the issues in anticipation of legislation that reflects the mutual interests of landowners, outfitters, and the sporting community; and

WHEREAS, after considering extensive input and advice from individual private citizens, local working groups, agencies, and nonprofit organizations involved in conservation, the Advisory Council by consensus developed recommendations for improving hunting access to private lands and for providing tangible benefits for landowners who allow access to their lands for hunting; and

WHEREAS, the Advisory Council has made efforts to break new ground philosophically in designing its recommendations, requiring that all interested parties be willing to accept change in order to benefit everyone who has an interest in Montana's hunting and wildlife heritage; and

WHEREAS, the Advisory Council finds it appropriate to present the following recommendations to the Legislature in the spirit of a cooperative and positive effort to enhance relations between landowners, outfitters, and sportspersons."

*1995 Statement of Intent:* The statement of intent attached to Ch. 459, L. 1995, provided: "A statement of intent is required for this bill because [sections 1 through 3] [87-1-265 through 87-1-267 (87-1-267 now repealed)] grant rulemaking authority to the department of fish, wildlife, and parks and the fish, wildlife, and parks commission to implement programs for hunter management and hunting access enhancement. It is intended that in addition to the statutory guidelines set out in those sections, any rules be adopted with the purpose of optimizing hunting opportunity and access while minimizing administrative costs in providing benefits to landowners who voluntarily participate in the programs. In addition, [section 6] [87-1-268, now repealed] grants rulemaking authority to the fish, wildlife, and parks commission to implement the provisions of variable pricing for Class B-10 and Class B-11 outfitter-sponsored licenses. It is intended that the fish, wildlife, and parks commission use its licensing authority to adjust the price of those licenses as necessary and that any additional revenue generated by variable pricing be used to fund the hunting access enhancement program."

*Severability:* Section 13, Ch. 459, L. 1995, was a severability clause.

*Saving Clause:* Section 14, Ch. 459, L. 1995, was a saving clause.

*Study of Recreational User Fees — 1992 Report:* Section 5, Ch. 659, L. 1991, provided for a study by the Department of Fish, Wildlife, and Parks, in cooperation with the Department of Natural Resources and Conservation, of the feasibility of charging recreational beneficiaries of water storage projects fees to assist in the repayment of a portion of those project costs. A written report must be submitted to the Water Policy Committee by July 1, 1992.

*1983 Amendment:* Substituted reference to state special revenue fund for reference to earmarked revenue fund.

*Seasonal Rules Adopted Annually:* Section 2-4-102 excludes from the Montana Administrative Procedure Act seasonal rules adopted annually relating to hunting, fishing, and trapping if the rules are published in accordance with statutory requirements. Section 87-1-202 sets out those requirements. Although the rules do not appear in the Administrative Register of Montana, they are published and copies are available in state and regional offices of the Department.

**Case Notes**

*Questioning at Game Check Station Not Custodial Arrest — Miranda Warning Not Required:* The defendant was stopped at a game check station with a deer he harvested. After some questioning, the defendant eventually made numerous admissions, including that he had used his daughter's tag on the animal and that he had illegally shot two additional deer. The defendant was charged with several crimes relating to illegal hunting. The defendant moved to suppress the evidence, arguing that he had not been issued a Miranda warning at the game check station. The Justice Court denied the motion, finding that the defendant was not subject to custodial interrogation and thus not required to receive Miranda warnings. The Supreme Court subsequently affirmed, holding that based on the totality of the circumstances, the roadside game inspection was not a custodial interrogation, was temporary in nature, and never exceeded the scope of a wildlife crime investigation. As such, the Supreme Court found the defendant made his admissions voluntarily. St. v. Maile, 2017 MT 154, 388 Mont. 33, 396 P.3d 1270.

*Transfer of Alternative Livestock to Unlicensed Tribal Lands Illegal:* The Wallaces, licensed alternative livestock ranchers, sought to reduce the size of their elk herd by transferring about 500 elk to the Crow Indian Reservation for subsequent release into the wild. The elk had been certified as free of tuberculosis, brucellosis, and elk-red deer hybridization by the Department of Livestock (DOL). Despite notification by the Department of Fish, Wildlife, and Parks (DFWP) that such an act violated state law, the Wallaces transferred 68 elk to the tribe. DFWP requested and received a permanent injunction prohibiting any further transfer of elk to the tribe, and the Wallaces appealed, questioning DFWP jurisdiction. The Supreme Court noted that DFWP has a statutory basis for its jurisdiction over the Wallaces as licensees. Based on DFWP jurisdiction over exterior fencing, and the Department's knowledge that the elk would not be contained behind a game-proof fence upon delivery to the tribe, DFWP had statutory authority to seek the permanent injunction to prevent the transfer. Also, the introduction or transplantation of any wildlife into the wild, including game farm elk, requires the approval of DFWP. Further, 87-4-414 provides that alternative livestock may be kept only on a licensed alternative livestock ranch, and because the tribe is not a licensed facility under Montana law, neither DFWP nor DOL had authority to permit the transfer. The Wallaces knew that the elk were destined for an unlicensed location where they would be released into the wild and could migrate back into Montana, so the transfer violated the Wallaces' duty as licensees to act in accordance with law, and the District Court correctly enjoined the transportation of the elk. Hagener v. Wallace, 2002 MT 109, 309 M 473, 47 P3d 847 (2002).

*Hours of Hunting Sufficiently Clear to Withstand Due Process Challenge:* After he shot a bull elk half an hour before sunrise, Johnston was arrested for hunting before the allowed time. Johnston challenged the rules of the Department of Fish, Wildlife, and Parks as being inconsistent, ambiguous, vague, and factually erroneous. The Supreme Court held that the rules establishing the time of sunrise within the hunting district where Johnston shot the elk were clear in that they precisely defined the time of sunrise on the day Johnston shot the elk, leaving no room to guess at what time a hunter could begin shooting. St. v. Johnston, 263 M 179, 867 P2d 1090, 51 St. Rep. 5 (1994).

*Evidence Sufficient to Support Conviction for Game Farm (now Alternative Livestock Ranch) Violations:* Evidence of the presence of wild elk on Brogan's game farm (now alternative livestock ranch), gathered by wardens through direct observation and supported by circumstantial evidence, such as animal tracks, the presence of hay near gates, the absence of electric power in the game farm (now alternative livestock ranch) fence, and Brogan's evasive conduct, was sufficient to support Brogan's conviction for capturing wild elk for use on the game farm (now alternative livestock ranch) and for failure to maintain fences. St. v. Brogan, 261 M 79, 862 P2d 19, 50 St. Rep. 1204 (1993).

*Removal Proceedings:* Summary dismissal of employee by the State Fish and Game Commission (now Fish, Wildlife, and Parks Commission) (holder of such authority under former law) without prior charges by the Commission, reasonable notice and hearing thereon, and without affording the employee an opportunity to refute the charges was prohibited. State ex rel. Ford v. St. Fish & Game Comm'n, 148 M 151, 418 P2d 300 (1966), distinguished in Steer v. Missoula, 169 M 398, 547 P2d 843 (1976).

*Construction and Application:* The power of discharge must be "for cause" and there is no distinction between officers and employees, and removal may be effected only after notice of the charges made has been given and the person involved has been given an opportunity to be heard in his defense. State ex rel. Opheim v. St. Fish & Game Comm'n, 133 M 362, 323 P2d 1116 (1958), distinguished in Steer v. Missoula, 169 M 398, 547 P2d 843 (1976), and State ex rel. Hollibaugh v. St. Fish & Game Comm'n, 139 M 384, 365 P2d 942 (1961).

**Attorney General's Opinions**

*Game Harvesting — Game Ranch:* The Fish and Game Commission (now Fish, Wildlife, and Parks Commission) does not have the authority to regulate the hunting and killing of privately owned game through the imposition of licensing requirements on individual hunters or open and closed seasons. 36 A.G. Op. 112 (1976).

*Fines by District Court in Game Violation Case:* A court imposing a fine in a fish and game violation case must pay the money collected to the Fish and Game Commission (now Fish, Wildlife, and Parks Commission). 36 A.G. Op. 39 (1975).

*Department Regulation of Ice Fishing:* The State Fish and Game Department (now Department of Fish, Wildlife, and Parks) has authority to regulate the use and abandonment of ice fishing facilities after proper findings of fact and pursuant to an agreement with the owner of the private waters involved. 28 A.G. Op. 45 (1959).

**Law Review Articles**

Is There a Middle Ground? One Approach to Resolution of Land Use Disputes in the Northwest, Gangle, 64 Mont. L. Rev. 493 (2003).

*Federal Dominance as to Dams and Fisheries:* Federal Power Commission v. Oregon, 349 US 435, 99 L Ed 1215, 75 S Ct 832 (1955), evidenced that the federal government can disregard the wishes of a state concerning its fisheries wherever it believes that the interests of the nation are best served by permitting a dam to be built, and this applies even where the waters are nonnavigable, provided only that the powersite is on reserved lands of the United States. Jasperson, 18 Mont. L. Rev. 118 (1956).

### 87-1-202. Publication of orders and rules.

**Compiler's Comments**

*2013 Amendment:* Chapter 235 in (1) inserted "or by the board setting seasonal land use regulations". Amendment effective July 1, 2013.

*Saving Clause:* Section 40, Ch. 235, L. 2013, was a saving clause.

*2007 Amendment:* Chapter 16 in (1) substituted provisions for posting annual and biennial commission rules for former language that read: "The orders, rules, and regulations of the department shall be published and posted in the following manner:

(1) Those having general application throughout the state shall be published in such manner and to such an extent as the department deems necessary and may direct"; substituted (2) regarding posting of site-specific land use regulations for former (2) that read: "(2) Those of general or special character having local application only shall be published once in some newspaper having general circulation in the locality or district wherein such rules, regulations, or orders are applicable and shall be posted in three conspicuous places in the locality or district in which they are applicable"; inserted (3) regarding publication of certain commission orders; inserted (4) regarding public notification of emergency closures; and made minor changes in style. Amendment effective March 16, 2007.

*Seasonal Rules Adopted Annually:* Section 2-4-102 excludes from the Montana Administrative Procedure Act seasonal rules adopted annually relating to hunting, fishing, and trapping if the rules are published in accordance with statutory requirements. Section 87-1-202 sets out those requirements. Although the rules do not appear in the Administrative Register of Montana, they are published and copies are available in state and regional offices of the Department.

### 87-1-204. Political activity of employees.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

**Case Notes**

*Department Employees Not Prohibited From Lobbying or Legislative Activity:* Plaintiff contended that the language in this section prohibiting a Department of Fish, Wildlife, and Parks (FWP) employee from using the employee's official authority or influence for the purpose of interfering with an election or affecting election results or for the purpose of coercing or influencing the political actions of any person or body meant that FWP employees could not lobby the Legislature or appear before the Legislature as proponents or opponents of legislation. The Supreme Court held that a general prohibition on FWP political activity would lead to an absurd result, given the Department's numerous statutory mandates to report to the Legislature and recommend legislation, and to interact with other governmental agencies on various levels. Rather, the prohibition in this section applies to FWP employees only in the partisan political sense and does not prohibit FWP employees from lobbying the Legislature or appearing before the Legislature as proponents or opponents of legislation. Mont. Sports Shooting Ass'n, Inc. v. St., 2008 MT 190, 344 M 1, 185 P3d 1003 (2008). See also St. v. Sullivan, 98 M 425, 40 P2d 995 (1935).

### 87-1-206. Bounty claims for wild animals.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

*1995 Amendment:* Chapter 325 in (3) substituted language requiring the Department to draw a warrant for former language requiring that a claim be sent to the Auditor and requiring the Auditor to draw a warrant; and made minor changes in style. Amendment effective July 1, 1995.

*1983 Amendment:* Substituted reference to state special revenue fund for reference to earmarked revenue fund.

### 87-1-207. Establishment of checking stations.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 1, Ch. 467, L. 2023. Amendment effective October 1, 2023.

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

**Case Notes**

*Stopping Short of and Subsequent Failure to Stop at Game Check Station — Particularized Suspicion Justifying Traffic Stop:* A game warden observed Clark stopping short of a game check station, exiting the vehicle, then reentering the vehicle and driving past the check station. Based on Clark's actions, the warden suspected that Clark might have stopped to hide or change something before reaching the check station, so wardens stopped Clark's vehicle. Clark exhibited signs of intoxication and was subsequently arrested by the Highway Patrol for DUI. Clark contended that wardens had no particularized suspicion to stop the vehicle for a possible fish and game violation and that evidence from the vehicle search should be suppressed. The District Court denied Clark's suppression motion, and on appeal the Supreme Court affirmed. The game warden possessed a reasonable suspicion based on articulable facts and experience from which to draw an inference that Clark might have committed a game violation sufficient to warrant stopping Clark's vehicle. St. v. Clark, 2009 MT 327, 353 M 1, 218 P3d 483 (2009).

### 87-1-209. Acquisition and sale of lands or waters.

**Compiler's Comments**

*2021 Amendment:* Chapter 149 in (1)(a) after "the commission or the board" substituted "for the purpose listed in subsection (1)(b)" for "and, in the case of land acquisition involving more than 100 acres or $100,000 in value, the approval of the board of land commissioners"; in (1)(a)(i) at beginning substituted "land or water by purchase, lease, agreement, gift, transfer, or devise" for "by purchase, lease, agreement, gift, or devise and may acquire easements upon lands or waters for the purposes listed in this subsection" and inserted second sentence relating to land acquisition involving more than 500 acres or $1 million in value; inserted (1)(a)(ii) relating to easements on lands or waters; and made minor changes in style. Amendment effective October 1, 2021.

*2013 Amendment:* Chapter 235 in (1) in first sentence inserted "and subsection (8) of this section" and after "commission" inserted "or the board"; in (2) substituted "board" for "commission"; in (3)(a) in two places and (4) in two places after "commission" inserted "or the board"; inserted (8) concerning approval of the board; and made minor changes in style. Amendment effective July 1, 2013.

*Saving Clause:* Section 40, Ch. 235, L. 2013, was a saving clause.

*2009 Amendments — Composite Section:* Chapter 427 in (1) inserted second, third, and fourth sentences requiring an additional amount for maintenance when land or water rights are purchased by the department under certain circumstances; throughout section substituted references to water rights for "waters"; and made minor changes in style. Amendment effective May 4, 2009, and terminates June 30, 2013.

Chapter 485 in (1) and in (6) at beginning inserted "Subject to 87-1-218"; and made minor changes in style. Amendment effective May 10, 2009.

*Severability:* Section 12, Ch. 485, L. 2009, was a severability clause.

*2005 Amendments — Composite Section:* Chapter 430 in (3)(a) near middle of second sentence after "entities" inserted "or to adjacent landowners" and near beginning of third sentence after "entity" inserted "or to an adjacent landowner"; inserted (4) allowing the director to grant or acquire right-of-way easements for certain purposes and to report any easement grant or acquisition to the commission; and made minor changes in style. Amendment effective April 28, 2005.

Chapter 560 in (3)(a) and (3)(b) at beginning inserted reference to section 2(3), Chapter 560, Laws of 2005; and made minor changes in style. Amendment effective May 2, 2005.

*Severability:* Section 19, Ch. 560, L. 2005, was a severability clause.

*2003 Amendment:* Chapter 114 in (1)(a) at end deleted "or alternative livestock ranches"; and made minor changes in style. Amendment effective October 1, 2003.

*2001 Amendments — Composite Section:* Chapter 7 at end of (1)(a) substituted "alternative livestock ranches" for "game farms". Amendment effective October 1, 2001.

Chapter 125 in (1)(a) substituted "alternative livestock ranches" for "game farms"; in (2) inserted reference to Title 70, chapter 30; and made minor changes in style. Amendment effective October 1, 2001.

*Interim Study Bill — Eminent Domain:* Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.*1997 Amendment:* Chapter 184 in (3)(a) inserted second and third sentences allowing the conveyance of certain Department interests in land and waters to governmental entities through direct sale rather than through a bidding process; and made minor changes in style. Amendment effective April 1, 1997.

*1993 Amendment:* Chapter 110 in third sentence of (3)(c), before "certified", deleted "registered or"; inserted (5) allowing the Department to enter into leases of land in exchange for services to be provided by the lessee; and made minor changes in style. Amendment effective March 18, 1993.

*1987 Amendment:* Near middle of (3)(a) substituted "public notice as required by subsection (3)(b)" for "that public notice".

*1985 Amendment:* In (3)(c) extended period for submission of cash bids from 30 to 60 days; and in (3)(d) inserted second and third sentences relating to the price on private sale and the method of conveyance.

*1983 Amendment:* At beginning of (4), deleted "Notwithstanding the provisions of 18-4-102".

*1981 Amendments:* Chapter 230 deleted "condemnation" after "may acquire by purchase" in the introductory clause of (1) and added subsection (2) relating to condemnation for historical or archaeological sites.

Chapter 418 inserted "and, in the case of land acquisition involving more than 100 acres or $100,000 in value, the approval of the board of land commissioners" near the beginning of (1).

*Severability:* Section 3, Ch. 379, L. 1979, was a severability section.

**Case Notes**

*Purchase of Conservation Easement Not Land Acquisition — Approval of Land Board Not Required:* The Governor directed the Department of Fish, Wildlife, and Parks (FWP) to finalize a conservation easement without the approval of the State Land Board. The Governor reasoned that the easement did not constitute a land acquisition under this section. The Attorney General subsequently issued a legal opinion that the purchase of the easement required the approval of the State Land Board under this section. The Governor and the FWP Director filed a petition to the Supreme Court, asking it to hold the Attorney General's opinion incorrect as a matter of law. The Supreme Court agreed, holding that the plain meaning of the term "land acquisition" did not include a conservation easement and therefore Land Board approval was not required. Bullock v. Fox, 2019 MT 50, 395 Mont. 35, 435 P.3d 1187.

*Request to Overturn Attorney General Opinion — Governor and Agency Director Have Standing:* The Governor directed the Department of Fish, Wildlife, and Parks (FWP) to finalize a conservation easement without the approval of the State Land Board. The Attorney General subsequently issued a legal opinion that the easement required the approval of the State Land Board under 87-1-209. The Governor and the FWP Director filed a petition to the Supreme Court, asking it to hold the Attorney General's opinion incorrect as a matter of law. The Attorney General argued that neither had standing to challenge his legal opinion. The Supreme Court disagreed, ruling that because only the Governor and the FWP Director had the authority to sign the paperwork to close the transaction to purchase the easement, their injuries were personal, concrete, and redressable. Bullock v. Fox, 2019 MT 50, 395 Mont. 35, 435 P.3d 1187.

*Nature of Road to Fishing Access Site — Easement — No Deprivation of Landowner's Property:* A landowner brought an action to prevent the state from opening a fishing access site and from paving a road to the site, based on a claimed fee title to the roadway. The District Court granted the state a summary judgment as a matter of law. The Supreme Court found the landowner's interest was an ordinary easement. The words "private road" did not clearly indicate intent to create in him an "exclusive" easement. The state's use of the road cannot be declared inconsistent with the landowner's on the basis of speculation. Furthermore, under various statutory provisions, the state obtained its land lawfully. The plaintiff had not yet been deprived of his property interest. Any damages remained speculative at the time of the decision. The summary judgment was accordingly affirmed. Titeca v. St., 194 M 209, 634 P2d 1156, 38 St. Rep. 1533 (1981).

**Attorney General's Opinions**

*Conservation Easements:* The President of the Senate requested an Attorney General opinion as to whether 87-1-209 required Board of Land Commissioners approval for the acquisition of a $6.1 million, 5,000-acre conservation easement by the Department of Fish, Wildlife, and Parks (FWP). The Attorney General issued an opinion, based on the plain meaning of "land acquisition", legislative history, and the course of FWP's application of 87-1-209, that Land Board approval was required because a conservation easement is a land acquisition. 57 A.G. Op. 4 (2018). See also Bullock v. Fox, 2019 MT 50, 395 Mont 35, 435 P.3d 1187, in which the Supreme Court subsequently reviewed the statute and held, based on plain meaning, that "land acquisition" does not include conservation easement acquisition.

*Department of Fish, Wildlife, and Parks Subject to Local Review in Creation of Recreational Vehicle Camping Area:* The term "subdivision" is defined in 76-3-103 to include the provision of multiple space for recreational camping vehicles. The Department of Fish, Wildlife, and Parks argued that, as a state agency, it was exempt from the review requirement. Because exemptions are provided for some state activities but not for activities to provide multiple space for recreational camping vehicles on state land, the clear implication is that the state is to stand on the same footing with a private person in this matter. It was noted that there is a trend toward abandoning the traditional view that activities of the state may be exercised free of local control. The Department is subject to local subdivision review to the extent that it creates an area that will provide multiple space for recreational camping vehicles. 39 A.G. Op. 14 (1981).

### 87-1-210. Research, training, and other projects.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

### 87-1-214. Disclosure of information — legislative finding — large predators.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 1, Ch. 461, L. 2023. Amendment effective May 8, 2023.

*Effective Date:* Section 3, Ch. 178, L. 2011, provided: "[This act] is effective on passage and approval." Chapter 178, L. 2011, was enacted into law without the governor's signature on April 14, 2011.

### 87-1-216. Wild buffalo or bison as species in need of management — policy — department duties.

**Compiler's Comments**

*2021 Amendment:* Chapter 354 in (4)(a) near beginning inserted "relocate"; inserted (4)(b) concerning requirement of authorization pursuant to 7-21-3214 in order to release, transplant, or relocate any wild buffalo or bison into any county; in (5)(c) near middle substituted "animal released, transplanted, or relocated" for "animal transplanted or released"; in (6) near middle substituted "release, transplant, or relocate" for "release or transplant"; and made minor changes in style. Amendment effective April 30, 2021.

*Applicability:* Section 9, Ch. 354, L. 2021, provided: "[This act] applies to releases, transplantation, relocations, or transfers of wild buffalo or wild bison on or after [the effective date of this act]." Effective April 30, 2021.

*Severability:* Section 7, Ch. 354, L. 2021, was a severability clause.

*2015 Amendment:* Chapter 172 in (5)(e) after "exceeding that carrying capacity" inserted "including in years of drought or severe winters" and inserted last sentence concerning forage analysis by certain range scientists; and made minor changes in style. Amendment effective April 2, 2015.

*2011 Amendments — Composite Section:* Chapter 383 in (2)(c) inserted last sentence allowing department to authorize the taking of bison; inserted (4) requiring public or private authorization; inserted (5) and (6) regarding management plan; inserted (7) creating liability for department in certain circumstances; and made minor changes in style. Amendment effective May 12, 2011.

Chapter 403 in (2)(c) inserted last sentence allowing department to authorize the taking of bison. Amendment effective May 13, 2011.

*Severability:* Section 2, Ch. 383, L. 2011, was a severability clause.

*2003 Amendment:* Chapter 604 in (2)(c) inserted third sentence concerning public hunting of wild buffalo or bison; deleted former (3) that read: "(3) The department and the department of livestock are strongly urged to enter into an agreement with the national park service for the long-term management of the Yellowstone national park wild buffalo or bison herd. If the national park service does not proceed in good faith in a timely manner to enter a long-term management agreement that, in the determination of the department and the department of livestock, responds adequately to the needs of Montana, the departments are strongly urged to take appropriate court action. The department and the department of livestock shall prepare a joint report to the 55th legislature regarding the present state of wild buffalo or bison management in Montana and any progress on an agreement for the long-term management of the Yellowstone national park herd"; inserted (4) concerning rules regarding special wild buffalo or bison license; and made minor changes in style. Amendment effective May 9, 2003.

*1995 Statement of Intent:* The statement of intent attached to Ch. 346, L. 1995, provided: "A statement of intent is required for this bill because the department of livestock is authorized in [section 1] [81-2-120] to adopt rules with regard to management of publicly owned wild buffalo or bison that enter Montana on private or public land and that are from a herd that is infected with a contagious disease that may spread to persons or livestock and may jeopardize compliance with federally administered livestock disease control programs. The department may determine that rulemaking is necessary with regard to feasible methods of taking wild buffalo or bison allowed within [section 1(1)] [81-2-120(1)] or with regard to disposal of the carcasses of wild buffalo or bison as provided for in [section 1(2) and (3)] [81-2-120(2) and (3)].

A statement of intent is also required because [section 2] [87-1-216] authorizes the department of fish, wildlife, and parks to adopt rules with regard to wild buffalo or bison that have not been exposed to or infected with a contagious disease but are in need of management because of potential damage to person or property. The department may determine that rulemaking is necessary if management of wild buffalo or bison under the provisions of [section 2] [87-1-216] includes public hunting."

*Effective Date:* Section 5, Ch. 346, L. 1995, provided: "[This act] is effective on passage and approval." Approved April 10, 1995.

**Case Notes**

*Phrase "Private or Public Land in Montana" Not Applicable to Tribal Lands — Injunction Prohibiting Transfer of Bison Improper:* The Department of Fish, Wildlife, and Parks transferred some Yellowstone bison to the Fort Peck Reservation, with part of the herd to be subsequently transferred to the Fort Belknap Reservation. The District Court issued a preliminary injunction to prohibit the transfer of some of the bison to Fort Belknap on the basis that the Department had not complied with the requirements of 87-1-216, which provides that the Department may not release, transplant, or allow wild buffalo or bison on any private or public land in Montana that has not been authorized for that use by the private or public owner. The Supreme Court reversed on the basis that the phrase "private or public land in Montana" does not apply to tribal lands and therefore it was error on the District Court's part to issue an injunction based on a violation of 87-1-216. Citizens for Balanced Use v. Maurier, 2013 MT 166, 370 Mont. 410, 303 P.3d 794.

*Federal Court Action Against State Barred Absent State Consent to Be Sued:* The Fund for Animals alleged that federal and state officials violated the National Environmental Policy Act of 1969 (NEPA) and the Montana Environmental Policy Act (MEPA) by failing to prepare an environmental impact statement before adopting a plan to kill bison leaving Yellowstone National Park. The District Court properly denied a preliminary injunction to halt implementation of the plan in light of public support of the plan, given the serious threat of brucellosis to Montana cattle, the large number of excess bison, and the lack of feasible alternatives to control bison migrating out of the park. Although nonfederal actors may be enjoined under NEPA if their proposed action cannot proceed without prior approval of a federal agency, state actors may not be enjoined simply because the state project involves major federal action. Penalizing the State of Montana for consenting to participate in a plan with the federal government, designed to limit the killing of bison, would be inequitable. Further, the 11th amendment to the U.S. Constitution barred the organization from proceeding in federal court against either the State of Montana or its officers for violations of MEPA, absent a demonstration that the state had consented to be sued in federal court for alleged MEPA violations. Fund for Animals, Inc. v. Lujan, 962 F2d 1391 (9th Cir. 1992).

## 87-1-217. Policy for management of large predators — legislative intent.

**Compiler's Comments**

*2017 Amendment:* Chapter 76 in (4) substituted "carcasses or parts of carcasses from wolves or mountain lions" for "wolf carcasses or parts of wolf carcasses" and before "management activities" deleted "wolf". Amendment effective October 1, 2017.

*2013 Amendment:* Chapter 163 in (6) inserted definition of consultation; and made minor changes in style. Amendment effective October 1, 2013.

*2011 Amendments — Composite Section:* Chapter 71 inserted (5) requiring department to work with federal authorities regarding sale of wolf carcasses. Amendment effective October 1, 2011.

Chapter 414 inserted (6) relating to consultation and coordination with counties and tribes; and made minor changes in style. Amendment effective May 14, 2011.

*Name Change — Directions to Code Commissioner:* Pursuant to sec. 6, Ch. 229, L. 2011, in (5) the Code Commissioner changed "livestock loss reduction and mitigation board" to "livestock loss board".

*2009 Amendment:* Chapter 275 in (1) following "department" inserted "in the order of listed priority"; renumbered (1)(a) as (1)(c) to reflect a change in order of priorities; inserted (4) to allow the department to use lethal action and defining problem wolves; and made minor changes in style. Amendment effective April 17, 2009.

*Severability:* Section 3, Ch. 212, L. 2003, was a severability clause.

*Effective Date:* Section 4, Ch. 212, L. 2003, provided: "[This act] is effective on passage and approval." Approved April 3, 2003.

## 87-1-218. Notice of proposed land acquisitions.

**Compiler's Comments**

*2015 Amendment:* Chapter 326 inserted (4) concerning departmental requirements for certain land acquisitions of 640 acres or more. Amendment effective October 1, 2015.

*Saving Clause:* Section 2, Ch. 326, L. 2015, was a saving clause.

*2013 Amendment:* Chapter 235 in (2) and (3)(d) inserted "or the board". Amendment effective July 1, 2013.

*Saving Clause:* Section 40, Ch. 235, L. 2013, was a saving clause.

*Severability:* Section 12, Ch. 485, L. 2009, was a severability clause.

*Effective Date:* Section 15, Ch. 485, L. 2009, provided: "[This act] is effective on passage and approval." Chapter 485, L. 2009, was enacted into law without the governor's signature on May 10, 2009.

## 87-1-221. Acquisition, importation, and propagation of fish and game — waterfowl food.

**Compiler's Comments**

*2003 Amendment:* Chapter 114 in (3) after "fish hatcheries" deleted "alternative livestock ranches". Amendment effective October 1, 2003.

*2001 Amendment:* Chapter 7 near middle of (3) substituted "alternative livestock ranches" for "game farms"; and made minor changes in style. Amendment effective October 1, 2001.

## 87-1-222. Construction and maintenance of fish hatcheries and fish ladders.

**Case Notes**

*Fish Ladder Construction:* Mandamus to compel fish pond licensee, in compliance with a statute, to construct fish ladder on diversion dam installed 7 years before with approval of State Fish and Game Commission (now Fish, Wildlife, and Parks Commission) would be denied on theory that individuals who have put water to beneficial use should not have their rights arbitrarily diluted under claim of sovereign right. Paradise Rainbow v. Fish & Game Comm'n, 148 M 412, 421 P2d 717 (1966).

## 87-1-223. Control of state waters for propagation of fish.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 in first sentence, twice in second sentence, and twice in last sentence, after "department", deleted "of fish, wildlife, and parks"; in second, third, and fourth sentences substituted "department of natural resources and conservation" for "department of state lands"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

**Law Review Articles**

The Background on Recreational Use of Montana Waters, Stone, 32 Mont. L. Rev. 1 (1971).

### 87-1-224. Destruction of beaver and beaver dams for protection of public health.

**Compiler's Comments**

*1995 Amendment:* Chapter 418 in (1), in two places, substituted "department of environmental quality" for "department of health and environmental sciences"; at end of (1) and at beginning of (2) and (3), after "department", deleted "of fish, wildlife, and parks"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

### 87-1-225. Regulation of wild animals damaging property — public hunting requirements.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

*1989 Amendment:* Inserted (1) relating to eligibility of landowners to receive game damage assistance; and inserted (2) relating to the authority of Department to provide game damage assistance to landowners denying public hunting.

*1987 Amendment:* At beginning substituted "Within 48 hours after receiving a" for "Upon the", after "complaint" substituted "from" for "of", and near end of first sentence, before "study", inserted "arrange to".

**Administrative Rules**

Title 12, chapter 9, subchapter 8, ARM Damage hunts.

Title 12, chapter 9, subchapter 11, ARM Management seasons.

**Case Notes**

*Discretion of Commission:* State Fish and Game Commission (now Fish, Wildlife, and Parks Commission) cannot be mandated to permit landowner to kill elk to protect his property since, although former statute compelled Commission to investigate property damage upon complaint, it conferred discretion to act, one exercise of which is taking no action. State ex rel. Sackman v. St. Fish & Game Comm'n, 151 M 45, 438 P2d 663 (1968).

**Law Review Articles**

The Right to Kill Wild Animals in Defense of Person or Property, Bender, 31 Mont. L. Rev. 235 (1970).

### 87-1-226. Disposition of meat of animals damaging property.

**Compiler's Comments**

*1995 Amendment:* Chapter 546 in two places substituted "department of public health and human services" for "department of social and rehabilitation services". Amendment effective July 1, 1995.

*Saving Clause:* Section 571, Ch. 546, L. 1995, was a saving clause.

*1985 Amendment:* In (1) at end of first sentence, inserted "charitable institutions"; and inserted (2) relating to the sale of meat not accepted by state institutions, school lunch programs, Department of Social and Rehabilitation Services, or charitable institutions.

### 87-1-228. Agreement with Indians concerning hunting and fishing — Indian treaty of 1855.

**Compiler's Comments**

*2005 Amendment:* Chapter 146 inserted (3) providing that a judgment issued by Confederated Salish and Kootenai tribal courts for fish and game violation is entitled to full faith and credit in Montana courts; and made minor changes in style. Amendment effective March 30, 2005.

*1993 Amendment:* Chapter 266 in (1)(c) inserted second sentence providing: "These joint licensing and permit requirements supersede the general licensing and permit requirements set forth in this title"; and made minor changes in style.

*1989 Amendment:* Substituted language relating to cooperation in matters involving hunting and fishing on Flathead Reservation for former text that read: "(1) Whereas, by treaty of July 16, 1855, between the United States of America, represented by Isaac I. Stephens, governor and superintendent of Indian affairs for the territory of Washington, and the chiefs, headmen, and delegates of the confederated tribes of the Flathead, Kootenai, and Upper Pend Oreille Indians, the said Indians were given the exclusive right to fish and hunt on the Flathead Indian reservation and the privilege of hunting in their usual hunting grounds on large areas of Montana; and whereas, nonmembers of such tribes have the right to hunt and fish on Indian lands by sufferance of such tribes only; and whereas, it appears to be to the common advantage of the state and such Indian tribes that hunting and fishing regulations and privileges on other lands of the state and on Indian lands shall be uniform and that hunting and fishing on such Indian lands shall be in common with the public, now, therefore, the department may negotiate and conclude an agreement with the council of the Confederated Salish and Kootenai tribes of the Flathead Indian reservation for the purpose of:

(a) obtaining and establishing for the citizens of Montana, regularly licensed to hunt and fish in the state, the privileges of hunting and fishing on Indian lands on the Flathead Indian reservation;

(b) the conservation and protection of fish and game and fur-bearing animals on such Indian lands and on lands adjacent thereto;

(c) setting dates for the opening and closing of seasons for hunting and fishing on such lands for Indians and non-Indians alike, opening and closing of streams and land areas for hunting and fishing;

(d) doing what in its judgment is necessary by way of granting to such tribal Indians state permits to hunt and fish, to be issued without charge to such Indians;

(e) stocking streams and land areas of such Indian lands for the common benefit;

(f) policing such Indian lands for the protection of fish and game; and

(g) in general carrying out the purposes of this section.

(2) If any part of such agreement provides for the payment of money to the tribes, that part must first have the approval of the state legislature.

(3) Any agreement entered into under subsection (1) must also satisfy the requirements of Title 18, chapter 11."

*1981 Amendment:* Added (3) requiring any agreement entered under subsection (1) to also satisfy the requirements of Title 18, chapter 11.

**Case Notes**

*Closure to Nontribal Member of Big Game Hunting on Indian Reservation Permissible Exercise of Authority of Fish, Wildlife, and Parks Commission:* It is not necessary that state fish and game laws specifically mention Indian hunting rights in order for the Fish, Wildlife, and Parks Commission to have proper authority to promulgate a regulation that recognizes those rights under state law, nor is it necessary that the Commission be directed by legislative intent, studies, or committee minutes specific to the issue in order to recognize Indian hunting rights. In promulgating hunting regulations, the Commission must take this section into account, which explicitly recognizes tribal hunting rights on the Flathead Indian Reservation, as well as federal court decisions regarding the issue of jurisdiction to regulate hunting on the Flathead Indian Reservation. Thus, the Commission properly exercised its authority in prohibiting hunting by nontribal members on reservations. Here, Shook, who was not a tribal member, was convicted of killing a whitetail buck on private property on the Flathead Indian Reservation. Shook's conviction did not conflict with 87-1-305. Further, 18 U.S.C. 1165, which gives tribes exclusive jurisdiction to regulate hunting on reservations, did not apply to Shook because the violation was charged under state rather than federal law. St. v. Shook, 2002 MT 347, 313 M 347, 61 P3d 863 (2002). See also State ex rel. Greely v. Confederated Salish & Kootenai Tribes, 219 M 76, 712 P2d 754 (1985), and Confederated Salish & Kootenai Tribes v. St., 750 F. Supp. 446 (1990).

*Summary of Holdings in Litigation Over Hunting and Fishing Rights on Crow Indian Reservation:* "The explicit holdings of the Supreme Court in Montana v. United States, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981), and of the 9th Circuit Court of Appeals in United States v. State of Montana, 604 F.2d 1162 (9th Cir. 1979), to the extent not reversed by the Supreme Court, are as follows:

1. The Crow Tribe can proscribe all hunting and fishing by non-members on those lands described in 18 U.S.C. § 1165. Montana v. United States, 450 U.S. at 557, 101 S.Ct. at 1254.

2. The Crow Tribe, within 18 U.S.C. § 1165 lands, has power to regulate hunting and fishing by non-members of the tribe (whether Indian or non-Indian) subject to the following conditions:

(a) That the Crow Tribe lacks the power to impose criminal sanctions on non-Indians who violate its hunting and fishing regulations,

(b) That the exercise by the Crow Tribe of its power to regulate hunting and fishing by non-Indians must be within the constraints recognized by this court in Quechan Tribe of Indians

v. Rowe, 531 F.2d 408 (9th Cir. 1976). Montana v. United States, 450 U.S. at 557, 101 S.Ct. at 1254; United States v. Montana, 604 F.2d at 1165, 1170.

3. The title to the bed and banks of the Big Horn is in the State of Montana. 450 U.S. at 556-57, 101 S.Ct. at 1253-54.

4. The Crow Tribe has no power to regulate hunting and fishing by non-members on non-member owned fee patent land located within the exterior boundaries of the Crow Reservation. Id. at 557, 101 S.Ct. at 1254.

5. The State of Montana cannot regulate hunting and fishing by members of the Crow Tribe within 18 U.S.C. § 1165 lands. 604 F.2d at 1172.

6. The State of Montana has the power to regulate hunting and fishing by non-members of the Crow Tribe within the exterior boundaries of the Crow Reservation subject to the following limitations:

(a) That such regulations of the State of Montana not regulate indirectly the hunting and fishing by members of the Crow Tribe on 18 U.S.C. § 1165 lands.

(b) That such regulations of the State of Montana must have as their purpose the conservation and proper management of game and fish and not to discriminate against, nor to impede, authorized regulation by the Crow Tribe. Id. at 1166.

7. Such rights as the State of Montana has to regulate fishing on the Big Horn River by the Crows and all others are not limited by either (a) the treaties of 1851 and 1868 (except to such extent as these treaties might acknowledge pertinent aboriginal title rights of the Crow Tribe not heretofore asserted or recognized in this litigation) or (b) the inherent sovereignty of the Crow Tribe. 604 F.2d at 1170-71." (Quoting from U.S. v. Mont., 686 F2d 766 (9th Cir. 1982), at pp. 768-769.)

*Tribal Regulation of Flathead Lake Usage:* Confederated Salish and Kootenai Tribes of the Flathead Reservation have authority to regulate federal common-law riparian rights of non-Indians who own reservation land bordering the south half of Flathead Lake. The Circuit Court held that the decision in Mont. v. U.S., 450 US 544, 67 L Ed 2d 493, 101 S Ct 1245 (1981), regarding ownership and control of the Bighorn River, was not controlling. The decision in Mont. Power Co. v. Rochester, 127 F2d 189 (9th Cir. 1942), was given deference under the principle of stare decisis. Rochester held that the United States holds title to the bed and banks of the south half of Flathead Lake in trust for the tribes. Confederated Salish & Kootenai Tribes of the Flathead Reservation v. Namen, 665 F2d 951 (9th Cir. 1982), followed in In re Estate of Hobbs, 2002 MT 85, 309 M 308, 46 P3d 594 (2002).

*Airborne Hunting — Non-Indian Hunters on Indian Reservations:* The Airborne Hunting Act, 16 U.S.C. § 742j-1, was declared unconstitutional in a challenge by non-Indian hunters caught hunting on an Indian reservation. The statute was found to be an unlawful preemption of reserve state regulatory authority. The federal government is not empowered to displace Montana's regulation in this area. U.S. v. Helsley, 463 F. Supp. 1111 (D.C. Mont. 1979), reversed in U.S. v. Helsley, 615 F2d 784 (9th Cir. 1979).

*Indians Hunting on Open and Unclaimed Land:* Members of the Confederated Salish and Kootenai Tribes have a right to hunt free from the regulation of Montana game laws on "open and unclaimed lands" by virtue of Article II of the Treaty of Hell Gate and this includes National Forest Service land. St. v. Stasso, 172 M 242, 563 P2d 562 (1977).

*Jurisdiction — Hunting and Fishing:* Flathead Tribe had jurisdiction to regulate fishing upon Crow Creek Reservoir, and violation of tribal ordinance requiring permit for fishing constituted federal offense. U.S. v. Zempel, 32 St. Rep. 1130 (D.C. Mont. 1975). (Annotator's Comment: This case was not published in F. Supp.)

*Treaty of 1855:* Indians were not subject to state fish and game laws on reservation property since under the Treaty of 1855 between the Indians of Flathead Reservation and the United States, the exclusive right to hunt and fish within the boundaries of the Reservation was reserved by the Indians. St. v. McClure, 127 M 534, 268 P2d 629 (1954).

**Law Review Articles**

Colville Confederated Tribes v. Walton: Indian Water Rights and Regulation in the Ninth Circuit, Isham, 43 Mont. L. Rev. 247 (1982).

Federal and Interstate Conflicts in Montana Water Law: Support for a State Water Plan, Ladd, 42 Mont. L. Rev. 267 (1981).

Comments on Indian Water Rights, Morrison, 41 Mont. L. Rev. 39 (1980).

Fishing Rights on the Crow Reservation (United States v. Finch), Jones, 37 Mont. L. Rev. 276 (1976).

The Lacey Act: America's Premier Weapon in the Fight Against Unlawful Wildlife Trafficking, Anderson, 16 Pub. Land L. Rev. 27 (1995).

## 87-1-232. Tattoo records.

### Compiler's Comments

*2011 Amendment:* Chapter 258 in (1) in first sentence substituted "87-6-701" for "87-1-231"; and made minor changes in style. Amendment effective October 1, 2011.

*Preamble:* The preamble attached to Ch. 258, L. 2011, provided: "WHEREAS, the 2007 Legislature passed House Joint Resolution No. 16, urging that revision of the criminal codes within Title 87 of the Montana Code Annotated be given priority; and

WHEREAS, House Joint Resolution No. 16 noted that practitioners, judges, and citizens find that the criminal codes intertwined within the fish and game laws in Title 87 are difficult to read, understand, and prosecute; and

WHEREAS, House Joint Resolution No. 16 directed that revision of the Title 87 criminal code should not include policy changes to current laws and should adhere to the intent of the legislatures that crafted the laws; and

WHEREAS, in 2008, the Director of Fish, Wildlife, and Parks appointed a Title 87 criminal code revision working group, consisting of Justices of the Peace, County Attorneys, an Assistant Attorney General, legal counsel and the enforcement administrator of the Department of Fish, Wildlife, and Parks, and legislative staff; and

WHEREAS, the working group met numerous times and spent countless hours crafting a revision that makes the Title 87 criminal code more understandable without making substantive or policy changes to present law; and

WHEREAS, revision of the fish and game criminal statutes will benefit the hunting and fishing public, magistrates, and prosecutors by codifying crimes and penalties in a separate chapter of Montana law, rather than being intertwined throughout Title 87."

*Saving Clause:* Section 131, Ch. 258, L. 2011, was a saving clause.

*Severability:* Section 132, Ch. 258, L. 2011, was a severability clause.

*Statement of Intent:* The statement of intent attached to HB 611 (Ch. 566, L. 1985) provided: "This bill requires a statement of intent because section 4 [apparently section 2, 87-1-232 intended] requires the department of fish, wildlife, and parks to adopt a rule establishing a fee to be charged for receiving reports of the capture of animals listed in the bill and maintaining a record of such reports. It is the intent of the legislature that such fee shall reflect the actual administrative cost incurred by the department in carrying out its responsibility under the bill."

### Administrative Rules

ARM 12.6.1903 Tattooing.

ARM 12.6.1904 Fees.

## 87-1-234. Exceptions to tattoo and compensation requirements.

### Compiler's Comments

*2011 Amendment:* Chapter 258 near beginning substituted "87-1-232, 87-1-233, and 87-6-701" for "87-1-231 through 87-1-233"; and made minor changes in style. Amendment effective October 1, 2011.

*Preamble:* The preamble attached to Ch. 258, L. 2011, provided: "WHEREAS, the 2007 Legislature passed House Joint Resolution No. 16, urging that revision of the criminal codes within Title 87 of the Montana Code Annotated be given priority; and

WHEREAS, House Joint Resolution No. 16 noted that practitioners, judges, and citizens find that the criminal codes intertwined within the fish and game laws in Title 87 are difficult to read, understand, and prosecute; and

WHEREAS, House Joint Resolution No. 16 directed that revision of the Title 87 criminal code should not include policy changes to current laws and should adhere to the intent of the legislatures that crafted the laws; and

WHEREAS, in 2008, the Director of Fish, Wildlife, and Parks appointed a Title 87 criminal code revision working group, consisting of Justices of the Peace, County Attorneys, an Assistant Attorney General, legal counsel and the enforcement administrator of the Department of Fish, Wildlife, and Parks, and legislative staff; and

WHEREAS, the working group met numerous times and spent countless hours crafting a revision that makes the Title 87 criminal code more understandable without making substantive or policy changes to present law; and

WHEREAS, revision of the fish and game criminal statutes will benefit the hunting and fishing public, magistrates, and prosecutors by codifying crimes and penalties in a separate chapter of Montana law, rather than being intertwined throughout Title 87."

*Saving Clause:* Section 131, Ch. 258, L. 2011, was a saving clause.

*Severability:* Section 132, Ch. 258, L. 2011, was a severability clause.

**Administrative Rules**

ARM 12.6.1903 Tattooing.

### 87-1-241. Acquisition of wildlife habitat — rules.

**Compiler's Comments**

*Termination Provision Repealed:* Section 1, Ch. 50, L. 2005, repealed sec. 12, Ch. 598, L. 1987, sec. 3, Ch. 319, L. 1991, and secs. 1 and 2, Ch. 241, L. 1993, which terminated this section March 1, 2006. Effective March 24, 2005.

*Preamble:* The preamble attached to Ch. 241, L. 1993, provided: "WHEREAS, the lease or purchase of land suitable for wildlife habitat and the acquisition of conservation easements to protect and enhance habitat are necessary; and

WHEREAS, the program instituted by the 1987 Legislature to allocate revenue from increased hunting license fees to fund the protection and enhancement of wildlife habitat has proved to be an effective and valuable tool in maintaining the quality of wildlife habitat in Montana; and

WHEREAS, it is in the interests of the people and the wildlife of the State of Montana to continue the wildlife habitat acquisition program on a permanent basis."

*Extension of Termination Date:* Section 1, Ch. 241, L. 1993, amended sec. 12, Ch. 598, L. 1987, to provide that the wildlife habitat acquisition program terminates March 1, 2006. Section 2, Ch. 241, L. 1993, amended sec. 3, Ch. 319, L. 1991, to provide that the wildlife habitat acquisition program terminates March 1, 2006.

*Extension of Termination Date:* Section 3, Ch. 319, L. 1991, amended sec. 12, Ch. 598, L. 1987, to provide that the wildlife habitat acquisition program terminates March 1, 1996. Amendment effective April 2, 1991.

*1989 Amendment:* Inserted (1)(e) requiring analysis of significant potential social and economic impacts. Amendment effective April 12, 1989.

*1987 Statement of Intent:* The statement of intent attached to Ch. 598, L. 1987, provided: "House Bill No. 526 [Ch. 598, L. 1987] requires a statement of intent because section 1 [87-1-241] requires the fish and game commission [now fish, wildlife, and parks commission] to adopt rules establishing its policy regarding wildlife habitat acquisitions provided for by this act.

It is the intent of this act to provide a means for the department of fish, wildlife, and parks to acquire an interest in land for the purpose of protecting and enhancing wildlife habitat. Such interest in land must be gained by the purchase of leases, conservation easements, or fee title. While it is preferable to acquire such interest through lease or conservation easement, the legislature acknowledges that the willing seller will determine the manner by which such interest is obtained and thus provides for all three alternatives.

It is intended that the rules will address policy considerations for making acquisitions generally, as well as establishing procedures for determining in each case of a proposed acquisition whether the interest will be acquired.

It is intended that the commission identify habitat needs by administrative region and compile these needs in a consolidated statewide habitat acquisition plan. The rules must ensure that acquired interests in habitat lands are reasonably distributed around the state in accordance with the statewide habitat acquisition plan and that emphasis is placed upon those areas where important habitat is seriously threatened.

It is intended that the department exercise good land management practices on all land acquired, and multiple uses of such land when not detrimental to its value as wildlife habitat are specifically authorized. The department shall identify management objectives for each proposed acquisition, analyze potential impacts to adjacent private land resulting from those objectives, and develop plans to address such impacts.

A public hearing must be held in the area of each proposed acquisition after the required analysis has been completed by the department, for the purpose of obtaining comment from the interested public. The analysis and related public concerns are to be presented to the fish and game commission [now fish, wildlife, and parks commission] prior to its final action on any acquisition of interest and also to the board of land commissioners if that body is required to make a decision on the proposal under 87-1-209.

The policy and an analysis for each proposal acted upon in a biennium must be presented to the members of both the house and senate fish and game committees when they next meet in regular session."

*Preamble:* The preamble to Ch. 598, L. 1987, read: "WHEREAS, the lease or purchase of land suitable for wildlife habitat and the acquisition of conservation easements to protect and enhance habitat are necessary; and

WHEREAS, allocating revenue from increases in hunting license fees is appropriate to fund the protection and enhancement of wildlife habitat."

**Administrative Rules**

Title 12, chapter 9, subchapter 5, ARM Wildlife habitat acquisition.

**87-1-242. Funding for wildlife habitat.**

**Compiler's Comments**

*2020 Amendment by Initiative Repealed:* Section 106, Ch. 576, L. 2021, repealed the amendments to this section made by sec. 52, Initiative Measure No. 190, before they became effective. Repealer effective July 1, 2021.

*2020 Amendment by Initiative:* Initiative Measure No. 190 in (3) after "this section" inserted "together with money from marijuana taxes deposited under 16-12-111 and". Amendment effective October 1, 2021.

*Severability:* Section 55, Initiative Measure No. 190, was a severability clause.

*2010 Amendment by Initiative:* Initiative Measure No. 161, proposed by initiative petition and approved at the general election held November 2, 2010, in (2) after "subsection (1)" deleted "except outfitter-sponsored Class B-10 and Class B-11 licenses subject to variable pricing under 87-1-268". Amendment effective March 1, 2011.

*Termination Provision Repealed:* Section 1, Ch. 50, L. 2005, repealed sec. 12, Ch. 598, L. 1987, sec. 3, Ch. 319, L. 1991, and secs. 1 and 2, Ch. 241, L. 1993, which terminated this section March 1, 2006. Effective March 24, 2005.

Sections 2 and 3, Ch. 235, L. 2005, amended sec. 6, Ch. 544, L. 1999, and sec. 18, Ch. 459, L. 1995, removing the provision that terminated amendments to this section March 1, 2006. Effective April 15, 2005.

*2001 Amendment:* Chapter 7 in (1)(i) after "Class AAA" substituted "combination sports" for "sportsman's". Amendment effective October 1, 2001.

*Extension of Termination Date:* Section 6, Ch. 544, L. 1999, amended sec. 18, Ch. 459, L. 1995, by extending the termination date imposed by Ch. 459 to March 1, 2006.

*1995 Amendment:* Chapter 459 in version effective March 1, 1996, in (2) inserted variable pricing exception; deleted former (4)(a) that read: "(a) Until March 1, 1991, 20% of the money allocated by this section must be credited to the account created by 87-1-601(5) for use in the manner prescribed therein for the development and maintenance of real property used for wildlife habitat"; in (4), at beginning, deleted "On and after March 1, 1991"; adjusted subsection references; and made minor changes in style. Amendment effective March 1, 1996, and terminates October 1, 2001.

*Preamble:* The preamble attached to Ch. 459, L. 1995, provided: "WHEREAS, Montana has a cherished hunting heritage based on a deep knowledge of and respect for wildlife and the land; and

WHEREAS, private landowners provide wildlife habitat and hunting opportunities, the hunting public provides financial and political support for sound wildlife management, and the combined efforts of landowners and the hunting public have sustained Montana's hunting and wildlife heritage; and

WHEREAS, landowner/outfitter/sportsperson relations have become increasingly strained over the past several years, leading to increased polarization between the groups; and

WHEREAS, the 1993 Legislature addressed this problem through the passage of House Joint Resolution No. 24, which requested the Governor, through the Department of Fish, Wildlife, and Parks, to coordinate a sustained, ongoing, cooperative effort to address these issues by establishing statewide, regional, and local groups to develop mutually satisfactory solutions that would preserve Montana's hunting and wildlife heritage and encourage the continuance of a viable outfitting industry; and

WHEREAS, in response to that request, the Governor appointed the Advisory Council on Private Land/Public Wildlife, consisting of representatives of the affected groups, to study the issues in anticipation of legislation that reflects the mutual interests of landowners, outfitters, and the sporting community; and

WHEREAS, after considering extensive input and advice from individual private citizens, local working groups, agencies, and nonprofit organizations involved in conservation, the Advisory Council by consensus developed recommendations for improving hunting access to private lands and for providing tangible benefits for landowners who allow access to their lands for hunting; and

WHEREAS, the Advisory Council has made efforts to break new ground philosophically in designing its recommendations, requiring that all interested parties be willing to accept change in order to benefit everyone who has an interest in Montana's hunting and wildlife heritage; and

WHEREAS, the Advisory Council finds it appropriate to present the following recommendations to the Legislature in the spirit of a cooperative and positive effort to enhance relations between landowners, outfitters, and sportspersons."

*1995 Statement of Intent:*"A statement of intent is required for this bill because [sections 1 through 3] [87-1-265 through 87-1-267 (87-1-267 now repealed)] grant rulemaking authority to the department of fish, wildlife, and parks and the fish, wildlife, and parks commission to implement programs for hunter management and hunting access enhancement. It is intended that in addition to the statutory guidelines set out in those sections, any rules be adopted with the purpose of optimizing hunting opportunity and access while minimizing administrative costs in providing benefits to landowners who voluntarily participate in the programs. In addition, [section 6] [87-1-268, now repealed] grants rulemaking authority to the fish, wildlife, and parks commission to implement the provisions of variable pricing for Class B-10 and Class B-11 outfitter-sponsored licenses. It is intended that the fish, wildlife, and parks commission use its licensing authority to adjust the price of those licenses as necessary and that any additional revenue generated by variable pricing be used to fund the hunting access enhancement program."

*Severability:* Section 13, Ch. 459, L. 1995, was a severability clause.

*Saving Clause:* Section 14, Ch. 459, L. 1995, was a saving clause.

*Preamble:* The preamble attached to Ch. 241, L. 1993, provided: "WHEREAS, the lease or purchase of land suitable for wildlife habitat and the acquisition of conservation easements to protect and enhance habitat are necessary; and

WHEREAS, the program instituted by the 1987 Legislature to allocate revenue from increased hunting license fees to fund the protection and enhancement of wildlife habitat has proved to be an effective and valuable tool in maintaining the quality of wildlife habitat in Montana; and

WHEREAS, it is in the interests of the people and the wildlife of the State of Montana to continue the wildlife habitat acquisition program on a permanent basis."

*Extension of Termination Date:* Section 1, Ch. 241, L. 1993, amended sec. 12, Ch. 598, L. 1987, to provide that the wildlife habitat acquisition program terminates March 1, 2006. Section 2, Ch. 241, L. 1993, amended sec. 3, Ch. 319, L. 1991, to provide that the wildlife habitat acquisition program terminates March 1, 2006.

*1991 Amendment:* At beginning of (4)(a) inserted "Until March 1, 1991"; and inserted (4)(b) reallocating 20% of the money collected under this section for development and maintenance of real property used for wildlife habitat. Amendment effective April 2, 1991.

*Preamble:* The preamble attached to Ch. 319, L. 1991, provided: "WHEREAS, wildlife is a major historical, social, and economic resource of Montana; and

WHEREAS, it is in the best interests of the people, the wildlife, and the State of Montana to have a permanent wildlife habitat and conservation easement acquisition program; and

WHEREAS, sportsmen and others have demonstrated their commitment to wildlife by supporting, through license fees, the acquisition of wildlife habitat; and

WHEREAS, private landowners provide significant habitat for Montana's wildlife resources and have legitimate concerns regarding the operation and maintenance of neighboring lands acquired by the Fish and Game Commission [now Fish, Wildlife, and Parks Commission] for wildlife habitat; and

WHEREAS, it is in the best interests of the people, the wildlife, and the State of Montana that relations between landowners and sportsmen be cooperative and mutually respectful in nature and that the concerns of both landowners and sportsmen be taken into consideration in the formulation of a wildlife habitat and conservation easement acquisition program; and

WHEREAS, an independent and detailed study is needed to determine the character and application of the state's permanent wildlife habitat and conservation easement acquisition program."

*Study Required — Report to 1993 Legislature:* Section 2, Ch. 319, L. 1991, provided: "(1) The department of fish, wildlife, and parks shall commission an independent comprehensive study of wildlife habitat acquisition, improvement, and development, to be funded in an amount up to $150,000 from money allocated under 87-1-242(3).

(2) The study must analyze the department's current wildlife habitat acquisition, improvement, operations, maintenance, and development program and develop a comprehensive plan for a permanent wildlife habitat acquisition, improvement, operations, maintenance, development, and land management program, including the use of conservation easements, leases, and fee title acquisition. The study must also include a comprehensive and detailed accounting of expenditures authorized by 87-1-242(4). The department shall ensure participation by the public, including landowners and sportsmen, in the development of the comprehensive plan. The study and plan must be completed by December 1, 1992, and presented to the 1993 legislature."

*Effective Date — Contingent Retroactive Applicability:* Section 4, Ch. 319, L. 1991, provided: "[This act] is effective on passage and approval and, if passed and approved on or after March 1, 1991, applies retroactively, within the meaning of 1-2-109, to funds allocated under 87-1-242(4) on and after March 1, 1991." Approved April 2, 1991.

*Extension of Termination Date:* Section 3, Ch. 319, L. 1991, amended sec. 12, Ch. 598, L. 1987, to provide that the wildlife habitat acquisition program terminates March 1, 1996. Amendment effective April 2, 1991.

*Coordination Instruction:* Section 11, Ch. 598, L. 1987, a coordination section, in (1)(a) substituted $77 for $100; in (1)(i) substituted $7 for $9; and inserted (1)(j) relating to the Class B-11 license.

**Administrative Rules**

Title 12, chapter 9, subchapter 5, ARM Wildlife habitat acquisition.

**87-1-246. Funding of upland game bird enhancement program.**

**Compiler's Comments**

*Termination Provision Repealed:* Section 1, Ch. 35, L. 2019, repealed sec. 6, Ch. 204, L. 2013, which terminated the 2013 amendments to this section June 30, 2019. Effective February 28, 2019.

*2013 Amendment:* Chapter 204 inserted (3) regarding class B-2 licenses; and made minor changes in style. Amendment effective April 15, 2013, and terminates June 30, 2019.

*2001 Amendment:* Chapter 7 in (3) after "Class AAA" substituted "combination sports" for "sportsman's". Amendment effective October 1, 2001.

*1989 Amendment:* Near middle of introductory clause, before "populations", substituted "upland game bird" for "pheasant". Amendment effective March 22, 1989.

**87-1-247. Upland game bird enhancement program — authorized use of funds.**

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 1, Ch. 121, L. 2023. Amendment effective April 18, 2023.

*2009 Amendment:* Chapter 306 in (1) at beginning substituted "Subject to subsections (2) and (3), revenue dedicated to the upland game bird enhancement program pursuant to 87-1-246 must" for "Not more than 15% of the money generated under 87-1-246 may"; inserted (1)(e) regarding strategic plan development; in (1)(f) at beginning substituted "pursuant to subsection (2), release" for "The remainder of the money raised must be used for releasing"; inserted (1)(h) regarding the upland game bird citizen's advisory council; inserted (3) establishing a procedure for prioritizing expenditures; and made minor changes in style. Amendment effective July 1, 2009.

*2001 Amendment:* Chapter 365 in (1) substituted "15%" for "10%"; in (1)(b) substituted "upland game bird" for "pheasant"; deleted former (2)(a) that read: "(a) to share, at $3 a bird, in the cost of releasing pheasants in suitable habitat, in such numbers and under conditions determined by the department under 87-1-248(1)"; in (2) substituted "for releasing upland game birds in suitable habitat and for the development, enhancement, and conservation of upland game bird habitat in Montana" for "to revert, at the end of each fiscal year, all unexpended funds to the habitat portion of the program outlined in 87-1-248(2) for the development, enhancement, and conservation of upland game bird habitat in Montana"; inserted (3)(a) concerning use of 15% of funds for upland game bird releases; inserted (3)(b) requiring 25% of funds to be spent each year; and made minor changes in style. Amendment effective July 1, 2001.

*1989 Amendment:* In (1)(a) and (1)(d) substituted "upland game bird" for "pheasant"; in (2)(a), near beginning, substituted "at $3" for "up to $3" and at end inserted reference to 87-1-248(1); inserted (2)(b) providing for reversion of funds for habitat enhancement; and made minor change in form. Amendment effective March 22, 1989.

**Administrative Rules**

ARM 12.9.604 Payment by Department.

### 87-1-248. Qualification of upland game bird enhancement projects.

**Compiler's Comments**

*2001 Amendment:* Chapter 365 in (1) in three places substituted "upland game bird" for "pheasant" and near end after "necessary" substituted "to provide for establishment of a viable" for "by the department to provide for a viable permanent"; in (2) in two places substituted "or" for "and", at beginning substituted "A project eligible for funding under the habitat enhancement program" for "Habitat enhancement efforts", and after "cost sharing" deleted "programs"; inserted (5) concerning requirements for projects, equipment, construction of certain improvements on cost-share basis, shelterbelts, and supplemental feeding programs; and made minor changes in style. Amendment effective July 1, 2001.

*1989 Amendment:* Inserted (2) stating qualifications for habitat enhancement efforts; and made minor changes in phraseology and form. Amendment effective March 22, 1989.

**Administrative Rules**

Title 12, chapter 9, subchapter 6, ARM Upland game bird release program.
ARM 12.9.605 Effect of rule violations.
Title 12, chapter 9, subchapter 7, ARM Upland game bird habitat enhancement program.
ARM 12.9.706 Effect of rule violations.
ARM 12.9.707 Definitions.

### 87-1-249. Rules.

**Compiler's Comments**

*2019 Amendment:* Chapter 63 in (2)(b) in middle substituted "and hunting access programs established pursuant to 87-1-265" for "the state hunter management program, and the state hunting access enhancement program". Amendment effective March 19, 2019.

*2001 Amendment:* Chapter 365 inserted (2) specifying required content of rules; and made minor changes in style. Amendment effective July 1, 2001.

*1989 Amendment:* Near middle substituted "upland game bird" for "pheasant". Amendment effective March 22, 1989.

*1987 Statement of Intent:* The statement of intent attached to Ch. 636, L. 1987, provided: "This bill requires a statement of intent because section 4 [87-1-249] requires the department of fish, wildlife, and parks to adopt rules to administer the pheasant enhancement program established by the bill. It is intended that the rules:

(1) provide for eligibility criteria for project applications consistent with the general requirements established in the bill;

(2) be consistent with general requirements of the conservation reserve program under the 1985 Food Security Act and the agricultural conservation program, so that landowners participating in those federal programs may also be eligible to participate in this program;

(3) specifically indicate conditions under which pheasants will be released on project areas under the program, including habitat requirements, number to be released, health requirements, banding requirements, time for release, age of pheasants to be released, and other matters determined necessary by the department; and

(4) establish procedures for application for project funding and review and approval or denial of such applications."

**Administrative Rules**

Title 12, chapter 9, subchapter 6, ARM Upland game bird release program.
Title 12, chapter 9, subchapter 7, ARM Upland game bird habitat enhancement program.

### 87-1-250. Upland game bird enhancement program — report.

**Compiler's Comments**

*2021 Amendment:* See 2021 Session Law for amendment made by sec. 125, Ch. 261, L. 2021. Amendment effective April 20, 2021.

*2009 Amendment:* Chapter 306 in middle of introductory language following "87-1-249" inserted "and 87-1-251" and following "biennium" substituted "including providing" for "together with"; inserted (1) concerning copies of reports; and made minor changes in style. Amendment effective July 1, 2009.

*1989 Amendment:* Near middle substituted "upland game bird" for "pheasant". Amendment effective March 22, 1989.

**87-1-251. Upland game bird enhancement program — advisory council.**

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 8, Ch. 603, L. 2023. Amendment effective July 1, 2023.

*Effective Date:* Section 5, Ch. 306, L. 2009, provided that this section is effective July 1, 2009.

**87-1-255. Purpose.**

**Compiler's Comments**

*1989 Statement of Intent:* The statement of intent attached to Ch. 601, L. 1989, provided: "It is the intent of the legislature that the department of fish, wildlife, and parks conduct the river restoration program in coordination, communication, and cooperation with local landowners, lessees, and conservation district officials so that projects conducted under the program will benefit the river resource and all parties involved."

*Effective Date:* Section 12, Ch. 601, L. 1989, provided that this section is effective July 1, 1989.

**87-1-256. Definitions.**

**Compiler's Comments**

*Effective Date:* Section 12, Ch. 601, L. 1989, provided that this section is effective July 1, 1989.

**87-1-257. River restoration program.**

**Compiler's Comments**

*2007 Amendment:* Chapter 448 in (2) near end after "limited to" substituted "a change in appropriation right or" for "the". Amendment effective May 8, 2007.

*1993 Amendment:* Chapter 175 in (2), after "habitat", inserted "including but not limited to the leasing of water rights under 85-2-436"; and made minor changes in style. Amendment effective July 1, 1993.

*Effective Date:* Section 12, Ch. 601, L. 1989, provided that this section is effective July 1, 1989.

**Administrative Rules**

Title 12, chapter 7, subchapter 11, ARM River restoration program.

**87-1-258. River restoration account.**

**Compiler's Comments**

*Effective Date:* Section 12, Ch. 601, L. 1989, provided that this section is effective July 1, 1989.

**87-1-259. Funding for river restoration account.**

**Compiler's Comments**

*Code Commissioner Instruction:* Pursuant to sec. 5, Ch. 263, L. 1995, in (3) substituted "combination sports license" for "sportsman's license". Amendment effective March 1, 1996.

*Effective Date:* Section 12, Ch. 601, L. 1989, provided that this section is effective July 1, 1989.

**87-1-263. Veterans' preference for reserving certain block management areas on Veterans' Day.**

**Compiler's Comments**

*Effective Date:* Section 3, Ch. 188, L. 2017, provided: "[This act] is effective July 1, 2017."

**87-1-264. Expenditure of hunting access program funds on weed control.**

**Compiler's Comments**

*2019 Amendment:* Chapter 63 at beginning substituted "The legislature recognizes that the hunting access programs authorized in 87-1-265 successfully encourage landowners to increase public access to private and public lands" for "The legislature recognizes that the hunter management and hunting access enhancement programs authorized in 87-1-265 through 87-1-267 have successfully encouraged landowners to increase public access to private lands"; and in last sentence after "incentive payments" inserted "above the maximum annual payment established in 87-1-265" and after "agree to use those" inserted "additional". Amendment effective March 19, 2019.

*Termination Provision Repealed:* Section 4, Ch. 235, L. 2005, repealed sec. 29, Ch. 407, L. 2001, which terminated this section March 1, 2006. Effective April 15, 2005.

*Effective Date:* Section 28, Ch. 407, L. 2001, provided that this section is effective July 1, 2001.

*Termination:* Section 29, Ch. 407, L. 2001, provided that this section terminates March 1, 2006.

**87-1-265. Hunting access programs — block management program — private landowner assistance — rules — restriction on landowner liability.**

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 1, Ch. 230, L. 2023. Amendment effective April 24, 2023.

*2021 Amendment:* Chapter 552 in (8)(a) near beginning inserted "and subsection (8)(b) of this section" and near end substituted "$25,000" for "$15,000"; inserted (8)(b) relating to payments for landowners who participate in a unified cooperative agreement; and made minor changes in style. Amendment effective May 15, 2021.

*2019 Amendment:* Chapter 63 in (1) substituted current text for former (1) that read: "(1) The department may establish within the block management program established by administrative rule pursuant to authority contained in 87-1-301 and 87-1-303 programs of landowner assistance that encourage public access to private and public lands for purposes of hunting and may adopt rules to carry out program purposes. Rules may address but are not limited to incentives provided under:

(a) a hunter management program as set out in 87-1-266, consisting of a cooperative agreement between a landowner and the department and including other resource management agencies when appropriate, that allows public hunting with certain restrictions or use rules; and

(b) a hunting access enhancement program as set out in 87-1-267, consisting of incentives for private landowners who allow public hunting access on their lands"; in (2) near beginning substituted "develop and administer alternative programs to" for "develop similar efforts outside the scope of" and substituted "private and public lands" for "private lands"; in (3) substituted current text for former (3) that read: "(3) Participation in a program established under this section is voluntary. A lease, acquisition, or other arrangement for public access across private property that is initiated through a program established under this part must be negotiated on a cooperative basis and may only be initiated with the voluntary participation of private landowners"; in (4) substituted current text for former (4) that read: "(4) Programs may not be structured in a manner that provides assistance to a private landowner who charges a fee for hunting access to private land that is enrolled in the program or who does not provide reasonable public hunting access to private land that is enrolled in the program. The commission shall develop criteria by which tangible benefits are allocated to participating landowners, and the department may distribute the benefits to participating landowners. The department may by rule limit the number of licenses that can be provided as incentives"; inserted (5) regarding consultation with stakeholders; inserted (6) regarding adoption of rules and factors used in determining benefits to be provided to participating landowners; inserted (7) regarding benefits that may be earned by a participating landowner; inserted (8) regarding the maximum annual payment to a participating landowner; inserted (9) regarding liability of a participating landowner; and made minor changes in style. Amendment effective March 19, 2019.

*Termination Provision Repealed:* Sections 2 and 3, Ch. 235, L. 2005, amended sec. 6, Ch. 544, L. 1999, and sec. 18, Ch. 459, L. 1995, and sec. 4, Ch. 235, L. 2005, repealed sec. 9, Ch. 216, L. 2001, removing the provisions that terminated this section effective March 1, 2006. Effective April 15, 2005.

*2001 Amendment:* Chapter 216 in (3) in first sentence substituted "this section" for "subsection (1)" and inserted second sentence concerning negotiation of access on cooperative basis with voluntary participation. Amendment effective March 1, 2002, and terminates March 1, 2006.

*Preamble:* The preamble attached to Ch. 216, L. 2001, provided: "WHEREAS, the Private Land/Public Wildlife Advisory Council is charged with the responsibility to make suggestions for funding, modification, or improvement of the hunting access enhancement program; and

WHEREAS, although the hunting access enhancement program has enjoyed considerable success to date in providing greater opportunities for Montana hunters, the Private Land/Public Wildlife Advisory Council recognizes the potential to increase hunting access through expansion of the program; and

WHEREAS, increasing the size of the current program through a once-a-season hunting access enhancement fee on resident and most nonresident hunters would provide revenue to allow greater landowner incentives, improve hunting access to private and public lands, improve program management and services, increase upland bird hunting opportunities, and provide for future increased program costs because of inflation."

*Extension of Termination Date:* Section 6, Ch. 544, L. 1999, amended sec. 18, Ch. 459, L. 1995, by extending the termination date imposed by Ch. 459 to March 1, 2006.

*Preamble:* The preamble attached to Ch. 459, L. 1995, provided: "WHEREAS, Montana has a cherished hunting heritage based on a deep knowledge of and respect for wildlife and the land; and

WHEREAS, private landowners provide wildlife habitat and hunting opportunities, the hunting public provides financial and political support for sound wildlife management, and the combined efforts of landowners and the hunting public have sustained Montana's hunting and wildlife heritage; and

WHEREAS, landowner/outfitter/sportsperson relations have become increasingly strained over the past several years, leading to increased polarization between the groups; and

WHEREAS, the 1993 Legislature addressed this problem through the passage of House Joint Resolution No. 24, which requested the Governor, through the Department of Fish, Wildlife, and Parks, to coordinate a sustained, ongoing, cooperative effort to address these issues by establishing statewide, regional, and local groups to develop mutually satisfactory solutions that would preserve Montana's hunting and wildlife heritage and encourage the continuance of a viable outfitting industry; and

WHEREAS, in response to that request, the Governor appointed the Advisory Council on Private Land/Public Wildlife, consisting of representatives of the affected groups, to study the issues in anticipation of legislation that reflects the mutual interests of landowners, outfitters, and the sporting community; and

WHEREAS, after considering extensive input and advice from individual private citizens, local working groups, agencies, and nonprofit organizations involved in conservation, the Advisory Council by consensus developed recommendations for improving hunting access to private lands and for providing tangible benefits for landowners who allow access to their lands for hunting; and

WHEREAS, the Advisory Council has made efforts to break new ground philosophically in designing its recommendations, requiring that all interested parties be willing to accept change in order to benefit everyone who has an interest in Montana's hunting and wildlife heritage; and

WHEREAS, the Advisory Council finds it appropriate to present the following recommendations to the Legislature in the spirit of a cooperative and positive effort to enhance relations between landowners, outfitters, and sportspersons."

*1995 Statement of Intent:* "A statement of intent is required for this bill because [sections 1 through 3] [87-1-265 through 87-1-267 (87-1-267 now repealed)] grant rulemaking authority to the department of fish, wildlife, and parks and the fish, wildlife, and parks commission to implement programs for hunter management and hunting access enhancement. It is intended that in addition to the statutory guidelines set out in those sections, any rules be adopted with the purpose of optimizing hunting opportunity and access while minimizing administrative costs in providing benefits to landowners who voluntarily participate in the programs. In addition, [section 6] [87-1-268, now repealed] grants rulemaking authority to the fish, wildlife, and parks commission to implement the provisions of variable pricing for Class B-10 and Class B-11 outfitter-sponsored licenses. It is intended that the fish, wildlife, and parks commission use its licensing authority to adjust the price of those licenses as necessary and that any additional revenue generated by variable pricing be used to fund the hunting access enhancement program."

*Severability:* Section 13, Ch. 459, L. 1995, was a severability clause.

*Saving Clause:* Section 14, Ch. 459, L. 1995, was a saving clause.

*Termination:* Section 18(1), Ch. 459, L. 1995, provided that this section terminates October 1, 2001.

**Case Notes**

*Hunting Violation of Restrictions for Private Property Enrolled in Block Management Program — Failure to Obtain Landowner Permission:* The defendant harvested a cow elk from a property that was enrolled with the Department of Fish, Wildlife, and Parks in a Block Management Program. The particular property required the hunter to sign in prior to hunting. The defendant claimed that he was unaware of any requirement that he sign in prior to hunting. He was convicted of hunting without landowner permission. On appeal, the defendant argued that the block management statutes and rules implementing them were unconstitutional. The Supreme Court upheld the conviction, holding that a person is on notice that the person is subject to rules relating to management of wildlife and that ignorance of the rules is no defense. St. v. McGregor, 2017 MT 156, 388 Mont. 63, 398 P.3d 241.

## 87-1-266. License benefits for landowners enrolled in block management program — rulemaking.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 10, Ch. 507, L. 2023. Amendment effective July 1, 2023.

*2019 Amendments — Composite Section:* Chapter 19 in (1), (2), and (3)(a) in two places inserted "and the necessary prerequisites"; and inserted definition of necessary prerequisites. Amendment effective February 26, 2019.

Chapter 63 throughout section changed "hunter management program" to "block management program"; deleted former (1) that read: "(1) As provided in 87-1-265, the department may establish a voluntary hunter management program to provide tangible benefits to private landowners enrolled in the block management program who grant access to their land for public hunting. The decision to enroll a landowner in the hunter management program is the responsibility of the department. Benefits may be granted as provided in this section and by rule"; in (1) near beginning inserted "established in 87-1-265", after "resident landowner" deleted "who becomes a cooperator in the program and who agrees to provide public hunting access", and in middle inserted "and the necessary prerequisites"; in (2) in first sentence after "nonresident landowner" deleted "who becomes a cooperator in the program and who agrees to provide public hunting access" and in the middle inserted "and the necessary prerequisites"; in (3)(a) substituted "a landowner of record who enrolls in the block management program may designate an immediate family member or employee to receive, without charge, the necessary prerequisites and" for "a landowner of record who becomes a cooperator in the hunter management program and who agrees to provide public hunting access may designate an immediate family member to receive"; in (3)(a)(i) after "license" deleted "without charge" and substituted "designated person" for "family member"; in (3)(a)(ii) after "license" deleted "without charge", substituted "designated person" for "family member", and deleted former last sentence that read: "An employee rather than a family member may be designated to receive the license"; in (3)(c) before "active farm or ranch operation" substituted "the active farm or ranch operation enrolled in the block management program" for "an active farm or ranch operation"; inserted (4) regarding department authority to limit by rule the overall number of licenses that can be provided to landowners; inserted (5) defining necessary prerequisites; deleted former (5) and (6) (see 2019 Session Law for former text); and made minor changes in style. Amendment effective March 19, 2019.

Chapter 221 in (1), (2), and (3)(a) inserted reference to wildlife conservation license; in (3)(a) inserted "or employee"; in (3)(a)(i) and (3)(a)(ii) substituted "designated person" for "family member"; in (3)(a)(ii) at end deleted "An employee rather than a family member may be designated to receive a license"; and made minor changes in style. Amendment effective March 1, 2020.

Style changes were slightly different in the chapters. In each case, the codifier chose appropriate text.

*2010 Amendment by Initiative:* Initiative Measure No. 161, proposed by initiative petition and approved at the general election held November 2, 2010, in (3) and (4)(e) near end before "87-2-505" deleted "87-1-268 and". Amendment effective March 1, 2011.

*2009 Amendment:* Chapter 114 in (4)(a) inserted second sentence allowing employee of landowner to receive free license allotted to landowner; in (4)(b) after "cooperator" substituted "by blood or marriage, a spouse, a legally adopted child, a sibling of the cooperator or spouse, or a niece or nephew" for "and spouse and includes legally adopted children and the cooperator's and spouse's siblings and siblings' children"; deleted former (4)(c) that read: "(c) If a cooperator elects to designate an immediate family member to receive a license pursuant to this subsection (4), the cost of the license must be deducted from hunter management program compensation paid to the cooperator"; inserted (4)(c) defining employee; and in (4)(d) and (4)(e) inserted reference to employee. Amendment effective April 1, 2009.

*2005 Amendment:* Chapter 471 in (3) in fifth sentence near end substituted "limits" for "quota of 11,500" and inserted "87-1-268 and"; inserted (4) allowing a landowner in the hunter management program who agrees to provide public hunting access to designate an immediate resident family member to receive a Class AAA combination sports license or if the family member is a nonresident, a Class B-10 nonresident big game combination license, without charge, defining immediate family member, providing that the cost of the license must be deducted from hunter management program compensation paid to the landowner, providing that the immediate family member must be otherwise eligible for licensure and may not transfer the license, and providing that the grant of a Class B-10 license does not affect the limits in 87-1-268 and 87-2-505; in (5) at beginning substituted "Any landowner" for "A resident landowner"; deleted former (4)(b) that read: "(b) A nonresident landowner who chooses to receive a license under subsection (3) may also receive assistance under the block management program, but is not eligible to receive cash payments under 87-1-267"; and made minor changes in style. Amendment effective October 1, 2005.

*Termination Provision Deleted:* Sections 2 and 3, Ch. 235, L. 2005, amended sec. 6, Ch. 544, L. 1999, and sec. 18, Ch. 459, L. 1995, removing the provision that terminated this section March 1, 2006. Effective April 15, 2005.

*Extension of Termination Date:* Section 6, Ch. 544, L. 1999, amended sec. 18, Ch. 459, L. 1995, by extending the termination date imposed by Ch. 459 to March 1, 2006.

*Code Commissioner Instruction:* Pursuant to sec. 5, Ch. 263, L. 1995, in (2) substituted "combination sports license" for "sportsman's license". Amendment effective March 1, 1996.

*Preamble:* The preamble attached to Ch. 459, L. 1995, provided: "WHEREAS, Montana has a cherished hunting heritage based on a deep knowledge of and respect for wildlife and the land; and

WHEREAS, private landowners provide wildlife habitat and hunting opportunities, the hunting public provides financial and political support for sound wildlife management, and the combined efforts of landowners and the hunting public have sustained Montana's hunting and wildlife heritage; and

WHEREAS, landowner/outfitter/sportsperson relations have become increasingly strained over the past several years, leading to increased polarization between the groups; and

WHEREAS, the 1993 Legislature addressed this problem through the passage of House Joint Resolution No. 24, which requested the Governor, through the Department of Fish, Wildlife, and Parks, to coordinate a sustained, ongoing, cooperative effort to address these issues by establishing statewide, regional, and local groups to develop mutually satisfactory solutions that would preserve Montana's hunting and wildlife heritage and encourage the continuance of a viable outfitting industry; and

WHEREAS, in response to that request, the Governor appointed the Advisory Council on Private Land/Public Wildlife, consisting of representatives of the affected groups, to study the issues in anticipation of legislation that reflects the mutual interests of landowners, outfitters, and the sporting community; and

WHEREAS, after considering extensive input and advice from individual private citizens, local working groups, agencies, and nonprofit organizations involved in conservation, the Advisory Council by consensus developed recommendations for improving hunting access to private lands and for providing tangible benefits for landowners who allow access to their lands for hunting; and

WHEREAS, the Advisory Council has made efforts to break new ground philosophically in designing its recommendations, requiring that all interested parties be willing to accept change in order to benefit everyone who has an interest in Montana's hunting and wildlife heritage; and

WHEREAS, the Advisory Council finds it appropriate to present the following recommendations to the Legislature in the spirit of a cooperative and positive effort to enhance relations between landowners, outfitters, and sportspersons."

*1995 Statement of Intent:*"A statement of intent is required for this bill because [sections 1 through 3] [87-1-265 through 87-1-267 (87-1-267 now repealed)] grant rulemaking authority to the department of fish, wildlife, and parks and the fish, wildlife, and parks commission to implement programs for hunter management and hunting access enhancement. It is intended that in addition to the statutory guidelines set out in those sections, any rules be adopted with the purpose of optimizing hunting opportunity and access while minimizing administrative costs in providing benefits to landowners who voluntarily participate in the programs. In addition, [section 6] [87-1-268, now repealed] grants rulemaking authority to the fish, wildlife, and parks commission to implement the provisions of variable pricing for Class B-10 and Class B-11 outfitter-sponsored licenses. It is intended that the fish, wildlife, and parks commission use its licensing authority to adjust the price of those licenses as necessary and that any additional revenue generated by variable pricing be used to fund the hunting access enhancement program."

*Severability:* Section 13, Ch. 459, L. 1995, was a severability clause.

*Saving Clause:* Section 14, Ch. 459, L. 1995, was a saving clause.

*Termination:* Section 18(1), Ch. 459, L. 1995, provided that this section terminates October 1, 2001.

*2010 Amendment by Initiative:* Initiative Measure No. 161, proposed by initiative petition and approved at the general election held November 2, 2010, in (3) and (4)(e) near end before "87-2-505" deleted "87-1-268 and". Amendment effective March 1, 2011.

*2009 Amendment:* Chapter 114 in (4)(a) inserted second sentence allowing employee of landowner to receive free license allotted to landowner; in (4)(b) after "cooperator" substituted "by blood or marriage, a spouse, a legally adopted child, a sibling of the cooperator or spouse, or a niece or nephew" for "and spouse and includes legally adopted children and the cooperator's and spouse's siblings and siblings' children"; deleted former (4)(c) that read: "(c) If a cooperator elects to designate an immediate family member to receive a license pursuant to this subsection (4), the cost of the license must be deducted from hunter management program compensation paid to the cooperator"; inserted (4)(c) defining employee; and in (4)(d) and (4)(e) inserted reference to employee. Amendment effective April 1, 2009.

*2005 Amendment:* Chapter 471 in (3) in fifth sentence near end substituted "limits" for "quota of 11,500" and inserted "87-1-268 and"; inserted (4) allowing a landowner in the hunter management program who agrees to provide public hunting access to designate an immediate resident family member to receive a Class AAA combination sports license or if the family member is a nonresident, a Class B-10 nonresident big game combination license, without charge, defining immediate family member, providing that the cost of the license must be deducted from hunter management program compensation paid to the landowner, providing that the immediate family member must be otherwise eligible for licensure and may not transfer the license, and providing that the grant of a Class B-10 license does not affect the limits in 87-1-268 and 87-2-505; in (5) at beginning substituted "Any landowner" for "A resident landowner"; deleted former (4)(b) that read: "(b) A nonresident landowner who chooses to receive a license under subsection (3) may also receive assistance under the block management program, but is not eligible to receive cash payments under 87-1-267"; and made minor changes in style. Amendment effective October 1, 2005.

*Termination Provision Deleted:* Sections 2 and 3, Ch. 235, L. 2005, amended sec. 6, Ch. 544, L. 1999, and sec. 18, Ch. 459, L. 1995, removing the provision that terminated this section March 1, 2006. Effective April 15, 2005.

*Extension of Termination Date:* Section 6, Ch. 544, L. 1999, amended sec. 18, Ch. 459, L. 1995, by extending the termination date imposed by Ch. 459 to March 1, 2006.

*Code Commissioner Instruction:* Pursuant to sec. 5, Ch. 263, L. 1995, in (2) substituted "combination sports license" for "sportsman's license". Amendment effective March 1, 1996.

*Preamble:* The preamble attached to Ch. 459, L. 1995, provided: "WHEREAS, Montana has a cherished hunting heritage based on a deep knowledge of and respect for wildlife and the land; and

WHEREAS, private landowners provide wildlife habitat and hunting opportunities, the hunting public provides financial and political support for sound wildlife management, and the combined efforts of landowners and the hunting public have sustained Montana's hunting and wildlife heritage; and

WHEREAS, landowner/outfitter/sportsperson relations have become increasingly strained over the past several years, leading to increased polarization between the groups; and

WHEREAS, the 1993 Legislature addressed this problem through the passage of House Joint Resolution No. 24, which requested the Governor, through the Department of Fish, Wildlife, and Parks, to coordinate a sustained, ongoing, cooperative effort to address these issues by establishing statewide, regional, and local groups to develop mutually satisfactory solutions that would preserve Montana's hunting and wildlife heritage and encourage the continuance of a viable outfitting industry; and

WHEREAS, in response to that request, the Governor appointed the Advisory Council on Private Land/Public Wildlife, consisting of representatives of the affected groups, to study the issues in anticipation of legislation that reflects the mutual interests of landowners, outfitters, and the sporting community; and

WHEREAS, after considering extensive input and advice from individual private citizens, local working groups, agencies, and nonprofit organizations involved in conservation, the Advisory Council by consensus developed recommendations for improving hunting access to private lands and for providing tangible benefits for landowners who allow access to their lands for hunting; and

WHEREAS, the Advisory Council has made efforts to break new ground philosophically in designing its recommendations, requiring that all interested parties be willing to accept change in order to benefit everyone who has an interest in Montana's hunting and wildlife heritage; and

WHEREAS, the Advisory Council finds it appropriate to present the following recommendations to the Legislature in the spirit of a cooperative and positive effort to enhance relations between landowners, outfitters, and sportspersons."

*1995 Statement of Intent:*"A statement of intent is required for this bill because [sections 1 through 3] [87-1-265 through 87-1-267] grant rulemaking authority to the department of fish, wildlife, and parks and the fish, wildlife, and parks commission to implement programs for hunter management and hunting access enhancement. It is intended that in addition to the statutory guidelines set out in those sections, any rules be adopted with the purpose of optimizing hunting opportunity and access while minimizing administrative costs in providing benefits to landowners who voluntarily participate in the programs. In addition, [section 6] [87-1-268, now repealed] grants rulemaking authority to the fish, wildlife, and parks commission to implement the provisions of variable pricing for Class B-10 and Class B-11 outfitter-sponsored licenses. It is intended that the fish, wildlife, and parks commission use its licensing authority to adjust the price of those licenses as necessary and that any additional revenue generated by variable pricing be used to fund the hunting access enhancement program."

*Severability:* Section 13, Ch. 459, L. 1995, was a severability clause.

*Saving Clause:* Section 14, Ch. 459, L. 1995, was a saving clause.

*Termination:* Section 18(1), Ch. 459, L. 1995, provided that this section terminates October 1, 2001.

**87-1-269. Private land/public wildlife advisory committee — duties — reports.**

**Compiler's Comments**

*2021 Amendment:* See 2021 Session Law for amendment made by sec. 126, Ch. 261, L. 2021. Amendment effective April 20, 2021.

*2019 Amendments — Composite Section:* Chapter 63 in (1) in first sentence substituted "hunting access programs established pursuant to 87-1-265" for "the hunting access enhancement program"; in (3)(a) in two places substituted references to hunting access programs for references to hunting access enhancement program and in two places substituted "the programs" for "the program"; in (5) in two places substituted "hunting access programs" for "hunting access enhancement program"; and made minor changes in style. Amendment effective March 19, 2019.

Chapter 296 in (1) at beginning substituted "There is a private land/public wildlife advisory committee composed" for "The governor shall appoint a committee", near middle after "industry issues" inserted "public access land agreements", and at end substituted "private land/public wildlife advisory committee" for "review committee"; inserted (2) concerning gubernatorial appointment of members of the committee"; in (3)(a) at beginning and (3)(b) at beginning substituted "The private land/public wildlife advisory committee" for "The review committee"; in (3)(a) and (3)(b) after "legislature" inserted "in accordance with 5-11-210"; inserted (4) concerning review and recommendation of public access land agreement proposals; in (5) in two places inserted "public access land agreements"; and made minor changes in style. Amendment effective July 1, 2019.

*Preamble:* The preamble attached to Ch. 296, L. 2019, provided: "WHEREAS, the public access land agreement program is a voluntary, incentive-based program; and

WHEREAS, Montana contains approximately 1.52 million acres of inaccessible federal land; and

WHEREAS, these lands are owned by the American people and are managed by public agencies; and

WHEREAS, isolated parcels are wholly enclosed by private land holdings through which no legal public road or trail passes; and

WHEREAS, more than 70% of western hunters depend on public lands for some or all of their access to hunting opportunities; and

WHEREAS, hunting, fishing, and outdoor recreation traditions are integral to many Montanans' way of life."

*2005 Amendments — Composite Section:* Chapter 48 in (2)(a) and (2)(b) near beginning before "legislature" substituted "each" for "the 58th". Amendment effective October 1, 2005.

Chapter 235 in (2)(a) and (2)(b) near beginning substituted references to each legislature for references to the 58th legislature; and made minor changes in style. Amendment effective April 15, 2005.

Chapter 471 in (2)(a) in first sentence near beginning substituted "each legislature" for "the 58th legislature" and near end substituted "recommendations" for "suggestions" and inserted second sentence requiring the department to provide fiscal analysis of all hunting access enhancement program funding sources to the review committee for review and recommendations; and in (2)(b) in first sentence near beginning substituted "each legislature" for "the 58th legislature" and near middle substituted "recommendations" for "suggestions" and inserted second sentence requiring the department to provide fiscal analysis of all fishing access enhancement program funding sources to the review committee for review and recommendations. Amendment effective April 28, 2005.

*Termination Provision Repealed:* Section 2, Ch. 48, L. 2005, repealed sec. 6, Ch. 196, L. 2001, which terminated this section March 1, 2006. Effective October 1, 2005.

Sections 2 and 3, Ch. 235, L. 2005, amended sec. 6, Ch. 544, L. 1999, and sec. 18, Ch. 459, L. 1995, removing the provision that terminated this section March 1, 2006. Effective April 15, 2005.

*2001 Amendment:* Chapter 196 in (1) in first sentence after "hunters" inserted "anglers" and after "hunting access enhancement program" inserted "the fishing access enhancement program"; in (2)(a) substituted reference to 58th legislature for reference to 57th legislature; inserted (2)(b) concerning report regarding success of fishing access enhancement program; and in two places in (3) inserted "and the fishing access enhancement program". Amendment effective March 1, 2002, and terminates March 1, 2006.

*1999 Amendment:* Chapter 544 in first sentence in (1) after "interested" substituted "in issues related to hunters, landowners, and outfitters, including but not limited to the hunting access enhancement program, landowner-hunter relations, outfitting industry issues" for "in the hunter management program, the hunting access enhancement program" and after "wildlife" deleted "to review the success and progress of the hunter management program and the hunting access enhancement program", in second sentence substituted "broad representation" for "equal representation" and after "sportspersons" deleted "and be broadly representative of the various geographical areas of the state", and in third sentence substituted "assist" for "facilitate the efforts of"; in first sentence in (2) after "governor" inserted "and to the 57th legislature", after "success" substituted "of various elements of" for "of the hunter management program and", and after "program" inserted language regarding reporting of annual participation, number of enrolled acres, harvest success, qualified applicants, and accounting for "including a report of annual landowner participation and the number of acres annually enrolled in the programs", in second sentence after "improvement" inserted "needed to achieve the objectives", and deleted former third sentence that read: "If the review committee determines that expanding funding for programs for hunter management and hunting access enhancement is desirable, consideration must be given to providing the expanded funding through increases in resident hunting license fees"; inserted (3) authorizing director to appoint additional advisory committees; and made minor changes in style. Amendment effective April 29, 1999.

*Extension of Termination Date:* Section 6, Ch. 544, L. 1999, amended sec. 18, Ch. 459, L. 1995, by extending the termination date imposed by Ch. 459 to March 1, 2006.

*Preamble:* The preamble attached to Ch. 459, L. 1995, provided: "WHEREAS, Montana has a cherished hunting heritage based on a deep knowledge of and respect for wildlife and the land; and

WHEREAS, private landowners provide wildlife habitat and hunting opportunities, the hunting public provides financial and political support for sound wildlife management, and the combined efforts of landowners and the hunting public have sustained Montana's hunting and wildlife heritage; and

WHEREAS, landowner/outfitter/sportsperson relations have become increasingly strained over the past several years, leading to increased polarization between the groups; and

WHEREAS, the 1993 Legislature addressed this problem through the passage of House Joint Resolution No. 24, which requested the Governor, through the Department of Fish, Wildlife, and Parks, to coordinate a sustained, ongoing, cooperative effort to address these issues by establishing statewide, regional, and local groups to develop mutually satisfactory solutions that would preserve Montana's hunting and wildlife heritage and encourage the continuance of a viable outfitting industry; and

WHEREAS, in response to that request, the Governor appointed the Advisory Council on Private Land/Public Wildlife, consisting of representatives of the affected groups, to study the issues in anticipation of legislation that reflects the mutual interests of landowners, outfitters, and the sporting community; and

WHEREAS, after considering extensive input and advice from individual private citizens, local working groups, agencies, and nonprofit organizations involved in conservation, the Advisory Council by consensus developed recommendations for improving hunting access to private lands and for providing tangible benefits for landowners who allow access to their lands for hunting; and

WHEREAS, the Advisory Council has made efforts to break new ground philosophically in designing its recommendations, requiring that all interested parties be willing to accept change in order to benefit everyone who has an interest in Montana's hunting and wildlife heritage; and

WHEREAS, the Advisory Council finds it appropriate to present the following recommendations to the Legislature in the spirit of a cooperative and positive effort to enhance relations between landowners, outfitters, and sportspersons."

*1995 Statement of Intent:*"A statement of intent is required for this bill because [sections 1 through 3] [87-1-265 through 87-1-267 (87-1-267 now repealed)] grant rulemaking authority to the department of fish, wildlife, and parks and the fish, wildlife, and parks commission to implement programs for hunter management and hunting access enhancement. It is intended that in addition to the statutory guidelines set out in those sections, any rules be adopted with the purpose of optimizing hunting opportunity and access while minimizing administrative costs in providing benefits to landowners who voluntarily participate in the programs. In addition, [section 6] [87-1-268, now repealed] grants rulemaking authority to the fish, wildlife, and parks commission to implement the provisions of variable pricing for Class B-10 and Class B-11 outfitter-sponsored licenses. It is intended that the fish, wildlife, and parks commission use its licensing authority to adjust the price of those licenses as necessary and that any additional revenue generated by variable pricing be used to fund the hunting access enhancement program."

*Severability:* Section 13, Ch. 459, L. 1995, was a severability clause.

*Saving Clause:* Section 14, Ch. 459, L. 1995, was a saving clause.

*Effective Date:* Section 17(1), Ch. 459, L. 1995, provided that this section is effective March 1, 1996.

*Termination:* Section 18(1), Ch. 459, L. 1995, provided that this section terminates October 1, 2001.

*2005 Amendments — Composite Section:* Chapter 48 in (2)(a) and (2)(b) near beginning before "legislature" substituted "each" for "the 58th". Amendment effective October 1, 2005.

Chapter 235 in (2)(a) and (2)(b) near beginning substituted references to each legislature for references to the 58th legislature; and made minor changes in style. Amendment effective April 15, 2005.

Chapter 471 in (2)(a) in first sentence near beginning substituted "each legislature" for "the 58th legislature" and near end substituted "recommendations" for "suggestions" and inserted second sentence requiring the department to provide fiscal analysis of all hunting access enhancement program funding sources to the review committee for review and recommendations; and in (2)(b) in first sentence near beginning substituted "each legislature" for "the 58th legislature" and near middle substituted "recommendations" for "suggestions" and inserted second sentence requiring the department to provide fiscal analysis of all fishing access enhancement program funding sources to the review committee for review and recommendations. Amendment effective April 28, 2005.

*Termination Provision Repealed:* Section 2, Ch. 48, L. 2005, repealed sec. 6, Ch. 196, L. 2001, which terminated this section March 1, 2006. Effective October 1, 2005.

Sections 2 and 3, Ch. 235, L. 2005, amended sec. 6, Ch. 544, L. 1999, and sec. 18, Ch. 459, L. 1995, removing the provision that terminated this section March 1, 2006. Effective April 15, 2005.

*2001 Amendment:* Chapter 196 in (1) in first sentence after "hunters" inserted "anglers" and after "hunting access enhancement program" inserted "the fishing access enhancement program"; in (2)(a) substituted reference to 58th legislature for reference to 57th legislature; inserted (2)(b) concerning report regarding success of fishing access enhancement program; and in two places in (3) inserted "and the fishing access enhancement program". Amendment effective March 1, 2002, and terminates March 1, 2006.

*1999 Amendment:* Chapter 544 in first sentence in (1) after "interested" substituted "in issues related to hunters, landowners, and outfitters, including but not limited to the hunting access enhancement program, landowner-hunter relations, outfitting industry issues" for "in the hunter management program, the hunting access enhancement program" and after "wildlife" deleted "to review the success and progress of the hunter management program and the hunting access enhancement program", in second sentence substituted "broad representation" for "equal representation" and after "sportspersons" deleted "and be broadly representative of the various geographical areas of the state", and in third sentence substituted "assist" for "facilitate the efforts of"; in first sentence in (2) after "governor" inserted "and to the 57th legislature", after "success" substituted "of various elements of" for "of the hunter management program and", and after "program" inserted language regarding reporting of annual participation, number of enrolled acres, harvest success, qualified applicants, and accounting for "including a report of annual landowner participation and the number of acres annually enrolled in the programs", in second sentence after "improvement" inserted "needed to achieve the objectives", and deleted former third sentence that read: "If the review committee determines that expanding funding for programs for hunter management and hunting access enhancement is desirable, consideration must be given to providing the expanded funding through increases in resident hunting license fees"; inserted (3) authorizing director to appoint additional advisory committees; and made minor changes in style. Amendment effective April 29, 1999.

*Extension of Termination Date:* Section 6, Ch. 544, L. 1999, amended sec. 18, Ch. 459, L. 1995, by extending the termination date imposed by Ch. 459 to March 1, 2006.

*Preamble:* The preamble attached to Ch. 459, L. 1995, provided: "WHEREAS, Montana has a cherished hunting heritage based on a deep knowledge of and respect for wildlife and the land; and

WHEREAS, private landowners provide wildlife habitat and hunting opportunities, the hunting public provides financial and political support for sound wildlife management, and the combined efforts of landowners and the hunting public have sustained Montana's hunting and wildlife heritage; and

WHEREAS, landowner/outfitter/sportsperson relations have become increasingly strained over the past several years, leading to increased polarization between the groups; and

WHEREAS, the 1993 Legislature addressed this problem through the passage of House Joint Resolution No. 24, which requested the Governor, through the Department of Fish, Wildlife, and Parks, to coordinate a sustained, ongoing, cooperative effort to address these issues by establishing statewide, regional, and local groups to develop mutually satisfactory solutions that would preserve Montana's hunting and wildlife heritage and encourage the continuance of a viable outfitting industry; and

WHEREAS, in response to that request, the Governor appointed the Advisory Council on Private Land/Public Wildlife, consisting of representatives of the affected groups, to study the issues in anticipation of legislation that reflects the mutual interests of landowners, outfitters, and the sporting community; and

WHEREAS, after considering extensive input and advice from individual private citizens, local working groups, agencies, and nonprofit organizations involved in conservation, the Advisory Council by consensus developed recommendations for improving hunting access to private lands and for providing tangible benefits for landowners who allow access to their lands for hunting; and

WHEREAS, the Advisory Council has made efforts to break new ground philosophically in designing its recommendations, requiring that all interested parties be willing to accept change in order to benefit everyone who has an interest in Montana's hunting and wildlife heritage; and

WHEREAS, the Advisory Council finds it appropriate to present the following recommendations to the Legislature in the spirit of a cooperative and positive effort to enhance relations between landowners, outfitters, and sportspersons."

*1995 Statement of Intent:*"A statement of intent is required for this bill because [sections 1 through 3] [87-1-265 through 87-1-267] grant rulemaking authority to the department of fish, wildlife, and parks and the fish, wildlife, and parks commission to implement programs for hunter management and hunting access enhancement. It is intended that in addition to the statutory guidelines set out in those sections, any rules be adopted with the purpose of optimizing hunting opportunity and access while minimizing administrative costs in providing benefits to landowners who voluntarily participate in the programs. In addition, [section 6] [87-1-268, now repealed] grants rulemaking authority to the fish, wildlife, and parks commission to implement the provisions of variable pricing for Class B-10 and Class B-11 outfitter-sponsored licenses. It is intended that the fish, wildlife, and parks commission use its licensing authority to adjust the price of those licenses as necessary and that any additional revenue generated by variable pricing be used to fund the hunting access enhancement program."

*Severability:* Section 13, Ch. 459, L. 1995, was a severability clause.

*Saving Clause:* Section 14, Ch. 459, L. 1995, was a saving clause.

*Effective Date:* Section 17(1), Ch. 459, L. 1995, provided that this section is effective March 1, 1996.

*Termination:* Section 18(1), Ch. 459, L. 1995, provided that this section terminates October 1, 2001.

**87-1-270. Allocation of license fees to hunting access programs.**

**Compiler's Comments**

*2019 Amendment:* Chapter 63 in (1) and (2) at end deleted "through 87-1-267"; and in (2) after "hunting access" deleted "enhancement". Amendment effective March 19, 2019.

*Termination Provision Repealed:* Section 1, Ch. 35, L. 2019, repealed sec. 6, Ch. 204, L. 2013, which terminated the 2013 amendments to this section June 30, 2019. Effective February 28, 2019.

*2015 Amendment:* Chapter 449 in (1) near beginning substituted "87-2-514 and 87-2-805(3)" for "87-2-805(1)(b)(ii)"; in (2) substituted "hunting access enhancement fees collected pursuant to 87-2-116" for "resident hunting access enhancement fee in 87-2-202(3)(c) and the nonresident hunting access enhancement fee in 87-2-202(3)(d)"; and made minor changes in style. Amendment effective March 1, 2016.

*2013 Amendment:* Chapter 204 in middle inserted "and $25 from the sale of each Class B-2 3-day nonresident upland game bird license". Amendment effective April 15, 2013, and terminates June 30, 2019.

*2009 Amendment:* Chapter 304 in (1) at beginning inserted exception clause; and made minor changes in style. Amendment effective April 18, 2009.

*Termination Provision Repealed:* Section 4, Ch. 235, L. 2005, repealed sec. 8, Ch. 544, L. 1999, and sec. 9, Ch. 216, L. 2001, that terminated this section March 1, 2006. Effective April 15, 2005.

*2001 Amendment:* Chapter 216 inserted (2) concerning use of resident and nonresident hunting access enhancement fee; and made minor changes in style. Amendment effective March 1, 2002, and terminates March 1, 2006.

*Preamble:* The preamble attached to Ch. 216, L. 2001, provided: "WHEREAS, the Private Land/Public Wildlife Advisory Council is charged with the responsibility to make suggestions for funding, modification, or improvement of the hunting access enhancement program; and

WHEREAS, although the hunting access enhancement program has enjoyed considerable success to date in providing greater opportunities for Montana hunters, the Private Land/Public Wildlife Advisory Council recognizes the potential to increase hunting access through expansion of the program; and

WHEREAS, increasing the size of the current program through a once-a-season hunting access enhancement fee on resident and most nonresident hunters would provide revenue to allow greater landowner incentives, improve hunting access to private and public lands, improve program management and services, increase upland bird hunting opportunities, and provide for future increased program costs because of inflation."

*Effective Date:* Section 9(2), Ch. 544, L. 1999, provided that this section is effective March 1, 2000.

*Termination:* Section 8, Ch. 544, L. 1999, provided that this section terminates March 1, 2006.

**87-1-271. Annual lottery of hunting licenses — proceeds dedicated to hunting access.**

**Compiler's Comments**

*2019 Amendment:* Chapter 63 in (4) after "hunting access" deleted "enhancement". Amendment effective March 19, 2019.

*2011 Amendment:* Chapter 298 in (4) at beginning inserted exception clause; and made minor changes in style. Amendment effective March 1, 2012.

*2007 Amendment:* Chapter 63 inserted (1)(f), (1)(g), and (1)(h) adding wild buffalo or bison, antelope, and mountain lion to the list for big game lottery licenses; and made minor changes in style. Amendment effective March 27, 2007.

*Effective Date:* Section 8(1), Ch. 471, L. 2005, provided that this section is effective on passage and approval. Approved April 28, 2005.

**Administrative Rules**

ARM 12.3.622 Super-tag hunting licenses.

**87-1-272. Future fisheries improvement program — funding priority — reports required.**

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 30, Ch. 365, L. 2023. Amendment effective October 1, 2023.

*2021 Amendment:* See 2021 Session Law for amendment made by sec. 127, Ch. 261, L. 2021. Amendment effective April 20, 2021.

*2009 Amendment:* Chapter 2 in (2) at beginning deleted "by April 1, 1996, and thereafter"; and made minor changes in style. Amendment effective October 1, 2009.

*2007 Amendment:* Chapter 183 in (2) near beginning of first sentence after "shall" deleted "by April 1, 1996, and thereafter"; and in (5)(b) near beginning of first sentence after "report to" inserted "the senate fish and game committee, the house fish, wildlife, and parks committee, and the natural resources and commerce joint appropriations subcommittee of" and at end after "program" inserted "and shall include specific information regarding progress and projects related to the restoration of native Montana fish species" and inserted third and fourth sentences detailing information to be included in the report. Amendment effective April 10, 2007, and terminates July 1, 2009.

*Preamble:* The preamble attached to Ch. 77, L. 2007, provided: "WHEREAS, the future fisheries improvement program and the bull trout and cutthroat trout enhancement program have proved to be effective voluntary programs to enhance Montana fisheries, including the historical habitats of native fish; and

WHEREAS, private landowners and anglers have found both programs to be effective tools for increasing fish populations; and

WHEREAS, it is important to the future of Montana's native fish, fisheries, and anglers to make the future fisheries improvement program and the bull trout and cutthroat trout enhancement program permanent."

*Termination Provision Repealed:* Section 1, Ch. 77, L. 2007, repealed sec. 5, Ch. 463, L. 1995, and sec. 6, Ch. 529, L. 1999, which terminated this section July 1, 2009. Effective March 27, 2007.

*Extension of Termination Date:* Section 6, Ch. 529, L. 1999, amended sec. 5, Ch. 463, L. 1995, by extending the termination date imposed by Ch. 463 to July 1, 2009. Effective July 1, 1999.

*1997 Amendment:* Chapter 440 in (5)(a) substituted "report on a state electronic access system" for "report on the state electronic bulletin board".

*Preamble:* The preamble attached to Ch. 463, L. 1995, provided: "WHEREAS, the rivers and streams of Montana hold one of the state's most important and economically valuable resources—wild fish; and

WHEREAS, the loss of historic spawning areas and other crucial habitats of native fish species is one of the greatest threats to the natural reproduction and propagation of the fish resource; and

WHEREAS, the state is presently in a position to address the key issue of these aquatic habitats in order to promote the future viability of Montana's wild fisheries before the continued loss of spawning areas and other habitats diminishes or destroys the resource; and

WHEREAS, a wild fisheries enhancement program will immensely benefit landowner-sportsperson relations; and

WHEREAS, a wild fisheries enhancement program will benefit Montana's economy; and

WHEREAS, it is fiscally sound state policy to enhance natural habitats and spawning areas to improve fishing opportunities now and preserve fishing opportunities for future generations; and

WHEREAS, voluntary cooperation between landowners, interested citizens, public and private organizations, and the Department of Fish, Wildlife, and Parks will help accomplish the purposes of the future fisheries improvement program."

*Termination:* Section 5, Ch. 463, L. 1995, provided: "(1) [Sections 1 and 2] [87-1-272 and 87-1-273] terminate July 1, 2005.

(2) [Section 3] [not codified] terminates July 1, 1997."

*Effective Date:* Section 6(2), Ch. 463, L. 1995, provided that this section is effective April 14, 1995.

**Administrative Rules**

Title 12, chapter 7, subchapter 12, ARM Future fisheries program.

**87-1-273. Future fisheries review panel — purpose — appointment and duties.**

**Compiler's Comments**

*Preamble:* The preamble attached to Ch. 77, L. 2007, provided: "WHEREAS, the future fisheries improvement program and the bull trout and cutthroat trout enhancement program have proved to be effective voluntary programs to enhance Montana fisheries, including the historical habitats of native fish; and

WHEREAS, private landowners and anglers have found both programs to be effective tools for increasing fish populations; and

WHEREAS, it is important to the future of Montana's native fish, fisheries, and anglers to make the future fisheries improvement program and the bull trout and cutthroat trout enhancement program permanent."

*Termination Provision Repealed:* Section 1, Ch. 77, L. 2007, repealed sec. 5, Ch. 463, L. 1995, and secs. 6 and 9, Ch. 529, L. 1999, which terminated this section July 1, 2009. Effective March 27, 2007.

*1999 Amendment:* Chapter 529 in (1) in first sentence before "appoint" deleted "by August 1, 1995" and near beginning of second sentence increased members from 10 to 13; in (1)(h) substituted "one member with expertise in silviculture" for "one member who is a representative of the governor's office"; inserted (1)(j) providing for a member with mining reclamation expertise; inserted (1)(k) providing for a member with fisheries expertise; inserted (1)(l) providing for an ex officio member from the department of transportation; and made minor changes in style. Amendment effective July 1, 1999, and terminates July 1, 2009.

*Extension of Termination Date:* Section 6, Ch. 529, L. 1999, amended sec. 5, Ch. 463, L. 1995, by extending the termination date imposed by Ch. 463 to July 1, 2009. Effective July 1, 1999.

*Preamble:* The preamble attached to Ch. 463, L. 1995, provided: "WHEREAS, the rivers and streams of Montana hold one of the state's most important and economically valuable resources—wild fish; and

WHEREAS, the loss of historic spawning areas and other crucial habitats of native fish species is one of the greatest threats to the natural reproduction and propagation of the fish resource; and

WHEREAS, the state is presently in a position to address the key issue of these aquatic habitats in order to promote the future viability of Montana's wild fisheries before the continued loss of spawning areas and other habitats diminishes or destroys the resource; and

WHEREAS, a wild fisheries enhancement program will immensely benefit landowner-sportsperson relations; and

WHEREAS, a wild fisheries enhancement program will benefit Montana's economy; and

WHEREAS, it is fiscally sound state policy to enhance natural habitats and spawning areas to improve fishing opportunities now and preserve fishing opportunities for future generations; and

WHEREAS, voluntary cooperation between landowners, interested citizens, public and private organizations, and the Department of Fish, Wildlife, and Parks will help accomplish the purposes of the future fisheries improvement program."

*Termination:* Section 5, Ch. 463, L. 1995, provided: "(1) [Sections 1 and 2] [87-1-272 and 87-1-273] terminate July 1, 2005.

(2) [Section 3] [not codified] terminates July 1, 1997."

*Effective Date:* Section 6(2), Ch. 463, L. 1995, provided that this section is effective April 14, 1995.

**Administrative Rules**

ARM 12.7.1203 Project ranking and approval.

## 87-1-274. Emergency instream flows — funding.

**Compiler's Comments**

*2013 Amendment:* Chapter 299 in (2) near middle substituted "native Montana fish species" for "bull trout and cutthroat trout". Amendment effective October 1, 2013.

*Effective Date:* Section 3, Ch. 84, L. 2005, provided: "[This act] is effective on passage and approval." Approved March 24, 2005.

## 87-1-275. Annual lottery of hunting licenses — residents only.

**Compiler's Comments**

*Effective Date:* Section 4, Ch. 267, L. 2023, provided: "[This act] is effective March 1, 2024."

## 87-1-276. Purpose.

**Compiler's Comments**

*Termination Provision Repealed:* Section 1, Ch. 53, L. 2001, repealed sec. 9, Ch. 475, L. 1999, which terminated this section July 1, 2004. Effective July 1, 2001.

*Severability:* Section 6, Ch. 475, L. 1999, was a severability clause.

*Effective Date:* Section 8, Ch. 475, L. 1999, provided: "[This act] is effective July 1, 1999."

*Termination:* Section 9, Ch. 475, L. 1999, provided: "[This act] terminates July 1, 2004."

### 87-1-277. Shooting range development grants.

**Compiler's Comments**

*Termination Provision Repealed:* Section 1, Ch. 53, L. 2001, repealed sec. 9, Ch. 475, L. 1999, which terminated this section July 1, 2004. Effective July 1, 2001.

*Severability:* Section 6, Ch. 475, L. 1999, was a severability clause.

*Effective Date:* Section 8, Ch. 475, L. 1999, provided: "[This act] is effective July 1, 1999."

*Termination:* Section 9, Ch. 475, L. 1999, provided: "[This act] terminates July 1, 2004."

### 87-1-278. Grant criteria.

**Compiler's Comments**

*Termination Provision Repealed:* Section 1, Ch. 53, L. 2001, repealed sec. 9, Ch. 475, L. 1999, which terminated this section July 1, 2004. Effective July 1, 2001.

*Severability:* Section 6, Ch. 475, L. 1999, was a severability clause.

*Effective Date:* Section 8, Ch. 475, L. 1999, provided: "[This act] is effective July 1, 1999."

*Termination:* Section 9, Ch. 475, L. 1999, provided: "[This act] terminates July 1, 2004."

### 87-1-279. Program rules.

**Compiler's Comments**

*Termination Provision Repealed:* Section 1, Ch. 53, L. 2001, repealed sec. 9, Ch. 475, L. 1999, which terminated this section July 1, 2004. Effective July 1, 2001.

*Severability:* Section 6, Ch. 475, L. 1999, was a severability clause.

*Effective Date:* Section 8, Ch. 475, L. 1999, provided: "[This act] is effective July 1, 1999."

*Termination:* Section 9, Ch. 475, L. 1999, provided: "[This act] terminates July 1, 2004."

### 87-1-283. Native Montana fish species enhancement program.

**Compiler's Comments**

*2013 Amendment:* Chapter 299 throughout section substituted references to native Montana fish species for references to bull trout and cutthroat trout; and made minor changes in style. Amendment effective October 1, 2013.

*Preamble:* The preamble attached to Ch. 77, L. 2007, provided: "WHEREAS, the future fisheries improvement program and the bull trout and cutthroat trout enhancement program have proved to be effective voluntary programs to enhance Montana fisheries, including the historical habitats of native fish; and

WHEREAS, private landowners and anglers have found both programs to be effective tools for increasing fish populations; and

WHEREAS, it is important to the future of Montana's native fish, fisheries, and anglers to make the future fisheries improvement program and the bull trout and cutthroat trout enhancement program permanent."

*Termination Provision Repealed:* Section 1, Ch. 77, L. 2007, repealed sec. 9, Ch. 529, L. 1999, which terminated this section July 1, 2009. Effective March 27, 2007.

*Preamble:* The preamble attached to Ch. 529, L. 1999, provided: "WHEREAS, the bull trout was federally listed as a threatened species under the Endangered Species Act of 1973 in May of 1998; and

WHEREAS, the cutthroat trout is listed as a species of special concern and is a candidate for listing under the Endangered Species Act; and

WHEREAS, the 56th Legislature recognizes the economic and social impacts that may accrue to businesses and individuals in western Montana as federal land-use restrictions to protect and recover the bull trout and cutthroat trout are imposed; and

WHEREAS, significant funding opportunities exist to provide revenue to address land-use impacts to bull trout and cutthroat trout through cooperative efforts with landowners; and

WHEREAS, the 56th Legislature finds the mechanism provided in the future fisheries improvement program to be a highly successful method for on-the-land restoration of river and stream habitat referred to by the United States Secretary of the Interior, Bruce Babbitt, as "a model for other states"."

*Effective Date:* Section 8(1), Ch. 529, L. 1999, provided that this section is effective July 1, 1999.

*Termination:* Section 9, Ch. 529, L. 1999, provided that this section terminates July 1, 2009.

### 87-1-285. Fishing access enhancement program created — private landowner assistance to promote public fishing access — rules.

**Compiler's Comments**

*Termination Provision Repealed:* Section 2, Ch. 48, L. 2005, repealed sec. 6, Ch. 196, L. 2001, which terminated this section March 1, 2006. Effective October 1, 2005.

*Effective Date:* Section 5, Ch. 196, L. 2001, provided: "[This act] is effective March 1, 2002."

*Termination:* Section 6, Ch. 196, L. 2001, provided: "[This act] terminates March 1, 2006."

### 87-1-286. Fishing access enhancement program — benefits for providing fishing access — cooperative agreement — factors for determining benefits earned — restriction on landowner liability.

**Compiler's Comments**

*Termination Provision Repealed:* Section 2, Ch. 48, L. 2005, repealed sec. 6, Ch. 196, L. 2001, which terminated this section March 1, 2006. Effective October 1, 2005.

*Effective Date:* Section 5, Ch. 196, L. 2001, provided: "[This act] is effective March 1, 2002."

*Termination:* Section 6, Ch. 196, L. 2001, provided: "[This act] terminates March 1, 2006."

### 87-1-287. Placement of warning sign in water legally accessible to public — liability limitation — role of department.

**Compiler's Comments**

*Effective Date:* Section 3, Ch. 119, L. 2003, provided: "[This act] is effective on passage and approval." Approved March 26, 2003.

### 87-1-290. Hunting access account.

**Compiler's Comments**

*2019 Amendments — Composite Section:* Chapter 63 in (1) at end deleted "established by law or by the department through administrative rule"; and in (2)(c) after "hunting access" deleted "enhancement". Amendment effective March 19, 2019.

Chapter 106 inserted (2)(d) concerning limited drawing refunds; and made minor changes in style. Amendment effective March 1, 2022.

*2015 Amendment:* Chapter 449 in (2)(a) in two places and in (2)(b) substituted "28.5%" for "25%"; in (2)(a) substituted "87-2-505" for "87-2-505(1)(c)" and substituted "87-2-510" for "87-2-510(1)(b)"; in (2)(c) substituted "collected pursuant to 87-2-116" for "assessed pursuant to 87-2-202(3)(c) and (3)(d)"; and made minor changes in style. Amendment effective March 1, 2016.

*2011 Amendment:* Chapter 415 in (2)(b) substituted "relatives" for "children". Amendment effective March 1, 2012.

### 87-1-293. Hunters against hunger — findings — optional donation — rulemaking.

**Compiler's Comments**

*Termination Provision Repealed:* Section 1, Ch. 292, L. 2017, repealed sec. 7, Ch. 83, L. 2013, which terminated this section June 30, 2019.

*Effective Date:* Section 6, Ch. 83, L. 2013, provided that this section is effective July 1, 2013.

*Termination:* Section 7, Ch. 83, L. 2013, provided that this section terminates June 30, 2019.

**Administrative Rules**

ARM 12.3.515 Hunters Against Hunger organization.

### 87-1-294. Unlocking public lands program — purpose — commission rulemaking authority.

**Compiler's Comments**

*Extension of Termination Date:* Sections 1 and 2, Ch. 139, L. 2017, amended sec. 6, Ch. 346, L. 2013, and sec. 3, Ch. 392, L. 2015, by extending the termination dates imposed by those sections to December 31, 2027.

*2015 Amendment:* Chapter 392 in (2), (3), (4), (5)(a), (7), and (8) substituted "unlocking public lands program" for "unlocking state lands program"; in (5)(a) in two places, (5)(b), (7), and (9)(a) substituted "public land" for "state land"; in (5)(a) at end inserted "Contracts may be established with landowners" and inserted (5)(a)(i) and (5)(a)(ii) regarding allowable contracts; in (5)(b) near beginning inserted "under subsection (5)" and substituted "2016" for "2014"; in (8) after "access route" inserted "or corridor"; inserted (9)(b) defining public land; and made minor changes in style. Amendment effective January 1, 2016.

*Extension of Termination Date:* Section 3, Ch. 392, L. 2015, amended sec. 6, Ch. 346, L. 2013, by extending the termination date imposed by Ch. 346 to December 31, 2020.

*Applicability:* Section 5, Ch. 392, L. 2015, provided: "[This act] applies to tax years beginning after December 31, 2015.

*Preamble:* The preamble attached to Ch. 346, L. 2013, provided: "WHEREAS, the Legislature wishes to increase access by the public to publicly owned, state lands; and

WHEREAS, increasing access to public lands will provide additional opportunities for activities such as hunting, fishing, wildlife viewing, and other recreational opportunities as determined by the commission; and

WHEREAS, the unlocking state lands program will provide incentives for participating landowners to increase public access to state lands."

*Effective Date:* Section 4, Ch. 346, L. 2013, provided: "[This act] is effective January 1, 2014."

*Applicability:* Section 5, Ch. 346, L. 2013, provided: "[This act] applies to tax years beginning after December 31, 2013."

*Termination:* Section 6, Ch. 346, L. 2013, provided: "[This act] terminates December 31, 2018."

**Administrative Rules**

ARM 12.2.601 State land access tax credit.

### 87-1-295. Public access land agreement — terms — application fee.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 1, Ch. 265, L. 2023. Amendment effective April 25, 2023.

*2021 Amendment:* Chapter 552 in (1) inserted second sentence excluding land for which the landowner is compensated; in (2)(a) near beginning inserted "not to exceed $15,000 annually"; in (6)(b) at end following "license account" inserted language relating to the purpose of establishing public access and unobligated revenue; inserted (7) relating to department rules; and made minor changes in style. Amendment effective May 15, 2021.

*Effective Date:* Section 6, Ch. 296, L. 2019, provided: "[This act] is effective July 1, 2019."

*Preamble:* The preamble attached to Ch. 296, L. 2019, provided: "WHEREAS, the public access land agreement program is a voluntary, incentive-based program; and

WHEREAS, Montana contains approximately 1.52 million acres of inaccessible federal land; and

WHEREAS, these lands are owned by the American people and are managed by public agencies; and

WHEREAS, isolated parcels are wholly enclosed by private land holdings through which no legal public road or trail passes; and

WHEREAS, more than 70% of western hunters depend on public lands for some or all of their access to hunting opportunities; and

WHEREAS, hunting, fishing, and outdoor recreation traditions are integral to many Montanans' way of life."

## Part 3
## Fish and Wildlife Commission

**Part Administrative Rules**

Title 12, chapter 12, subchapter 1, ARM Public use of recreational land.

### 87-1-301. Powers of commission.

**Compiler's Comments**

*2021 Amendments — Composite Section:* Chapter 94 inserted (1)(k) regarding the issuance of either-sex or antlerless elk licenses or permits; and made minor changes in style. Amendment effective March 26, 2021.

Chapter 232 in (6)(a) at end inserted "and the special muzzleloader heritage hunting season established in 87-1-304". Amendment effective October 1, 2021.

Chapter 552 in (5)(b) in first sentence after "Class D-4 nonresident hound" deleted "handler" and deleted former last sentence that read: "However, no more than two Class D-4 licenses may be issued in any one hunting district per license year." Amendment effective May 15, 2021.

*2019 Amendment:* Chapter 378 in (5)(a) at beginning inserted "Subject to the provisions of subsection (5)(b)"; inserted (5)(b) regarding adoption of rules for Class D-4 nonresident hound handler licenses; and made minor changes in style. Amendment effective March 1, 2020.

*2017 Amendment:* Chapter 349 deleted former (5) that read: "(5) (a) Subject to the provisions of 87-2-115, the commission may adopt rules establishing license preference systems to distribute hunting licenses and permits:

(i) giving an applicant who has been unsuccessful for a longer period of time priority over an applicant who has been unsuccessful for a shorter period of time; and

(ii) giving a qualifying landowner a preference in drawings. As used in this subsection (5)(a), "qualifying landowner" means the owner of land that provides some significant habitat benefit for wildlife, as determined by the commission.

(b) The commission shall square the number of points purchased by an applicant per species when conducting drawings for licenses and permits"; and made minor changes in style. Amendment effective May 7, 2017.

*2013 Amendments — Composite Section:* Chapter 137 inserted (1)(i) relating to policies for salvage of animals. Amendment effective October 1, 2013.

Chapter 163 inserted (1)(j) requiring compliance with state wildlife management plans; and made minor changes in style. Amendment effective October 1, 2013.

Chapter 235 in (1) substituted "subsections (7) and (8)" for "subsection (7)"; in (1)(a) after "department" inserted "related to fish and wildlife"; in (1)(c) and (1)(e) inserted "23-1-111 and"; in (1)(e) substituted "87-1-209(2) and (4)" for "87-1-209(4)"; in (1)(f) and (1)(g) inserted exception clauses; in (1)(f) substituted "office of budget and program planning" for "budget office"; inserted (8) concerning commission oversight restrictions; and made minor changes in style. Amendment effective July 1, 2013.

*Saving Clause:* Section 40, Ch. 235, L. 2013, was a saving clause.

*2011 Amendments — Composite Section:* Chapter 174 inserted (5)(b) requiring commission to square the number of points purchased by an applicant when conducting drawings for licenses or permits; and made minor changes in style. Amendment effective March 1, 2012.

Chapter 254 in (1)(c) at beginning inserted exception clause. Amendment effective April 21, 2011.

Chapter 370 in (1) at beginning inserted exception clause; inserted (7) prohibiting regulation of firearms; and made minor changes in style. Amendment effective October 1, 2011.

Chapter 391 in (5) at beginning inserted "Subject to the provisions of 87-2-115"; and made minor changes in style. Amendment effective July 1, 2011.

*2011 Code Commissioner Correction:* In (7)(c) the Code Commissioner substituted "87-6-401(1)(f)" for "87-3-301" and in (7)(e) substituted "87-6-401(1)(g) or (1)(h)" for "87-3-401". Sections 87-3-301 and 87-3-401 were repealed by Ch. 258, L. 2011. Subsections (1)(f), (1)(g), and (1)(h) of 87-6-401, enacted by Ch. 258, deal with the same subject matter as the repealed section. The authority for the correction is contained in sec. 49, Ch. 19, L. 2011.

*Preamble:* The preamble attached to Ch. 254, L. 2011, provided: "WHEREAS, the Montana Department of Fish, Wildlife, and Parks (MDFWP) is considering whether to deem and classify domestic livestock trailing as a commercial use that is subject to licensing or permitting by the department, the payment of a licensing or permitting fee, and an environmental review under the Montana Environmental Policy Act; and

WHEREAS, MDFWP has adopted administrative rules governing the commercial use of lands under the control, administration, and jurisdiction of the department; and

WHEREAS, livestock grazing, farming, haying, fencing, and timber harvest have been exempted from those rules; and

WHEREAS, given those exemptions for farming and ranching activities, the Legislature believes that domestic livestock trailing should also be exempt; and

WHEREAS, domestic livestock trailing is a necessary component of ranching and farming in Montana; and

WHEREAS, in order to sustain Montana's valuable farm and ranching economy and land bases associated with that economy, farmers and ranchers must be encouraged and have the right to engage in activities that allow them to remain in farming and ranching; and

WHEREAS, MDFWP's attempt to classify domestic livestock trailing as a commercial use and to subject trailing activities to environmental review interferes with the Legislature's directive under Article XII, section 1, of the Montana Constitution to enact laws that protect, enhance, and develop all agriculture; and

WHEREAS, the Legislature has a strong interest in protecting the health of Montana's agriculture industry."

*Severability:* Section 3, Ch. 254, L. 2011, was a severability clause.

*2007 Amendment:* Chapter 262 in (1)(h) inserted second and third sentences requiring commission to consider landowner tolerance when deciding whether to restrict elk hunting in a hunting district and defining landowner tolerance. Amendment effective April 26, 2007.

*2005 Amendment:* Chapter 430 in (1)(e) at end inserted exception clause. Amendment effective April 28, 2005.

*2003 Amendments — Composite Section:* Chapter 127 at end of (6)(a)(i) after "districts" deleted "in the administrative region designated by the department as region 1"; and in (6)(a)(ii) after "districts" deleted "in the administrative region designated by the department as region 1, which may include limiting the number of nonresident hound handler permits". Amendment effective October 1, 2003.

Chapter 553 in (1)(a) inserted "management"; inserted (1)(h) relating to management of elk, deer, and antelope populations; in (4)(b)(i) and (4)(b)(ii) inserted "antelope"; inserted (4)(b)(iii) relating to sustainable elk, deer, and antelope populations; and made minor changes in style. Amendment effective May 5, 2003.

*Termination Provision Repealed:* Section 2, Ch. 127, L. 2003, repealed sec. 3, Ch. 575, L. 2001, which terminated the 2001 amendments to this section April 30, 2004. Effective October 1, 2003.

*2001 Amendment:* Chapter 575 inserted (6) authorizing commission to adopt rules regarding hunting of mountain lions; and made minor changes in style. Amendment effective May 5, 2001, and terminates April 30, 2004.

*Preamble:* The preamble attached to Ch. 575, L. 2001, provided: "WHEREAS, the Legislature finds that there are unique and special circumstances associated with lion hunting in Region 1 that have created intense hunting pressure, competition, and biological management problems that are unacceptable to the general public."

*Termination Provision Repealed:* Section 1, Ch. 21, L. 2001, repealed sec. 6, Ch. 355, L. 1997, which terminated the 1997 amendments to this section October 1, 2001. Effective February 19, 2001.

*1999 Amendments — Composite Section:* Chapter 373 in (3) at end inserted "and persons with disabilities"; and made minor changes in style. Amendment effective April 20, 1999.

Chapter 533 inserted (5) ((4) in version effective October 1, 2001) concerning rules establishing preference systems for distributing hunting licenses and permits. Amendment effective October 1, 2000.

*1997 Amendment:* Chapter 355 inserted (4) allowing the Commission to adopt rules regarding separation and sale of deer licenses from nonresident big game combination licenses. Amendment effective April 22, 1997, and terminates October 1, 2001.

*1997 Statement of Intent:* The statement of intent attached to Ch. 355, L. 1997, provided: "This bill establishes the authority of the fish, wildlife, and parks commission to modify, by rule, the structure of nonresident elk and deer licenses within the general framework established by law as needed for the effective management of big game animals. It is the intent of the legislature that in its initial rulemaking process, the commission utilize an advisory committee, including representatives of hunting and fishing organizations, outfitters, and landowners, to make recommendations regarding the structure of nonresident hunting licenses as authorized by this bill. It is also the intent of the legislature that commission rules not authorize more nonresident elk and deer hunters than are prescribed by current law."

*Termination:* Section 6, Ch. 355, L. 1997, provided: "[This act] terminates October 1, 2001."

*1995 Amendment:* Chapter 267 inserted (3) authorizing Commission to adopt rules.

*Preamble:* The preamble attached to Ch. 267, L. 1995, provided: "WHEREAS, Montana has a long and cherished hunting tradition; and

WHEREAS, as with other traditions Montana's hunting heritage will persevere through its passage from one generation to the next; and

WHEREAS, it is fitting that the Fish, Wildlife, and Parks Commission, as the regulating body for state hunting regulations, be granted the specific authority to encourage this hunting heritage for Montana's youth through the establishment of special youth licenses or permits, seasons, conditions, or programs."

*1991 Amendment:* Inserted (2) giving Commission authority to adopt rules regarding use of archery equipment for hunting and fishing.

*1991 Statement of Intent:* The statement of intent attached to Ch. 22, L. 1991, provided: "A statement of intent is required for this bill because 87-1-301(2) grants to the fish and game commission [now fish, wildlife, and parks commission] the authority to adopt rules regarding the use and type of archery equipment that may be employed for hunting and fishing purposes. It is intended that this authority be permissive rather than mandatory in order to allow but not require the commission to address any need for restrictions or limitations on archery equipment, with adequate opportunity for public hearing and comment. The legislature is aware that this rulemaking power is expressed in broad and general language; however, this is necessary because bow hunting technology is an emerging field for which detailed and precise standards have not yet been fully developed. The legislature recognizes that the commission has the power to determine the extent and nature of hunting and fishing privileges and that the commission's expertise makes it the proper forum for addressing the need for archery equipment regulation."

*Seasonal Rules Adopted Annually:* Section 2-4-102 excludes from the Montana Administrative Procedure Act seasonal rules adopted annually relating to hunting, fishing, and trapping if the rules are published in accordance with statutory requirements. Section 87-1-202 sets out those requirements. Although the rules do not appear in the Administrative Register of Montana, they are published and copies are available in state and regional offices of the Department.

**Administrative Rules**

Title 12, chapter 2, subchapter 4, ARM Rules implementing the Montana Environmental Policy Act.
ARM 12.3.501 Definitions.
ARM 12.3.511 Salvage permits.
ARM 12.3.514 Animals unfit for human consumption.
ARM 12.3.627 License and permit refunds.
Title 12, chapter 4, subchapter 2, ARM Block management rules.
Title 12, chapter 5, subchapter 1, ARM Resource statements.
Title 12, chapter 7, subchapter 1, ARM Commercial fishing permit.
Title 12, chapter 7, subchapter 2, ARM Commercial seining license.
ARM 12.7.301 Raising fish in public waters.
Title 12, chapter 7, subchapter 6, ARM Fish planting policies.
Title 12, chapter 8, subchapter 6, ARM Parks development.
Title 12, chapter 8, subchapter 7, ARM Primitive fishing access sites.
Title 12, chapter 9, subchapter 1, ARM Wildlife management policies.
Title 12, chapter 9, subchapter 2, ARM Game preserves.
Title 12, chapter 9, subchapter 3, ARM Bird permits.
ARM 12.9.805 Supplemental game damage license.
Title 12, chapter 9, subchapter 10, ARM Translocation of prairie dogs.
ARM 12.9.1401 Grizzly bear policy.
Title 12, chapter 11, subchapter 1, ARM Recreational water use — western fishing district.
Title 12, chapter 11, subchapter 3, ARM Boating regulations.
ARM 12.11.331 Use of snowmobiles on open, public water.
Title 12, chapter 11, subchapter 65, ARM Blackfoot River special recreation permit program.
Title 12, chapter 14, subchapter 1, ARM Commercial use permitting requirements.

**Case Notes**

*Hunting Violation of Restrictions for Private Property Enrolled in Block Management Program — Failure to Obtain Landowner Permission:* The defendant harvested a cow elk from a property that was enrolled with the Department of Fish, Wildlife, and Parks in a Block Management Program. The particular property required the hunter to sign in prior to hunting. The defendant claimed that he was unaware of any requirement that he sign in prior to hunting. He was convicted of hunting without landowner permission. On appeal, the defendant argued that the block management statutes and rules implementing them were unconstitutional. The Supreme Court upheld the conviction, holding that a person is on notice that the person is subject to rules relating to management of wildlife and that ignorance of the rules is no defense. St. v. McGregor, 2017 MT 156, 388 Mont. 63, 398 P.3d 241.

*Closure to Nontribal Member of Big Game Hunting on Indian Reservation Permissible Exercise of Authority of Fish, Wildlife, and Parks Commission:* It is not necessary that state fish and game laws specifically mention Indian hunting rights in order for the Fish, Wildlife, and Parks Commission to have proper authority to promulgate a regulation that recognizes those rights under state law, nor is it necessary that the Commission be directed by legislative intent, studies, or committee minutes specific to the issue in order to recognize Indian hunting rights. In promulgating hunting regulations, the Commission must take 87-1-228 into account, which explicitly recognizes tribal hunting rights on the Flathead Indian Reservation, as well as federal court decisions regarding the issue of jurisdiction to regulate hunting on the Flathead Indian Reservation. Thus, the Commission properly exercised its authority in prohibiting hunting by nontribal members on reservations. Here, Shook, who was not a tribal member, was convicted of killing a whitetail buck on private property on the Flathead Indian Reservation. Shook's conviction did not conflict with 87-1-305. Further, 18 U.S.C. 1165, which gives tribes exclusive jurisdiction to regulate hunting on reservations, did not apply to Shook because the violation was charged under state rather than federal law. St. v. Shook, 2002 MT 347, 313 M 347, 61 P3d 863 (2002). See also State ex rel. Greely v. Confederated Salish & Kootenai Tribes, 219 M 76, 712 P2d 754 (1985), and Confederated Salish & Kootenai Tribes v. St., 750 F. Supp. 446 (1990).

*Summary of Holdings in Litigation Over Hunting and Fishing Rights on Crow Indian Reservation:* "The explicit holdings of the Supreme Court in Montana v. United States, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981), and of the 9th Circuit Court of Appeals in United States v. State of Montana, 604 F.2d 1162 (9th Cir. 1979), to the extent not reversed by the Supreme Court, are as follows:

1. The Crow Tribe can proscribe all hunting and fishing by non-members on those lands described in 18 U.S.C. § 1165. Montana v. United States, 450 U.S. at 557, 101 S.Ct. at 1254.

2. The Crow Tribe, within 18 U.S.C. § 1165 lands, has power to regulate hunting and fishing by non-members of the tribe (whether Indian or non-Indian) subject to the following conditions:

(a) That the Crow Tribe lacks the power to impose criminal sanctions on non-Indians who violate its hunting and fishing regulations,

(b) That the exercise by the Crow Tribe of its power to regulate hunting and fishing by non-Indians must be within the constraints recognized by this court in Quechan Tribe of Indians v. Rowe, 531 F.2d 408 (9th Cir. 1976). Montana v. United States, 450 U.S. at 557, 101 S.Ct. at 1254; United States v. Montana, 604 F.2d at 1165, 1170.

3. The title to the bed and banks of the Big Horn is in the State of Montana. 450 U.S. at 556-57, 101 S.Ct. at 1253-54.

4. The Crow Tribe has no power to regulate hunting and fishing by non-members on non-member owned fee patent land located within the exterior boundaries of the Crow Reservation. Id. at 557, 101 S.Ct. at 1254.

5. The State of Montana cannot regulate hunting and fishing by members of the Crow Tribe within 18 U.S.C. § 1165 lands. 604 F.2d at 1172.

6. The State of Montana has the power to regulate hunting and fishing by non-members of the Crow Tribe within the exterior boundaries of the Crow Reservation subject to the following limitations:

(a) That such regulations of the State of Montana not regulate indirectly the hunting and fishing by members of the Crow Tribe on 18 U.S.C. § 1165 lands.

(b) That such regulations of the State of Montana must have as their purpose the conservation and proper management of game and fish and not to discriminate against, nor to impede, authorized regulation by the Crow Tribe. Id. at 1166.

7. Such rights as the State of Montana has to regulate fishing on the Big Horn River by the Crows and all others are not limited by either (a) the treaties of 1851 and 1868 (except to such extent as these treaties might acknowledge pertinent aboriginal title rights of the Crow Tribe not heretofore asserted or recognized in this litigation) or (b) the inherent sovereignty of the Crow Tribe. 604 F.2d at 1170-71." (Quoting from U.S. v. Mont., 686 F2d 766 (9th Cir. 1982), at pp. 768-769.)

*Tribal Regulation of Flathead Lake Usage:* Confederated Salish and Kootenai Tribes of the Flathead Reservation have authority to regulate federal common-law riparian rights of non-Indians who own reservation land bordering the south half of Flathead Lake. The Circuit Court held that the decision in Mont. v. U.S., 450 US 544, 67 L Ed 2d 493, 101 S Ct 1245 (1981), regarding ownership and control of the Bighorn River, was not controlling. The decision in Mont. Power Co. v. Rochester, 127 F2d 189 (9th Cir. 1942), was given deference under the principle of stare decisis. Rochester held that the United States holds title to the bed and banks of the south half of Flathead Lake in trust for the tribes. Confederated Salish & Kootenai Tribes of the Flathead Reservation v. Namen, 665 F2d 951 (9th Cir. 1982), followed in In re Estate of Hobbs, 2002 MT 85, 309 M 308, 46 P3d 594 (2002).

**Attorney General's Opinions**

*Game Harvesting — Game Ranch:* The Fish and Game Commission (now Fish, Wildlife, and Parks Commission) does not have the authority to regulate the hunting and killing of privately owned game through the imposition of licensing requirements on individual hunters or open and closed seasons. 36 A.G. Op. 112 (1976).

**Law Review Articles**

Colville Confederated Tribes v. Walton: Indian Water Rights and Regulation in the Ninth Circuit, Isham, 43 Mont. L. Rev. 247 (1982).

*Federal Dominance as to Dams and Fisheries:* Federal Power Commission v. Oregon, 349 US 435, 99 L Ed 1215, 75 S Ct 832 (1955), evidenced that the federal government can disregard the wishes of a state concerning its fisheries wherever it believes that the interests of the nation are best served by permitting a dam to be built, and this applies even where the waters are nonnavigable, provided only that the powersite is on reserved lands of the United States. Jasperson, 18 Mont. L. Rev. 118 (1956).

The Remarkable Odyssey of Stream Access in Montana, Lane, 36 Pub. Land. & Resources L. Rev. 69 (2015).

## 87-1-302. Commission meetings.

### Compiler's Comments

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

## 87-1-303. Rules for use of lands and waters.

### Compiler's Comments

*2017 Amendment:* Chapter 349 in (1) and (2) near beginning in exception clause substituted "87-1-301(6)" for "87-1-301(7)". Amendment effective May 7, 2017.

*2013 Amendment:* Chapter 235 in (1) near beginning inserted "23-1-111"; and made minor changes in style. Amendment effective July 1, 2013.

*Saving Clause:* Section 40, Ch. 235, L. 2013, was a saving clause.

*2011 Amendments — Composite Section:* Chapter 254 in (1) at beginning of first sentence inserted "Except as provided in subsection (3)"; inserted (3) regarding domestic livestock trailing; inserted (4) defining terms; and made minor changes in style. Amendment effective April 21, 2011.

Chapter 370 in (1) and (2) at beginning inserted "Except as provided in 87-1-301(7)"; and made minor changes in style. Amendment effective October 1, 2011.

*Preamble:* The preamble attached to Ch. 254, L. 2011, provided: "WHEREAS, the Montana Department of Fish, Wildlife, and Parks (MDFWP) is considering whether to deem and classify domestic livestock trailing as a commercial use that is subject to licensing or permitting by the department, the payment of a licensing or permitting fee, and an environmental review under the Montana Environmental Policy Act; and

WHEREAS, MDFWP has adopted administrative rules governing the commercial use of lands under the control, administration, and jurisdiction of the department; and

WHEREAS, livestock grazing, farming, haying, fencing, and timber harvest have been exempted from those rules; and

WHEREAS, given those exemptions for farming and ranching activities, the Legislature believes that domestic livestock trailing should also be exempt; and

WHEREAS, domestic livestock trailing is a necessary component of ranching and farming in Montana; and

WHEREAS, in order to sustain Montana's valuable farm and ranching economy and land bases associated with that economy, farmers and ranchers must be encouraged and have the right to engage in activities that allow them to remain in farming and ranching; and

WHEREAS, MDFWP's attempt to classify domestic livestock trailing as a commercial use and to subject trailing activities to environmental review interferes with the Legislature's directive under Article XII, section 1, of the Montana Constitution to enact laws that protect, enhance, and develop all agriculture; and

WHEREAS, the Legislature has a strong interest in protecting the health of Montana's agriculture industry."

*Severability:* Section 3, Ch. 254, L. 2011, was a severability clause.

*1999 Amendment:* Chapter 569 in (2) in second sentence after "public safety" inserted "public welfare", after "property" inserted "and public resources", and after "motor-driven boats" inserted "the operation of personal watercraft, the resolution of conflicts between users of motorized and nonmotorized boats"; and made minor changes in style. Amendment effective June 1, 1999.

*Preamble:* The preamble attached to Ch. 569, L. 1999, provided: "WHEREAS, Montana waters will experience a great increase in traffic by recreationists celebrating the bicentennial of the Lewis and Clark expedition and retracing the routes of the famous explorers; and

WHEREAS, the increased recreational use of Montana waters by every manner of recreationist, motorized as well as nonmotorized users, has led to a corresponding increase in conflicts between river users; and

WHEREAS, in other states, conflicts between recreational users of waters have escalated to the point of violence and even deaths of recreationists; and

WHEREAS, the use of personal watercraft has grown immensely in Montana, and the irresponsible use of personal watercraft conflicts with the ability of lakeshore cabin owners and homeowners to enjoy their pursuit of happiness through peaceful relaxation; and

WHEREAS, it is in the interests of public health, safety, welfare, and protection of property that measures be taken in Montana to reduce potential conflicts between recreational users of Montana waters before this state experiences similar problems."

*1995 Amendments:* Chapter 418 near end of (2) substituted "department of public health" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 546 near end of (2) substituted "department of public health and human services" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clauses:* Section 503, Ch. 418, L. 1995, was a saving clause.

Section 571, Ch. 546, L. 1995, was a saving clause.

*Seasonal Rules Adopted Annually:* Section 2-4-102 excludes from the Montana Administrative Procedure Act seasonal rules adopted annually relating to hunting, fishing, and trapping if the rules are published in accordance with statutory requirements. Section 87-1-202 sets out those requirements. Although the rules do not appear in the Administrative Register of Montana, they are published and copies are available in state and regional offices of the Department.

**Administrative Rules**

Title 12, chapter 4, subchapter 2, ARM Block management rules.
Title 12, chapter 6, subchapter 1, ARM Ice fishing shelters.
ARM 12.6.601 Snowmobile closures.
Title 12, chapter 11, subchapter 1, ARM Recreational water use — western fishing district.
Title 12, chapter 11, subchapter 3, ARM Boating regulations.
ARM 12.11.331 Use of snowmobiles on open, public water.
Title 12, chapter 11, subchapter 6, ARM Recreational water use — rivers and streams.
ARM 12.11.633 Shields River.
ARM 12.11.1002 Canyon Ferry Reservoir — Broadwater County.
ARM 12.11.1910 Silver Lake.
ARM 12.11.2225 Tepee Lake.
ARM 12.11.3962 Lake Marshall.
Title 12, chapter 11, subchapter 67, ARM Madison River recreation management.
Title 12, chapter 14, subchapter 1, ARM Commercial use permitting requirements.

**Case Notes**

*Hunting Violation of Restrictions for Private Property Enrolled in Block Management Program — Failure to Obtain Landowner Permission:* The defendant harvested a cow elk from a property that was enrolled with the Department of Fish, Wildlife, and Parks in a Block Management Program. The particular property required the hunter to sign in prior to hunting. The defendant claimed that he was unaware of any requirement that he sign in prior to hunting. He was convicted of hunting without landowner permission. On appeal, the defendant argued that the block management statutes and rules implementing them were unconstitutional. The Supreme Court upheld the conviction, holding that a person is on notice that the person is subject to rules relating to management of wildlife and that ignorance of the rules is no defense. St. v. McGregor, 2017 MT 156, 388 Mont. 63, 398 P.3d 241.

**Law Review Articles**

Public Use of the Banks and Beds of Montana Streams, Stone, 52 Mont. L. Rev. 107 (1991).

The Background on Recreational Use of Montana Waters, Stone, 32 Mont. L. Rev. 1 (1971).

The Remarkable Odyssey of Stream Access in Montana, Lane, 36 Pub. Land. & Resources L. Rev. 69 (2015).

Stream Access in Montana After Galt v. State, Hunter, 8 Pub. Land L. Rev. 177 (1987).

**87-1-304. Fixing of seasons and bag and possession limits.**

**Compiler's Comments**

*2021 Amendments — Composite Section:* Chapter 163 in (1) in introductory clause inserted reference to subsection (8); inserted (8) concerning the authorization of a wolf trapping season; and made minor changes in style. Amendment effective October 1, 2021.

Chapter 232 in (1) inserted reference to subsection (9); inserted (9) establishing a special muzzleloader heritage hunting season; and made minor changes in style. Amendment effective October 1, 2021.

*2017 Amendment:* Chapter 349 in (1)(d) substituted "87-1-301(6)" for "87-1-301(7)". Amendment effective May 7, 2017.

*2013 Amendment:* Chapter 13 in (1) and (3) after "87-5-302" inserted "and subsection (7) of this section"; and inserted (7) regarding hunting or trapping of wolves adjacent to a national park. Amendment effective February 13, 2013.

*2011 Amendments — Composite Section:* Chapter 221 in (1)(a)(iii) in temporary version and in (1)(c) in March 1, 2012, version in two places following "bear" inserted "wild buffalo or bison". Amendment effective October 1, 2011.

Chapter 292 in (1) and (3) at beginning inserted "Subject to the provisions of 87-5-302"; and made minor changes in style. Amendment effective March 1, 2012.

Chapter 370 in (1)(b) in temporary version and in (1)(d) in March 1, 2012, version at beginning inserted "Subject to the provisions of 87-1-301(7)"; and made minor changes in style. Amendment effective October 1, 2011.

*2009 Amendment:* Chapter 13 in (1)(a)(iii) near beginning after "goat" substituted "mountain lion, bear, and wolf by persons holding an archery stamp and the required license, permit, or tag" for "by bow and arrow permitholders" and near end after "goat" inserted "mountain lion, bear, and wolf"; and made minor changes in style. Amendment effective March 17, 2009.

*2001 Amendment:* Chapter 3 in (4) at beginning of third sentence substituted "The commission" for "It later"; in (6) in two places increased the age that juveniles may be allowed to fish in certain designated waters from under 13 years to under 15 years; and made minor changes in style. Amendment effective February 7, 2001.

*1993 Amendment:* Chapter 589 in (1) substituted second sentence concerning restricted areas, species, and types of hunting for former second and third sentences that read: "It may declare areas open to deer or elk or both deer and elk hunting where only bow and arrow or shotguns or both may be used to hunt or kill deer or elk. In areas where deer or elk or both deer and elk hunting is open to the use of shotguns, the commission shall authorize the use of muzzleloaders with restrictions as necessary for safety"; and made minor changes in style. Amendment effective April 29, 1993.

*1987 Amendment:* At beginning of second sentence of (1), after "deer", substituted "or elk or both deer and elk hunting where only bow and arrow or shotguns or both" for "hunting where shotguns only", at end of sentence, after "deer", inserted "or elk", at beginning of third sentence, after "deer", inserted "or elk or both deer and elk", after "shotguns" deleted "only", after "commission" changed "may" to "shall", and at end of sentence, after "muzzleloaders", substituted "with restrictions as necessary for safety" for "(rifled or smoothbore)".

*1985 Amendment:* In (1) inserted third sentence concerning muzzleloaders.

*1983 Amendment:* Inserted (5) relating to the opening or closing of a special season upon 12 hours notice.

**Administrative Rules**

Title 12, chapter 3, subchapter 1, ARM Special licensing.

ARM 12.3.504 Excess licenses/permits.

ARM 12.3.618 Deer permits.

ARM 12.3.620 Moose, sheep, and goat licenses.

**Case Notes**

*Violation of Open Meeting Laws — Attorney Fees Awarded — Prevailing Party Despite No Final Judgment:* The plaintiffs sued the Fish, Wildlife, and Parks Commission for not providing adequate notice of a meeting at which the Commission voted to expedite the closing of the wolf hunting season. The District Court granted a temporary restraining order and ultimately awarded attorney fees. During litigation, the Legislature enacted a law prohibiting the Commission from implementing certain hunting closures, rendering the litigation moot. On appeal, the Commission argued that attorney fees were not appropriate because a final judgment was never issued. The Supreme Court disagreed, holding that the plaintiffs were a prevailing party because the preliminary injunction produced the same result as a final judgment and there was no remaining underlying controversy to litigate. Citizens for Balanced Use v. Fish, Wildlife & Parks Comm'n, 2014 MT 214, 376 Mont. 202, 331 P.3d 844.

*Closure to Nontribal Member of Big Game Hunting on Indian Reservation Not Violative of Equal Protection Guarantee:* Fish, Wildlife, and Parks Commission regulations limited hunting on Indian reservations to tribal members only. Shook, who was not a tribal member, killed a whitetail buck on private property on the Flathead Indian Reservation. Shook did not own the property, nor was the property owned by a tribal member. Shook was convicted of hunting in a closed area and appealed on grounds that the closure was an unconstitutional violation of equal protection because it distinguished between tribal and nontribal members on the basis of race. The state and tribes countered that laws that distinguish between persons based on tribal membership have long been held constitutional because the distinction is political rather than racial. The District Court agreed with the state and the tribes, and the Supreme Court affirmed. As set out in Morton v. Mancari, 417 US 535 (1974), laws that afford special treatment for Indians are constitutional as long as those laws can be rationally tied to the fulfillment of the unique federal obligation toward Indians. Federal Indian law is binding on the state; therefore, the state constitutional equal protection guarantee must allow for state classifications based on tribal membership if those classifications can be rationally tied to the governmental obligation toward Indians. The state has a duty to regulate hunting by nontribal members in a way that recognizes Indian hunting privileges protected by federal law; thus, the regulation was an entirely rational way for the state to fulfill that duty by preserving wildlife populations for hunting by Indians and was not violative of equal protection guarantees. St. v. Shook, 2002 MT 347, 313 M 347, 61 P3d 863 (2002).

*Closure to Nontribal Member of Big Game Hunting on Indian Reservation Permissible Exercise of Authority of Fish, Wildlife, and Parks Commission:* It is not necessary that state fish and game laws specifically mention Indian hunting rights in order for the Fish, Wildlife, and Parks Commission to have proper authority to promulgate a regulation that recognizes those rights under state law, nor is it necessary that the Commission be directed by legislative intent, studies, or committee minutes specific to the issue in order to recognize Indian hunting rights. In promulgating hunting regulations, the Commission must take 87-1-228 into account, which explicitly recognizes tribal hunting rights on the Flathead Indian Reservation, as well as federal court decisions regarding the issue of jurisdiction to regulate hunting on the Flathead Indian Reservation. Thus, the Commission properly exercised its authority in prohibiting hunting by nontribal members on reservations. Here, Shook, who was not a tribal member, was convicted of killing a whitetail buck on private property on the Flathead Indian Reservation. Shook's conviction did not conflict with 87-1-305. Further, 18 U.S.C. 1165, which gives tribes exclusive jurisdiction to regulate hunting on reservations, did not apply to Shook because the violation was charged under state rather than federal law. St. v. Shook, 2002 MT 347, 313 M 347, 61 P3d 863 (2002). See also State ex rel. Greely v. Confederated Salish & Kootenai Tribes, 219 M 76, 712 P2d 754 (1985), and Confederated Salish & Kootenai Tribes v. St., 750 F. Supp. 446 (1990).

*Drawing for Licenses:* The literal language of section 26-104(15), R.C.M. 1947 (repealed in 1973), did not require that the application process to receive a permit to hunt elk be fulfilled by one personally present at the drawing; rather it merely required that the drawing be held at a particular town. State ex rel. Jones v. District Court, 158 M 67, 488 P2d 1141 (1971).

*Seasons on Indian Reservation:* Conviction of non-Indian for killing two bull elk on Crow Indian Reservation during season closed by state fish and game laws was not in conflict with act of Congress providing penalty for trespass to possessory rights of reservation Indians or in conflict with The Enabling Act providing that Indian lands shall remain under the absolute jurisdiction and control of Congress of United States. State ex rel. Nepstad v. Danielson, 149 M 438, 427 P2d 689 (1967), followed in U.S. v. Sanford, 547 F2d 1089 (9th Cir. 1976).

*Commission Empowered to Lengthen Hunting Season:* A temporary order restraining the State Fish and Game Commission (now Fish, Wildlife, and Parks Commission) from putting into effect its order lengthening the hunting season on elk in a certain locality, thus modifying the law on fixing of seasons, was improper since under section 26-104, R.C.M. 1947, declaring prior to amendment that the statutes governing "such subjects" should continue in force and effect except as altered or modified by the rules and regulations of the Commission, the Legislature so empowered the Commission, amounting to modification of existing statutes. State ex rel. Fish & Game Comm'n v. District Court, 107 M 289, 84 P2d 798 (1938).

**Attorney General's Opinions**

*Game Harvesting — Game Ranch:* The Fish and Game Commission (now Fish, Wildlife, and Parks Commission) does not have the authority to regulate the hunting and killing of privately owned game through the imposition of licensing requirements on individual hunters or open and closed seasons. 36 A.G. Op. 112 (1976).

## 87-1-305. Fish and game refuges.

**Administrative Rules**

Title 12, chapter 9, subchapter 2, ARM Game preserves.

**Case Notes**

*Closure to Nontribal Member of Big Game Hunting on Indian Reservation Permissible Exercise of Authority of Fish, Wildlife, and Parks Commission:* It is not necessary that state fish and game laws specifically mention Indian hunting rights in order for the Fish, Wildlife, and Parks Commission to have proper authority to promulgate a regulation that recognizes those rights under state law, nor is it necessary that the Commission be directed by legislative intent, studies, or committee minutes specific to the issue in order to recognize Indian hunting rights. In promulgating hunting regulations, the Commission must take 87-1-228 into account, which explicitly recognizes tribal hunting rights on the Flathead Indian Reservation, as well as federal court decisions regarding the issue of jurisdiction to regulate hunting on the Flathead Indian Reservation. Thus, the Commission properly exercised its authority in prohibiting hunting by nontribal members on reservations. Here, Shook, who was not a tribal member, was convicted of killing a whitetail buck on private property on the Flathead Indian Reservation. Shook's conviction did not conflict with this section. Further, 18 U.S.C. 1165, which gives tribes exclusive jurisdiction to regulate hunting on reservations, did not apply to Shook because the violation was charged under state rather than federal law. St. v. Shook, 2002 MT 347, 313 M 347, 61 P3d 863 (2002). See also State ex rel. Greely v. Confederated Salish & Kootenai Tribes, 219 M 76, 712 P2d 754 (1985), and Confederated Salish & Kootenai Tribes v. St., 750 F. Supp. 446 (1990).

## 87-1-306. Designation of certain river stretches as no-wake waters — personal watercraft use prohibited.

**Compiler's Comments**

*Preamble:* The preamble attached to Ch. 569, L. 1999, provided: "WHEREAS, Montana waters will experience a great increase in traffic by recreationists celebrating the bicentennial of the Lewis and Clark expedition and retracing the routes of the famous explorers; and

WHEREAS, the increased recreational use of Montana waters by every manner of recreationist, motorized as well as nonmotorized users, has led to a corresponding increase in conflicts between river users; and

WHEREAS, in other states, conflicts between recreational users of waters have escalated to the point of violence and even deaths of recreationists; and

WHEREAS, the use of personal watercraft has grown immensely in Montana, and the irresponsible use of personal watercraft conflicts with the ability of lakeshore cabin owners and homeowners to enjoy their pursuit of happiness through peaceful relaxation; and

WHEREAS, it is in the interests of public health, safety, welfare, and protection of property that measures be taken in Montana to reduce potential conflicts between recreational users of Montana waters before this state experiences similar problems."

*Effective Date:* Section 6, Ch. 569, L. 1999, provided: "[This act] is effective June 1, 1999."

## 87-1-321. Purpose.

**Compiler's Comments**

*Preamble:* The preamble attached to Ch. 553, L. 2003, provided: "WHEREAS, the universal mission of all wildlife management agencies includes an implied objective to manage wildlife within acceptable levels to ensure that wildlife does not become a nuisance or a hazard; and

WHEREAS, for over 70 years wildlife populations in Montana have continued to increase and the damage to private land as a result of this increased wildlife population has increased dramatically; and

WHEREAS, the Department of Fish, Wildlife, and Parks has historically included private land as part of the habitat equation in determining how much habitat is available for wildlife use in Montana; and

WHEREAS, the amount of habitat that is available for use by wildlife should be recalculated to accurately reflect the amount of habitat that is available without causing game damage to agricultural crops; and

WHEREAS, it is time for the Department of Fish, Wildlife, and Parks to use the tools that it has had available for many years, along with new tools to be implemented through this legislation, to manage Montana's wildlife populations in a sustainable manner."

*Effective Date:* Section 13, Ch. 553, L. 2003, provided that this section is effective on passage and approval. Approved May 5, 2003.

### 87-1-322. Calculation of available habitat.

**Compiler's Comments**

*Preamble:* The preamble attached to Ch. 553, L. 2003, provided: "WHEREAS, the universal mission of all wildlife management agencies includes an implied objective to manage wildlife within acceptable levels to ensure that wildlife does not become a nuisance or a hazard; and

WHEREAS, for over 70 years wildlife populations in Montana have continued to increase and the damage to private land as a result of this increased wildlife population has increased dramatically; and

WHEREAS, the Department of Fish, Wildlife, and Parks has historically included private land as part of the habitat equation in determining how much habitat is available for wildlife use in Montana; and

WHEREAS, the amount of habitat that is available for use by wildlife should be recalculated to accurately reflect the amount of habitat that is available without causing game damage to agricultural crops; and

WHEREAS, it is time for the Department of Fish, Wildlife, and Parks to use the tools that it has had available for many years, along with new tools to be implemented through this legislation, to manage Montana's wildlife populations in a sustainable manner."

*Effective Date:* Section 13, Ch. 553, L. 2003, provided that this section is effective on passage and approval. Approved May 5, 2003.

### 87-1-323. Viable elk, deer, and antelope populations based on habitat acreage — reduction of populations as necessary.

**Compiler's Comments**

*Preamble:* The preamble attached to Ch. 553, L. 2003, provided: "WHEREAS, the universal mission of all wildlife management agencies includes an implied objective to manage wildlife within acceptable levels to ensure that wildlife does not become a nuisance or a hazard; and

WHEREAS, for over 70 years wildlife populations in Montana have continued to increase and the damage to private land as a result of this increased wildlife population has increased dramatically; and

WHEREAS, the Department of Fish, Wildlife, and Parks has historically included private land as part of the habitat equation in determining how much habitat is available for wildlife use in Montana; and

WHEREAS, the amount of habitat that is available for use by wildlife should be recalculated to accurately reflect the amount of habitat that is available without causing game damage to agricultural crops; and

WHEREAS, it is time for the Department of Fish, Wildlife, and Parks to use the tools that it has had available for many years, along with new tools to be implemented through this legislation, to manage Montana's wildlife populations in a sustainable manner."

*Effective Date:* Section 13, Ch. 553, L. 2003, provided that this section is effective on passage and approval. Approved May 5, 2003.

### 87-1-324. Sustainable elk, deer, and antelope populations program — funding.

**Compiler's Comments**

*Preamble:* The preamble attached to Ch. 553, L. 2003, provided: "WHEREAS, the universal mission of all wildlife management agencies includes an implied objective to manage wildlife within acceptable levels to ensure that wildlife does not become a nuisance or a hazard; and

WHEREAS, for over 70 years wildlife populations in Montana have continued to increase and the damage to private land as a result of this increased wildlife population has increased dramatically; and

WHEREAS, the Department of Fish, Wildlife, and Parks has historically included private land as part of the habitat equation in determining how much habitat is available for wildlife use in Montana; and

WHEREAS, the amount of habitat that is available for use by wildlife should be recalculated to accurately reflect the amount of habitat that is available without causing game damage to agricultural crops; and

WHEREAS, it is time for the Department of Fish, Wildlife, and Parks to use the tools that it has had available for many years, along with new tools to be implemented through this legislation, to manage Montana's wildlife populations in a sustainable manner."

*Effective Date:* Section 13, Ch. 553, L. 2003, provided that this section is effective on passage and approval. Approved May 5, 2003.

**87-1-325. Rulemaking — discounted antlerless elk B tag licenses.**

**Compiler's Comments**

*2021 Amendment:* Chapter 486 inserted (4) concerning one-half cost priced licenses for use on private lands in hunting districts where the elk population is above the sustainable population number. Amendment effective March 1, 2022.

*Preamble:* The preamble attached to Ch. 553, L. 2003, provided: "WHEREAS, the universal mission of all wildlife management agencies includes an implied objective to manage wildlife within acceptable levels to ensure that wildlife does not become a nuisance or a hazard; and

WHEREAS, for over 70 years wildlife populations in Montana have continued to increase and the damage to private land as a result of this increased wildlife population has increased dramatically; and

WHEREAS, the Department of Fish, Wildlife, and Parks has historically included private land as part of the habitat equation in determining how much habitat is available for wildlife use in Montana; and

WHEREAS, the amount of habitat that is available for use by wildlife should be recalculated to accurately reflect the amount of habitat that is available without causing game damage to agricultural crops; and

WHEREAS, it is time for the Department of Fish, Wildlife, and Parks to use the tools that it has had available for many years, along with new tools to be implemented through this legislation, to manage Montana's wildlife populations in a sustainable manner."

*Effective Date:* Section 13, Ch. 553, L. 2003, provided that this section is effective on passage and approval. Approved May 5, 2003.

## Part 4
## Director of Fish, Wildlife, and Parks

**87-1-401. Director to carry out policies.**

**Compiler's Comments**

*2013 Amendment:* Chapter 235 inserted "and the board". Amendment effective July 1, 2013.

*Saving Clause:* Section 40, Ch. 235, L. 2013, was a saving clause.

**Administrative Rules**

Title 12, chapter 2, subchapter 4, ARM Rules implementing the Montana Environmental Policy Act.

**87-1-402. Oath of director.**

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

**87-1-403. Regulation of employees by director.**

**Compiler's Comments**

*2021 Amendment:* Chapter 56 in (1) deleted last sentence that read: "The action of the department resulting from such a hearing constitutes final administrative action for purposes of filing a grievance with the board of personnel appeals as provided in 87-1-205"; in (2) in last sentence substituted "2-18-501 through 2-18-503" for "2-18-501 through 2-18-503, as amended"; and made minor changes in style. Amendment effective March 8, 2021.

*Saving Clause:* Section 3, Ch. 56, L. 2021, was a saving clause.

**Case Notes**

*District Court Bound by Factual Findings of Board of Personnel Appeals — Wrongful Discharge — Reinstatement — No Backpay:* An employee of the state was discharged from employment because he used a state-owned vehicle for private purposes. He appealed the decision of the Department of Fish, Wildlife, and Parks, and the Board of Personnel Appeals ruled that though his discharge was properly justified, the Department had never adopted a policy regarding such use of vehicles and had not punished similar usage; thus, the discharge was wrongful and he was entitled to reinstatement. He was offered a substantially equivalent position but appealed the Board's denial of backpay and benefits and, upon losing the District Court appeal, pursued the issues before the Supreme Court. The court upheld the District Court on all issues, observing that both courts were bound by factual findings of the Board and stipulations by the parties. The District Court was not obligated to hold a hearing on the facts. Hutchin v. St., 213 M 15, 688 P2d 1257, 41 St. Rep. 1916 (1984).

*Removal of Employee:* Under this section's former language, the State Fish and Game Director has the power of summary removal without prior charges, notice, or hearing. However, that power is subject to review and final action by the Fish and Game Commission (now Fish, Wildlife, and Parks Commission) if the employee demanded a hearing. State ex rel. Ford v. St. Fish & Game Comm'n, 148 M 151, 418 P2d 300 (1966), distinguished in Steer v. Missoula, 169 M 389, 547 P2d 843 (1976).

Under former language, this section did not require that the Director hold a hearing before discharging an employee for cause but merely required that the employee have an opportunity for hearing before the Commission. State ex rel. Hollibaugh v. St. Fish & Game Comm'n, 139 M 384, 365 P2d 942 (1961).

### 87-1-405. Publication of laws.

**Compiler's Comments**

*1983 Amendment:* Substituted reference to state special revenue fund for reference to earmarked revenue fund.

## Part 5
## Fish and Game Wardens

### 87-1-501. Selection and oath of wardens.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

**Case Notes**

*Authority of Game Warden to Approach Boat to Promote Safety — Particularized Suspicion Unnecessary:* Initially concerned for the safety of the occupants of a seemingly unoccupied watercraft, a game warden looked into the live well of Boyer's boat and in the process found unlawfully killed game fish. Boyer contended that the warden had initiated an investigatory stop without the requisite particularized suspicion of wrongdoing, as required in 46-5-401, and that the evidence was therefore unlawfully seized. The Supreme Court disagreed. The warden was acting within his express authority to enforce outdoor recreation laws, including the safety of persons and property connected with the use of watercraft, and thus the warden's approach of Boyer's boat was lawful. St. v. Boyer, 2002 MT 33, 308 M 276, 42 P3d 771 (2002), distinguished in St. v. Maile, 2017 MT 154, 388 Mont. 33, 396 P.3d 1270.

### 87-1-502. Qualifications, powers, and duties.

**Compiler's Comments**

*1991 Amendments:* Chapter 609 in (3), near middle after "fish", inserted "and that those persons who make recreational use of state lands, as defined in 77-1-101, for hunting and fishing"; and made minor change in style. Amendment effective March 1, 1992.

Chapter 662 inserted (7) providing that Department is a criminal justice agency and its authorized officers are peace officers with enumerated powers; and made minor changes in style. Amendment effective April 26, 1991.

*Applicability:* Section 22, Ch. 609, L. 1991, provided: "On passage and approval of [this act], the board of land commissioners shall commence proceedings to adopt rules to be effective March 1, 1992. The department of state lands [now department of natural resources and conservation] and the department of fish, wildlife, and parks shall commence proceedings and arrangements necessary to establish a recreational use license to be effective March 1, 1992." Approved April 24, 1991.

*Redundant Language Not Codified:* The following language from section 26-107, R.C.M. 1947, was not codified in the MCA because it is redundant with 87-1-502: "State fish and game wardens employed and appointed by virtue of this act shall be persons who have an interest in protection, conservation and propagation of wildlife, game and fur-bearing animals, fish and game birds; they shall devote all of their time to their official duties." This language is still valid law. Citation may be made to sec. 1, Ch. 78, L. 1955, as amended by sec. 1, Ch. 77, L. 1957. See 1-2-208.

**Administrative Rules**

ARM 12.6.1005 Kill site verification.

**Case Notes**

*Game Warden May Reasonably Request Production of Hunting or Fishing License — Particularized Suspicion of Criminal Activity Inapplicable:* Initially concerned for the safety of the occupants of a seemingly unoccupied watercraft, a game warden was assured of Boyer's safety, but when Boyer told the warden that he had been fishing, the warden asked to see Boyer's fishing license. Boyer contended that the warden needed a particularized suspicion of wrongdoing to effectuate detention and the request for the license. However, under 87-2-109 (now repealed, but see 87-6-304), it is unlawful to refuse to show one's fishing license upon demand, and the warden had authority under this section to request production of the license. In light of these provisions, the Supreme Court declined to imply a particularized suspicion into the statutes, holding that a game warden may request production of a hunting or fishing license when circumstances reasonably indicate that an individual has been engaged in those activities. St. v. Boyer, 2002 MT 33, 308 M 276, 42 P3d 771 (2002).

*Particularized Suspicion of Wrongdoing Not Required for Game Warden to Step on Boat Transom in Effort to Inspect Angler's Catch When Reasonable Suspicion Exists for Investigatory Stop:* Initially concerned for the safety of the occupants of a seemingly unoccupied watercraft, a game warden discovered that Boyer was fishing and asked to see Boyer's license and catch. Boyer produced several fish, and the warden requested to see what else was in Boyer's live well. Boyer suggested that the warden could look later when Boyer came to shore, but the warden declined, and after tethering the boats together, the warden stepped onto the transom of Boyer's boat to look into the open live well, and found several unlawfully killed game fish. Boyer suggested that the warden's act of stepping onto the boat transom constituted an illegal search in violation of Boyer's reasonable expectation of privacy. The Supreme Court disagreed. Boyer had no legitimate expectation of privacy in the rear platform of his boat, and the act of stepping on the transom—an exterior platform readily accessible to the public—did not constitute a search. The nature of the intrusion was so minimal as not to violate any privacy expectation that Boyer might have had. Whether or not probable cause existed at that point was irrelevant, because Boyer's behavior gave the warden a reasonable suspicion that an offense had occurred, and it is the presence of reasonable suspicion that allowed the warden to proceed with the investigative stop. St. v. Boyer, 2002 MT 33, 308 M 276, 42 P3d 771 (2002), distinguishing St. v. Elison, 2000 MT 288, 302 M 228, 14 P3d 456 (2000), and distinguished in St. v. Maile, 2017 MT 154, 388 Mont. 33, 396 P.3d 1270.

*Consent to Improper Tagging:* Any consent given by Game Warden to illegal tagging of killed elk would be outside scope of authority and would have no effect whatever in law. State ex rel. Visser v. St. Fish & Game Comm'n, 150 M 525, 437 P2d 373 (1968).

*Unlawful Possession — Search and Seizure:* When plaintiff lawfully killed a deer but failed to fill out the tag attached to his hunting license and attach it to the carcass, the deer was not unlawfully possessed and the Game Warden was without authority to seize and confiscate the carcass when he arrested plaintiff for failure to attach the tag. Shipman v. Todd, 131 M 365, 310 P2d 300 (1957).

## 87-1-503. Ex officio wardens.

**Compiler's Comments**

*2009 Amendment:* Chapter 32 inserted (1)(g) to include certain tribal fish and game wardens as ex officio fish, wildlife, and parks wardens; and made minor changes in style. Amendment effective March 20, 2009.

*1995 Amendments:* Chapter 328 near beginning inserted "the executive director and investigators of the board of outfitters"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 417 near middle of first sentence inserted "former fish and game wardens". Amendment effective July 1, 1995.

*Severability:* Section 37, Ch. 417, L. 1995, was a severability clause.

*1993 Amendment:* Chapter 187 near beginning, after "state forest officers", inserted "and, as authorized by cooperative agreement, all" and after "wildlife service" inserted "peace officers of the bureau of land management, national park service, and corps of engineers"; and made minor changes in style.

*1991 Amendment:* In last sentence inserted "and the laws relating to parks and outdoor recreation contained in chapters 1 and 2 of Title 23, except chapter 2, part 7"; and made minor changes in style. Amendment effective April 26, 1991.

## 87-1-504. Protection of private property — duty of wardens.

### Compiler's Comments

*2021 Amendment:* Chapter 552 in (1) near beginning inserted "and wardens have the power of peace officers in the enforcement of" and at end deleted "being used for hunting and fishing". Amendment effective May 15, 2021.

*2009 Amendment:* Chapter 2 near beginning after "wardens" deleted "(state conservation officers)" and at end after "fishing" deleted "and to act as ex officio firewardens as provided by 77-5-104". Amendment effective October 1, 2009.

*1993 Amendment:* Chapter 10 deleted (2) that read: "(2) As used in this section, "recreational purposes" means recreational purposes as defined in 70-16-301"; and made minor changes in style.

*1991 Amendment:* In (1), near middle after "75-10-212(2)", inserted "77-1-801, 77-1-806, and rules adopted under 77-1-804", after "private" inserted "and state", and after "purposes" inserted "of hunting and fishing"; and made minor changes in style. Amendment effective March 1, 1992.

*Applicability:* Section 22, Ch. 609, L. 1991, provided: "On passage and approval of [this act], the board of land commissioners shall commence proceedings to adopt rules to be effective March 1, 1992. The department of state lands [now department of natural resources and conservation] and the department of fish, wildlife, and parks shall commence proceedings and arrangements necessary to establish a recreational use license to be effective March 1, 1992." Approved April 24, 1991.

*1985 Amendment:* In (1) after "private lands", substituted "being used for recreational purposes" for "where public recreation is permitted"; and inserted (2) defining recreational purposes.

## 87-1-506. Enforcement powers of wardens.

### Compiler's Comments

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 11, Ch. 507, L. 2023. Amendment effective July 1, 2023.

*2021 Amendment:* Chapter 281 in (1)(g) after "as provided for in 37-47-345" substituted "investigate violations of 37-47-301(1) and (2) and 37-47-404" for "investigate and make arrests for violations of the provisions of Title 37, chapter 47, and of any rules adopted pursuant to that chapter relating to the regulation of outfitters and guides in the state"; and made minor changes in style. Amendment effective April 22, 2021.

*Transition — Applicability:* Section 14, Ch. 281, L. 2021, provided: "Within 60 days of [the effective date of this act] [April 22, 2021], the board membership must reflect [section 1] [2-15-1773]. All terms of all board members appointed under the previous composition of the board terminate 60 days following [the effective date of this act] [April 22, 2021], and all appointments made, and vacancies filled after [the effective date of this act] [April 22, 2021] must be in accordance with [section 1] [2-15-1773]. The appointments must consist of 1, 2, or 3-year terms at the governor's discretion, so the initial terms of the newly composed board members are staggered in accordance with [section 1] [2-15-1773]."

*Severability:* Section 16, Ch. 281, L. 2021, was a severability clause.

*2019 Amendment:* Chapter 122 deleted former (1)(b) that read: "(b) search, without a warrant, any tent not used as a residence, any boat, vehicle, box, locker, basket, creel, crate, game bag, or package, or their contents upon probable cause to believe that any fish and game law or department rule for the protection, conservation, or propagation of game, fish, birds, or fur-bearing animals has been violated"; in (1)(b) at end substituted "in accordance with Title 46, chapter 5" for "any dwelling house or other building"; and made minor changes in style. Amendment effective October 1, 2019.

*2009 Amendment:* Chapter 429 inserted (1)(i) allowing a warden to enforce certain provisions of Title 80, chapter 7, part 10; and made minor changes in style. Amendment effective July 1, 2009.

*Preamble:* The preamble attached to Ch. 429, L. 2009, provided: "WHEREAS, invasive species can wreak damage on the economy, environment, recreational opportunities, and human health; and

WHEREAS, aquatic invasive species, including Eurasian watermilfoil, the quagga mussel, and the zebra mussel, pose new and imminent threats, which if left unchecked could cost millions of dollars not only in damage to Montana waterways, rivers, and lakes, to water storage, delivery, and irrigation systems, to hydroelectric power structures and systems, and to aquatic ecosystems, but also to the entire state economy; and

WHEREAS, the enormous impact caused by the zebra mussel is clearly demonstrated in the eastern United States where the species was first observed in Lake Ontario in 1988 and spread to Lake Michigan and the Finger Lakes Region in New York State by the following year; and

WHEREAS, the United States Geological Survey estimates that $5 billion has been spent thus far in the Great Lakes Basin alone for damages caused by and control efforts for the zebra mussel; and

WHEREAS, the zebra mussel was first discovered in Lake Mead in January 2007 and has now spread to Lakes Mojave and Havasu and the Colorado River, impacting the states of Arizona, Nevada, and California, as well as to Pueblo Reservoir in Colorado, San Justo Reservoir in California, and Electric Lake in Utah; and

WHEREAS, Eurasian watermilfoil, the zebra mussel, and the quagga mussel are easily carried on vessels used in infested water and then transported to another body of water if the vessel has not been properly cleaned; and

WHEREAS, Eurasian watermilfoil is already present in Montana and unless Montana takes action now to prevent the infestation of its waters with the zebra mussel and quagga mussel it is only a matter of time before their introduction in this state occurs; and

WHEREAS, the most cost-effective way of dealing with an aquatic invasive species is preventing an infestation from occurring."

*Severability:* Section 19, Ch. 429, L. 2009, was a severability clause.

*1997 Amendment:* Chapter 523 inserted (2) requiring donation of seized game animals to the food bank network or to public or charitable institutions; and made minor changes in style.

*1991 Amendment:* Inserted (8) concerning wardens' authority for violations involving outfitters and guides. Amendment effective April 4, 1991.

*Preamble:* The preamble to Ch. 336, L. 1991, provided: "WHEREAS, under the provisions of section 37-47-306, MCA, fees collected by the Board of Outfitters may be used for investigation of license applicants, administrative costs, and enforcement of statutes and rules related to outfitters and guides; and

WHEREAS, wardens of the Department of Fish, Wildlife, and Parks have authority under section 37-47-345, MCA, to enforce violations of Title 37, chapter 47, MCA, relating to outfitters and guides, and this authority should be clearly provided in Title 87, MCA; and

WHEREAS, the Legislature intends that costs to the Department of Fish, Wildlife, and Parks related to enforcement of Title 37, chapter 47, MCA, by wardens of the Department be funded from the fees that are collected by the Board of Outfitters and transferred to the Department through memorandums of understanding or other agreements."

*1983 Amendment:* Inserted (7) relating to enforcement of disorderly conduct and public nuisance laws as applied to motorboat use.

**Administrative Rules**

ARM 12.6.1005 Kill site verification.

**Case Notes**

*Hunting Violation of Restrictions for Private Property Enrolled in Block Management Program — Failure to Obtain Landowner Permission:* The defendant harvested a cow elk from a property that was enrolled with the Department of Fish, Wildlife, and Parks in a Block Management Program. The particular property required the hunter to sign in prior to hunting. The defendant claimed that he was unaware of any requirement that he sign in prior to hunting. He was convicted of hunting without landowner permission. On appeal, the defendant argued that the block management statutes and rules implementing them were unconstitutional. The Supreme Court upheld the conviction, holding that a person is on notice that the person is subject to rules relating to management of wildlife and that ignorance of the rules is no defense. St. v. McGregor, 2017 MT 156, 388 Mont. 63, 398 P.3d 241.

*Seized Evidence Not Considered "Other Evidence of a Crime" Not Subject to Suppression:* Cotterell moved to suppress evidence of illegal hunting activity that was seized under a search warrant that allowed seizure of numerous hunting-related items, but also allowed seizure of "any other evidence of a crime", on grounds that the warrant was overbroad. The motion was denied. On appeal, the state conceded that the phrase "any other evidence of a crime" was overbroad (see St. v. Seader, 1999 MT 290, 297 M 60, 990 P2d 180 (1999), and Hauge v. District Court, 2001 MT 255, 307 M 195, 36 P3d 947 (2001)) but asserted that journals and calendars found in searching Cotterell's property were directly related to the crimes being investigated and thus were not subject to suppression. The Supreme Court agreed with the state. Although the journals and calendars were not specifically mentioned in the warrant, they were found during execution of a validly executed warrant in places that could lawfully be searched, were found in the course of a search for items that were specifically set out in the warrant, and were related to hunting and fishing activities. Even if the overbroad phrase was excised from the warrant, the journals and calendars were within the scope of the warrant, so denial of the motion to suppress was affirmed. St. v. Cotterell, 2008 MT 409, 347 M 231, 198 P3d 254 (2008).

*No Reasonable Expectation of Privacy in Possession of Game Fish — Probable Cause Not Required for Game Warden's Inspection of Angler's Concealed Catch:* Initially concerned for the safety of the occupants of a seemingly unoccupied watercraft, a game warden approached the watercraft. When informed that Boyer had been fishing, the warden asked to see Boyer's license and catch. After Boyer requested a later inspection, he reluctantly exhibited eight fish. At that point, the warden looked into the live well of Boyer's boat, and in the process found unlawfully killed game fish. Boyer contended that the warden needed probable cause to believe that Boyer had committed a violation at the time that the request was made in order to inspect his catch, and that conducting a warrantless search of Boyer's live well was impermissible. The Supreme Court noted that under the Montana Constitution, an impermissible search occurs only when a reasonable expectation of privacy exists. To determine whether the warden unlawfully intruded into Boyer's privacy, the court considered: (1) whether Boyer had an actual expectation of privacy; (2) whether society was willing to recognize that expectation as objectively reasonable; and (3) the nature of the state's intrusion (see St. v. Bassett, 1999 MT 109, 294 M 327, 982 P2d 410 (1999)). The court concluded that Boyer's subjective expectation of privacy in his catch was not one that society would recognize as reasonable. Under Art. IX, sec. 1, Mont. Const., the state must maintain a clean and healthful environment, and the Legislature has provided for game wardens to enforce the environmental laws regarding fish and game by implementing a system that includes the ability of wardens to inspect game in the field, which encompasses proper licensing and game limitation requirements. In this capacity, wardens act as public trustees protecting and conserving Montana wildlife and habitat for all citizens. Fishing is a privilege accorded by the state, not a private right, and anglers must assume the burdens of the sport, as well as its benefits, and acknowledge the prospect of at least some governmental intrusion into their activities, including license checks, inquiries about game taken, and requests to inspect game in the field. Because Boyer had no reasonable expectation of privacy in his catch, the warden's request for and inspection of the catch was not considered a search, so probable cause was not necessary. St. v. Boyer, 2002 MT 33, 308 M 276, 42 P3d 771 (2002).

*Particularized Suspicion of Wrongdoing Not Required for Game Warden to Step on Boat Transom in Effort to Inspect Angler's Catch When Reasonable Suspicion Exists for Investigatory Stop:* Initially concerned for the safety of the occupants of a seemingly unoccupied watercraft, a game warden discovered that Boyer was fishing and asked to see Boyer's license and catch. Boyer produced several fish, and the warden requested to see what else was in Boyer's live well. Boyer suggested that the warden could look later when Boyer came to shore, but the warden declined, and after tethering the boats together, the warden stepped onto the transom of Boyer's boat to look into the open live well, and found several unlawfully killed game fish. Boyer suggested that the warden's act of stepping onto the boat transom constituted an illegal search in violation of Boyer's reasonable expectation of privacy. The Supreme Court disagreed. Boyer had no legitimate expectation of privacy in the rear platform of his boat, and the act of stepping on the transom—an exterior platform readily accessible to the public—did not constitute a search. The nature of the intrusion was so minimal as not to violate any privacy expectation that Boyer might have had. Whether or not probable cause existed at that point was irrelevant, because Boyer's behavior gave the warden a reasonable suspicion that an offense had occurred, and it is the presence of reasonable suspicion that allowed the warden to proceed with the investigative stop. St. v. Boyer, 2002 MT 33, 308 M 276, 42 P3d 771 (2002), distinguishing St. v. Elison, 2000 MT 288, 302 M 228, 14 P3d 456 (2000), and distinguished in St. v. Maile, 2017 MT 154, 388 Mont. 33, 396 P.3d 1270.

*Forfeiture of Game Properly Applied in Case of Waste of Mountain Goat:* Defendant was convicted of wasting game contrary to the provisions of 87-3-102 (now repealed, but see 87-6-205). He contended that it was improper to impose a penalty of forfeiture of the head, cape, and horns of the mountain goat he killed legally. Having failed to comply with the requirement that he not waste the meat, defendant was subject to the game warden's authority under this section to seize any parts of the animal. Imposition of forfeiture was not contrary to law. St. v. Huebner, 252 M 184, 827 P2d 1260, 49 St. Rep. 210 (1992).

*Confiscation of Illegally Killed Game:* Illegally killed elk, tagged improperly in that one tag was not punched on month and day of kill and other was not filled in with name and address of hunter and county of kill, were subject to confiscation by State Fish and Game Commission (now

Fish, Wildlife, and Parks Commission). State ex rel. Visser v. St. Fish & Game Comm'n, 150 M 525, 437 P2d 373 (1968).

### 87-1-511. Sale of confiscated birds and animals — disposition of seized grizzly bears.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

*1985 Amendments:* Chapter 120 in first sentence of (1) at beginning inserted the exception, and in middle inserted "or otherwise acquired by a department employee in the scope of his employment" and substituted "may be sold" for "shall be sold".

Chapter 540 in (1) near beginning, after "animal", inserted "other than grizzly bear"; and inserted (2) relating to donation or sale of confiscated grizzly bear parts.

### 87-1-512. Certificate of sale.

**Compiler's Comments**

*1989 Amendment:* At end of (1) substituted "reselling the property for human consumption" for "reselling or using the same for any commercial purpose"; at end of first sentence of (2) inserted reference to auction conducted pursuant to 87-1-511; inserted (3) providing that subsection (1) does prohibit resale of heads, hides, pelts, or mounts; and made minor changes in form and phraseology. Amendment effective March 15, 1989.

### 87-1-513. Disposition of proceeds of sale.

**Compiler's Comments**

*2011 Amendment:* Chapter 134 in (1) near middle of second sentence substituted "with violating fish and game law is convicted or forfeits bond or bail" for "with violation of the law is found guilty of or forfeits bond for violation of the fish and game laws of the state"; and made minor changes in style. Amendment effective October 1, 2011.

*Saving Clause:* Section 5, Ch. 134, L. 2011, was a saving clause.

*2009 Amendment:* Chapter 426 in (2) near end of first sentence following "human services" deleted "and are statutorily appropriated, as provided in 17-7-502, to the department of public health and human services". Amendment effective July 1, 2009.

*1997 Amendment:* Chapter 523 in (1), at end of second sentence, inserted "except as provided in subsection (2)"; and inserted (2) regarding deposit of proceeds from the sale of seized game animal meat.

*1993 Amendment:* Chapter 170 in first sentence substituted "retained and accounted for by the department when" for "paid over to the court before whom" and in second sentence, after "guilty of", inserted "or forfeits bond"; and made minor changes in style. Amendment effective July 1, 1993.

*1985 Amendment:* In middle of second-to-last sentence inserted "or where the animals sold were killed pursuant to 87-1-225".

**Case Notes**

*Liability of Game Warden for Seizure of Carcass:* This section has reference only to a case wherein the officer has a right to seize the property, and it offered no defense to a Game Warden who confiscated the carcass of a deer that was properly killed in open territory by one with a license. Shipman v. Todd, 131 M 365, 310 P2d 300 (1957).

## Part 6
## Finance

### 87-1-601. Use of fish and game money.

**Compiler's Comments**

*2021 Amendments — Composite Section:* Chapter 153 in (10)(a) after "the search and rescue" substituted "surcharges in 23-2-636 and" for "surcharge in". Amendment effective April 8, 2021.

Chapter 563 in (10) after "all money received from the" substituted "voluntary search and rescue donation" for "search and rescue surcharge"; deleted former (10)(b), (10)(c), and (10)(d) (see 2021 Session Law for former text); and made minor changes in style. Amendment effective March 1, 2022.

*Termination Provision Repealed:* Section 1, Ch 292, L. 2017, repealed sec. 7, Ch. 83, L. 2013, which terminated the 2013 amendments to this section June 30, 2019. Effective October 1, 2017.

*2013 Amendment:* Chapter 83 in (1)(a) in exception clause inserted "87-1-293"; and made minor changes in style. Amendment effective July 1, 2013, and terminates June 30, 2019.

*2011 Amendments — Composite Section:* Chapter 62 in (5)(a) inserted "and subsection (6) of this section"; inserted (6) pertaining to deposit and use of money received from sale or lease of certain lands; and made minor changes in style. Amendment effective March 25, 2011.

Chapter 258 in (9) substituted "imposed pursuant to Title 87, chapter 6" for "pursuant to 87-1-102". Amendment effective October 1, 2011.

Chapter 390 in (1)(a) near beginning inserted "87-1-623"; and made minor changes in style. Amendment effective July 1, 2011.

*Preamble:* The preamble attached to Ch. 258, L. 2011, provided: "WHEREAS, the 2007 Legislature passed House Joint Resolution No. 16, urging that revision of the criminal codes within Title 87 of the Montana Code Annotated be given priority; and

WHEREAS, House Joint Resolution No. 16 noted that practitioners, judges, and citizens find that the criminal codes intertwined within the fish and game laws in Title 87 are difficult to read, understand, and prosecute; and

WHEREAS, House Joint Resolution No. 16 directed that revision of the Title 87 criminal code should not include policy changes to current laws and should adhere to the intent of the legislatures that crafted the laws; and

WHEREAS, in 2008, the Director of Fish, Wildlife, and Parks appointed a Title 87 criminal code revision working group, consisting of Justices of the Peace, County Attorneys, an Assistant Attorney General, legal counsel and the enforcement administrator of the Department of Fish, Wildlife, and Parks, and legislative staff; and

WHEREAS, the working group met numerous times and spent countless hours crafting a revision that makes the Title 87 criminal code more understandable without making substantive or policy changes to present law; and

WHEREAS, revision of the fish and game criminal statutes will benefit the hunting and fishing public, magistrates, and prosecutors by codifying crimes and penalties in a separate chapter of Montana law, rather than being intertwined throughout Title 87."

*Saving Clause:* Section 131, Ch. 258, L. 2011, was a saving clause.

*Severability:* Section 132, Ch. 258, L. 2011, was a severability clause.

Section 8, Ch. 390, L. 2011, was a severability clause.

*2010 Amendment by Initiative:* Initiative Measure No. 161, proposed by initiative petition and approved at the general election held November 2, 2010, in (1)(a) near beginning inserted reference to 87-1-290; and made minor changes in style. Amendment effective March 1, 2011.

*2009 Amendment:* Chapter 330 in (5)(a) inserted reference to 87-1-621; and made minor changes in style. Amendment effective July 1, 2009.

*2007 Amendments — Composite Section:* Chapter 332 in (9)(d) in first sentence eliminated a fiscal year reimbursement schedule for search and rescue missions and provided matching funds to reimburse counties for search and rescue training and equipment costs and deleted former second sentence that read: "After this period, any money remaining in the special revenue account after the transfers provided for in this section must be transferred to the general license account of the department." Amendment effective April 27, 2007.

Chapter 420 in (6) before "subject" deleted "not" and near middle after "requirements of" substituted "17-6-105(6) unless the department has submitted and received approval for a modified deposit schedule pursuant to 17-6-105(8)" for "17-6-105" and deleted former second sentence that read: "The department shall deposit license drawing application money within a reasonable time after receipt." Amendment effective October 1, 2007.

*2005 Amendments — Composite Section:* Chapter 326 in (9)(d) at beginning substituted "Any money deposited in the special revenue account in a fiscal year is available for reimbursement of search and rescue missions and to provide matching funds during the fiscal year when the money is deposited and during the following fiscal year. After this period" for "At the end of each fiscal year"; and made minor changes in style. Amendment effective April 21, 2005.

Chapter 560 in (5)(a) at beginning inserted exception clause; and made minor changes in style. Amendment effective May 2, 2005.

*Severability:* Section 19, Ch. 560, L. 2005, was a severability clause.

*2003 Amendments — Composite Section:* Chapter 381 in (1)(c)(iii) substituted "87-2-411" for "87-2-412"; at beginning of (2) inserted exception clause; and made minor changes in style. Amendment effective April 18, 2003.

Chapter 534 in (1)(a) near beginning in exception clause inserted reference to subsection (9); inserted (9) concerning deposit, use, and transfer of search and rescue surcharge funds; and made minor changes in style. Amendment effective January 1, 2004.

*2001 Amendments — Composite Section:* Chapter 34 at beginning of (5)(a) after "Money" inserted "must be deposited in an account in the permanent fund if it is"; at end of (5)(a)(iii) after "acquisition" deleted "must be deposited in an account within the nonexpendable trust fund of the state treasury"; in (5)(b) near beginning after "derived from the" substituted "account" for "fund"; and made minor changes in style. Amendment effective July 1, 2001.

Chapter 257 in (1)(a), (4), and (8) substituted references to department of revenue for references to state treasurer. Amendment effective July 1, 2001.

*Applicability:* Section 49, Ch. 257, L. 2001, provided: "[This act] applies to remittances of state money made to the department of revenue for fiscal years beginning after June 30, 2001."

*1999 Amendment:* Chapter 389 in (7) substituted present language requiring fines and forfeited bond money to be deposited in state general fund for former (7)(a) and (7)(b) that read: "(a) 50% in an account for use by the department for the enforcement of 77-1-801, 77-1-806, and rules adopted under 77-1-804; and

(b) 50% in the state lands recreational use account established by 77-1-808 for use by the department of natural resources and conservation in the management of state lands"; and made minor changes in style. Amendment effective July 1, 1999.

*1995 Amendments:* Chapter 417 at beginning of (4), in exception clause, inserted reference to subsection (8); inserted (8) regarding deposit in state general fund; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 418 in (7)(b) substituted "department of natural resources and conservation" for "department of state lands"; and made minor changes in style. Amendment effective July 1, 1995.

*Severability:* Section 37, Ch. 417, L. 1995, was a severability clause.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1991 Amendments:* Chapter 41 inserted (1)(c) regarding disposition of interest earned on certain accounts; and made minor changes in style. Amendment effective January 1, 1992.

Chapter 339 inserted (6) excepting money received from license drawing applications from requirements of 17-6-105; and made minor changes in style. Amendment effective April 4, 1991.

Chapter 609 at beginning of (1) and (4) inserted exception clause; in (4), near end of first sentence after "department", deleted "of fish, wildlife, and parks"; and inserted (7) regarding allocation of fines or forfeited bonds collected for violations of 77-1-801, 77-1-806, or rules adopted under 77-1-804. Amendment effective March 1, 1992.

*Preamble:* The preamble to Ch. 41, L. 1991, provided: "WHEREAS, the federal government has imposed a requirement on the Department of Fish, Wildlife, and Parks that all interest received from cash balances resulting from license sales must be used for department programs; and

WHEREAS, under present law interest earnings from money received are not credited to department programs; and

WHEREAS, unless present law is amended to conform to federal requirements, the department is in danger of losing over $7 million in federal funds; and

WHEREAS, the Legislature finds that it is in the best interests of the state to designate that interest earned on money received by the Department from license sales be credited to the Department's special revenue account so that the interest is available for expenditure by the Department."

*Applicability:* Section 22, Ch. 609, L. 1991, provided: "On passage and approval of [this act], the board of land commissioners shall commence proceedings to adopt rules to be effective March 1, 1992. The department of state lands [now department of natural resources and conservation] and the department of fish, wildlife, and parks shall commence proceedings and arrangements necessary to establish a recreational use license to be effective March 1, 1992." Approved April 24, 1991.

*1987 Amendment:* Near beginning of (4), after "bonds", inserted "except money collected or received by a justice's court".

*1983 Amendment:* In (1), (3), and (4) substituted "state special revenue fund" for "earmarked revenue fund"; in (1) and (3), substituted "federal special revenue fund" for "federal and private revenue fund"; and in first sentence of (5), substituted "nonexpendable trust fund" for "trust and legacy fund".

*1981 Amendment:* Added (5) establishing a special account for funding the operation, development, and maintenance of real property of the Department of Fish, Wildlife, and Parks.

**Attorney General's Opinions**

*Fines by District Court in Game Violation Case:* A court imposing a fine in a fish and game violation case must pay the money collected to the Fish and Game Commission (now Fish, Wildlife, and Parks Commission). 36 A.G. Op. 39 (1975).

### 87-1-602. Payment of salaries, per diem, and expenses.

**Compiler's Comments**

*1983 Amendment:* Substituted "federal special revenue fund" for "federal and private revenue fund"; and substituted "state special revenue fund" for "earmarked revenue fund".

**Case Notes**

*Damages for Torts Not Payable as Expenses:* Under former law, the State Fish and Game Fund was property of the state and could not lawfully be used to pay for torts committed by officers or employees of the State Fish and Game Commission (now Fish, Wildlife, and Parks Commission) for which such officers or employees were personally liable as individual wrongdoers. Heiser v. Severy, 117 M 105, 158 P2d 501, 160 ALR 319 (1945).

### 87-1-603. Payments to counties for department-owned land — exceptions.

**Compiler's Comments**

*2009 Amendment:* Chapter 485 in (1) at beginning inserted exception clause; inserted (2) through (4) concerning department purchase of land and statutorily appropriating the money to be paid to each affected county; and made minor changes in style. Amendment effective May 10, 2009.

*Severability:* Section 12, Ch. 485, L. 2009, was a severability clause.

*1995 Amendment:* Chapter 325 in fifth sentence substituted "department of administration" for "state auditor"; and made minor changes in style. Amendment effective July 1, 1995.

*1987 Amendment:* Deleted references to "voucher" throughout section; at beginning of first sentence substituted "Before November 30" for "The director shall before October 15" and near middle, before "the drawing", inserted "and request"; at beginning of second sentence deleted "A county treasurer receiving a voucher shall execute it and return it to" and after "approve" inserted "or disapprove the request"; inserted third and fourth sentences concerning disapproval of request; at beginning of fifth sentence inserted "If the director approves a request, he shall"; at end of section substituted "acquired and managed for the purposes of Title 23, chapter 1" for "administered with money from the general fund"; and made minor changes in phraseology.

*Applicability:* Section 3, Ch. 486, L. 1987, provided: "This act applies retroactively, within the meaning of 1-2-109, to tax liabilities arising after June 30, 1986."

### 87-1-605. Fees used to purchase recreational facilities.

**Compiler's Comments**

*2003 Amendment:* Chapter 228 in middle of (1) inserted "$3.50 of the fee for a Class B-5 nonresident fishing license"; and made minor changes in style. Amendment effective April 3, 2003.

*Termination Provision Repealed:* Section 1, Ch. 82, L. 2003, repealed sec. 4, Ch. 428, L. 1995, which terminated amendments to this section July 1, 1999, and sec. 1, Ch. 109, L. 1999, which terminated amendments to this section July 1, 2003. Effective March 20, 2003.

*Extension of Termination Date:* Section 1, Ch. 109, L. 1999, amended sec. 4, Ch. 428, L. 1995, by extending the termination date imposed by Ch. 428 to July 1, 2003. Effective March 18, 1999.

*1997 Amendment:* (Both versions) Chapter 336 near beginning of (1) inserted "10% of the fee for a Class A-8 resident temporary fishing license".

*1995 Amendments:* Chapter 18 near middle of (1), after "B-4 nonresident", deleted "5-day"; and made minor changes in style.

Chapter 428 in two places in (2), after "operation", deleted "development" and in first sentence, after "maintenance", substituted "must equal at least 50% of the money" for "may not exceed 25% of the moneys" and after "section" inserted "and must be expended as provided in subsection (3)"; inserted (3) requiring operation and maintenance money to be expended for weed management, streambank restoration, and general operation and maintenance; and made minor changes in style. Amendment effective July 1, 1995, and terminates July 1, 1999.

*Report to Legislature:* Section 2, Ch. 428, L. 1995, provided: "Because [section 1] [87-1-605] terminates July 1, 1999, the department of fish, wildlife, and parks shall report to the 56th legislature by December 1, 1998, regarding the success of the operation and maintenance program required by [section 1] [87-1-605] and on the status of weed management and streambank restoration at fishing access sites and frontages."

*Termination:* Section 4, Ch. 428, L. 1995, provided: "[This act] terminates July 1, 1999."

*1983 Amendment:* In (1) after "nonresident" substituted "5-day" for "1-day"; after "5-day fishing license" deleted "$5 of the fee for the Class B-3 nonresident 6-day fishing license".

*1981 Amendment:* Increased the figure in (2) from 15% to 25%.

**87-1-610. Contributions for leasing appropriation rights — general spending authority.**

**Compiler's Comments**

*Termination Provision Repealed:* Section 8(2), Ch. 448, L. 2007, repealed sec. 11, Ch. 658, L. 1989, sec. 4, Ch. 740, L. 1991, and secs. 5 and 6, Ch. 123, L. 1999, which terminated this section June 30, 2009. Effective May 8, 2007.

*Extension of Termination Date:* Sections 5 through 7, Ch. 123, L. 1999, amended sec. 11, Ch. 658, L. 1989, and secs. 4 and 7, Ch. 740, L. 1991, by extending the termination date imposed by Ch. 658, L. 1989, and Ch. 740, L. 1991, to June 30, 2009. Effective March 19, 1999.

*1993 Amendment:* Chapter 175 in (2), after "fisheries", inserted "including but not limited to departmental funds in the river restoration special revenue account established under 87-1-258". Amendment effective July 1, 1993.

*Effective Date:* Section 10, Ch. 658, L. 1989, provided that this section is effective May 11, 1989.

**87-1-621. Forest management account.**

**Compiler's Comments**

*2011 Amendment:* Chapter 395 in (2) and (3) substituted "87-1-622" for "87-1-201(9)(a)(iv)". Amendment effective July 1, 2011.

*Effective Date:* Section 7, Ch. 330, L. 2009, provided: "(1) Except as provided in subsection (2), [this act] is effective July 1, 2009.

(2) [Section 4] [87-1-621, version effective July 1, 2013] is effective July 1, 2013."

*Termination Date:* Section 8, Ch. 330, L. 2009, provided: "[Section 3] [87-1-621, temporary version] terminates June 30, 2013."

**87-1-622. Forest management plan — sustainable yield study required — definition.**

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 2, Ch. 117, L. 2023. Amendment effective April 18, 2023.

*2013 Amendment:* Chapter 235 in (1) after "commission" inserted "and the board" and after "adopt" substituted "forest management plans for lands under their jurisdiction" for "a forest management plan"; in (4) after "commission" inserted "and the board" and after "yield" inserted "for lands under their jurisdiction". Amendment effective July 1, 2013.

*Saving Clause:* Section 40, Ch. 235, L. 2013, was a saving clause.

*Effective Date:* Section 6, Ch. 395, L. 2011, provided: "[This act] is effective July 1, 2011."

**87-1-623. Wolf management account.**

**Compiler's Comments**

*Severability:* Section 8, Ch. 390, L. 2011, was a severability clause.

*Effective Date:* Section 9, Ch. 390, L. 2011, provided that this section is effective July 1, 2011.

**87-1-625. Funding for wolf management.**

**Compiler's Comments**

*2015 Amendment:* Chapter 438 in (1) decreased allocation for wolf management from $900,000 to $500,000. Amendment effective May 5, 2015.

*Preamble:* The preamble attached to Ch. 400, L. 2011, provided:

"WHEREAS, the gray wolf was listed as an endangered species under the Endangered Species Act (ESA) in 1973; and

WHEREAS, gray wolves were reintroduced in Yellowstone National Park and central Idaho in 1995 and 1996 by the United States Fish and Wildlife Service (USFWS) to speed up recovery of the gray wolf population in the Northern Rocky Mountain region; and

WHEREAS, the biological requirement established by the USFWS for the recovery of the gray wolf population in the Northern Rocky Mountains is a minimum of 30 breeding pairs and 300 wolves in Montana, Idaho, and Wyoming combined or effectively 10 breeding pairs and 100 wolves per state; and

WHEREAS, the USFWS approved the Montana Gray Wolf Conservation and Management Plan in January 2004, under which Montana agreed to use adaptive management strategies to ensure its portion of the biological recovery goal is met; and

WHEREAS, the gray wolf population in Montana, Idaho, and Wyoming achieved the biological requirements of 30 breeding pairs and 300 wolves in 2002; and

WHEREAS, the most recent data available show that at the end of 2009, the estimated minimum number of wolves in Montana was 524 wolves with an estimated minimum of 37 breeding pairs in Montana; and

WHEREAS, the final environmental impact statement prepared by the Montana Department of Fish, Wildlife, and Parks (MDFWP) for the Montana Gray Wolf Conservation and Management Plan, submitted to the USFWS in October 2003, estimated that MDFWP's required budget for the wolf management alternative that was ultimately selected would be $924,739 to $1,062,399, of which 90% would be provided by the federal government under Section 6 of the ESA and 10% would be the responsibility of Montana; and

WHEREAS, the 90%-10% cost share was never implemented because the USFWS allocated funding directly to MDFWP rather than it being necessary for MDFWP to request funding under Section 6 of the ESA; and

WHEREAS, the USFWS allocated an average of $573,000 annually to Montana for wolf management under a 5-year contract that expired June 30, 2010; and

WHEREAS, that annual allocation was far below the estimate included in the final environmental impact statement; and

WHEREAS, under MDFWP's new contract for July 1, 2010, through June 30, 2015, the USFWS allocates only $626,000 to Montana for the entire 5-year period."

*Effective Date:* Section 5, Ch. 400, L. 2011, provided that this section is effective July 1, 2011.

### 87-1-628. Hunters against hunger account.

**Compiler's Comments**

*Termination Provision Repealed:* Section 1, Ch. 292, L. 2017, repealed sec. 7, Ch. 83, L. 2013, which terminated this section June 30, 2019. Effective October 1, 2017.

*Effective Date:* Section 6, Ch. 83, L. 2013, provided that this section is effective July 1, 2013.

*Termination:* Section 7, Ch. 83, L. 2013, provided that this section terminates June 30, 2019.

### 87-1-629. Review of budget — report to legislature.

**Compiler's Comments**

*2021 Amendment:* See 2021 Session Law for amendment made by sec. 128, Ch. 261, L. 2021. Amendment effective April 20, 2021.

*Effective Date:* Section 42, Ch. 449, L. 2015, provided that this section is effective July 1, 2015.

## Part 7
## State-Federal Relationships

### 87-1-701. Assent to Dingell-Johnson Act.

**Compiler's Comments**

*2013 Amendment:* Chapter 69 inserted first and second sentences concerning restoration of language assenting to Dingell-Johnson Act; and in third sentence substituted "Therefore, the state of Montana assents to the Dingell-Johnson Act" for "The state of Montana assents to the provisions of Public Law 681, 81st congress, chapter 658, 2nd session, which is commonly known as the Dingell-Johnson bill". Amendment effective March 18, 2013.

*2009 Amendment:* Chapter 56 at beginning deleted "The congress of the United States having passed an act which was approved on August 9, 1950, and which is known as Public Law 681, 81st congress, chapter 658, 2nd session, wherein it is, among other things, provided that "no money apportioned under this act to any state, except as hereinafter provided, shall be expended therein until its legislature, or other state agency authorized by the state constitution to make laws governing the conservation of fish, shall have assented to the provisions of this act and shall have passed laws for the conservation of fish, which shall include prohibition against the diversion of license fees paid by fishermen for any other purpose than the administration of said fish, wildlife, and parks department, except that, until the final adjournment of the first regular session of the legislature held after passage of this act, the assent of the governor of the state shall be sufficient", and since the moneys referred to in the act of congress are collected in part from the fishermen of this state and will not be returned to the state of Montana except the state of Montana does assent to this act; now, therefore"; made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

*Citation of Federal Act:* The act of Congress approved August 9, 1950, referred to in this section, is compiled in 16 U.S.C. §§ 777 through 777k.

## 87-1-702. Powers of department relating to fish restoration and management.

**Law Review Articles**

*Federal Dominance as to Fisheries and Dams:* Federal Power Commission v. Oregon, 349 US 435, 99 L Ed 1215, 75 S Ct 832 (1955), evidenced that the federal government can disregard the wishes of a state concerning its fisheries wherever it believes that the interests of the nation are best served by permitting a dam to be built, and this applies even where the waters are nonnavigable, provided only that the powersite is on reserved lands of the United States. Jasperson, 18 Mont. L. Rev. 118 (1956).

## 87-1-703. Cooperative agreements on federally owned land.

**Compiler's Comments**

*Citation of Federal Act:* The Dingell-Johnson bill, referred to in this section, is compiled in 16 U.S.C. §§ 777 through 777k.

## 87-1-704. Federal fish-hatching operations.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

## 87-1-705. Acquisition of land by United States for migratory bird reservation.

**Compiler's Comments**

*Citation of Federal Act:* The act of Congress approved February 18, 1929, referred to in this section, is compiled in 16 U.S.C. §§ 715 through 715d, 715e, 715f through 715k, 715l through 715r.

## 87-1-706. Regulation of bird reserve in Flathead County.

**Administrative Rules**

ARM 12.9.209 Stillwater game preserve.

## 87-1-707. Water supply for the Benton Lake wildlife refuge.

**Compiler's Comments**

*Citation of Federal Act:* The act of Congress approved February 18, 1929, referred to in this section, is compiled in 16 U.S.C. §§ 715 through 715d, 715e, 715f through 715k, 715l through 715r.

**Law Review Articles**

*Winters Doctrine Rights — Keystone of National Programs for Western Land and Water Conservation and Utilization:* The "Winters doctrine" applies to wildlife refuges. Veeder, 26 Mont. L. Rev. 152 (1965).

## 87-1-708. Assent to Pittman-Robertson Act — authority of department.

**Compiler's Comments**

*Citation of Federal Act:* The act of Congress approved September 2, 1937, referred to in this section, is compiled in 16 U.S.C. §§ 669 through 669b, 669c through 669i.

**Case Notes**

*Enforcement of Pittman-Robertson Act — No Private Right of Action:* No private right of action exists to enforce the Pittman-Robertson Wildlife Restoration Act. Ill. St. Rifle Ass'n v. Ill., 717 F. Supp. 634 (N.D. Ill. 1989).

## 87-1-709. Cooperation with United States for wildlife restoration.

**Compiler's Comments**

*Citation of Federal Act:* The Pittman-Robertson Act, referred to in this section, is compiled in 16 U.S.C. § 669, et seq.

## 87-1-711. Acquisition of land by United States for bison and other big game animals.

**Law Review Articles**

Returning to a Tribal Self-Governance Partnership at the National Bison Range Complex: Historical, Legal, and Global Perspectives, Upton, 35 Pub. Land. & Resources L. Rev. 51 (2014).

### 87-1-712. Development of national bison range.

**Law Review Articles**

Returning to a Tribal Self-Governance Partnership at the National Bison Range Complex: Historical, Legal, and Global Perspectives, Upton, 35 Pub. Land. & Resources L. Rev. 51 (2014).

## Part 8

## Interstate Wildlife Violator Compact

**Part Compiler's Comments**

*Authorization to Participate in Compact:* Chapter 122, L. 1995, authorized Montana's participation in the Interstate Wildlife Violator Compact with neighboring states to deal with resident and nonresident violators of fish and wildlife statutes and regulations. Other signatory states include Colorado, Oregon, Arizona, Nevada, Idaho, Utah, and Washington.

### 87-1-803. Reciprocal recognition of license suspensions — suspension of privileges for conviction in participating state.

**Compiler's Comments**

*2011 Amendment:* Chapter 258 deleted former (4) that read: "(4) A person whose privileges have been suspended and who hunts, traps, or fishes in Montana, who applies for or purchases any licenses or permits to hunt, trap, or fish in Montana, or who refuses to surrender any current hunting, trapping, and fishing licenses as required is guilty of a misdemeanor and is subject to the penalties prescribed in 87-1-102(4)." Amendment effective October 1, 2011.

*Preamble:* The preamble attached to Ch. 258, L. 2011, provided: "WHEREAS, the 2007 Legislature passed House Joint Resolution No. 16, urging that revision of the criminal codes within Title 87 of the Montana Code Annotated be given priority; and

WHEREAS, House Joint Resolution No. 16 noted that practitioners, judges, and citizens find that the criminal codes intertwined within the fish and game laws in Title 87 are difficult to read, understand, and prosecute; and

WHEREAS, House Joint Resolution No. 16 directed that revision of the Title 87 criminal code should not include policy changes to current laws and should adhere to the intent of the legislatures that crafted the laws; and

WHEREAS, in 2008, the Director of Fish, Wildlife, and Parks appointed a Title 87 criminal code revision working group, consisting of Justices of the Peace, County Attorneys, an Assistant Attorney General, legal counsel and the enforcement administrator of the Department of Fish, Wildlife, and Parks, and legislative staff; and

WHEREAS, the working group met numerous times and spent countless hours crafting a revision that makes the Title 87 criminal code more understandable without making substantive or policy changes to present law; and

WHEREAS, revision of the fish and game criminal statutes will benefit the hunting and fishing public, magistrates, and prosecutors by codifying crimes and penalties in a separate chapter of Montana law, rather than being intertwined throughout Title 87."

*Saving Clause:* Section 131, Ch. 258, L. 2011, was a saving clause.

*Severability:* Section 132, Ch. 258, L. 2011, was a severability clause.

*1999 Amendment:* Chapter 502 at end of (4) substituted "87-1-102(4)" for "87-1-102(3)". Amendment effective October 1, 1999.

### 87-1-804. Suspension of privileges for failure to comply with citation issued in participating state.

**Compiler's Comments**

*2011 Amendment:* Chapter 258 deleted former (3) that read: "(3) A person who hunts, traps, or fishes, who applies for or purchases licenses or permits, or who refuses to surrender any current hunting, trapping, or fishing license in violation of this section is guilty of a misdemeanor and is subject to the penalties prescribed in 87-1-102(4)." Amendment effective October 1, 2011.

*Preamble:* The preamble attached to Ch. 258, L. 2011, provided: "WHEREAS, the 2007 Legislature passed House Joint Resolution No. 16, urging that revision of the criminal codes within Title 87 of the Montana Code Annotated be given priority; and

WHEREAS, House Joint Resolution No. 16 noted that practitioners, judges, and citizens find that the criminal codes intertwined within the fish and game laws in Title 87 are difficult to read, understand, and prosecute; and

WHEREAS, House Joint Resolution No. 16 directed that revision of the Title 87 criminal code should not include policy changes to current laws and should adhere to the intent of the legislatures that crafted the laws; and

WHEREAS, in 2008, the Director of Fish, Wildlife, and Parks appointed a Title 87 criminal code revision working group, consisting of Justices of the Peace, County Attorneys, an Assistant Attorney General, legal counsel and the enforcement administrator of the Department of Fish, Wildlife, and Parks, and legislative staff; and

WHEREAS, the working group met numerous times and spent countless hours crafting a revision that makes the Title 87 criminal code more understandable without making substantive or policy changes to present law; and

WHEREAS, revision of the fish and game criminal statutes will benefit the hunting and fishing public, magistrates, and prosecutors by codifying crimes and penalties in a separate chapter of Montana law, rather than being intertwined throughout Title 87."

*Saving Clause:* Section 131, Ch. 258, L. 2011, was a saving clause.

*Severability:* Section 132, Ch. 258, L. 2011, was a severability clause.

*1999 Amendment:* Chapter 502 at end of (3) substituted "87-1-102(4)" for "87-1-102(3)". Amendment effective October 1, 1999.

## Part 9
## Gray Wolf Management

### 87-1-901. Gray wolf management — rulemaking — reporting.

**Compiler's Comments**

*2021 Amendments — Composite Section:* Chapter 162 in (1) inserted second sentence concerning the use of snares; and in (2)(b) near beginning inserted "or snaring". Amendment effective October 1, 2021.

Chapter 261 in (5) near middle inserted "in accordance with 5-11-210". Amendment effective April 20, 2021.

Chapter 336 in (1) after "hunting and trapping seasons for wolves" inserted "with the intent to reduce the wolf population in this state to a sustainable level, but not less than the number of wolves necessary to support at least 15 breeding pairs"; in (2) near beginning inserted "may apply different management techniques depending on the conditions in each administrative region with the most liberal harvest regulations applied in regions with the greatest number of wolves. In doing so, the commission"; inserted (2)(c) concerning authorization of the harvesting of an unlimited number of wolves by the holder of a single wolf hunting or wolf trapping license; inserted (2)(d) concerning authorization of the use of bait while hunting or trapping wolves during the wolf trapping season; inserted (2)(e) concerning the hunting of wolves on private lands outside of daylight hours; and made minor changes in style. Amendment effective October 1, 2021.

*Severability:* Section 8, Ch. 297, L. 2013, was a severability clause.

*Effective Date:* Section 9, Ch. 297, L. 2013, provided: "[This act] is effective on passage and approval." Approved April 25, 2013.

## CHAPTER 2
## FISHING, HUNTING, AND TRAPPING LICENSES

**Chapter Case Notes**

*Application of Federal Lacey Act to Outfitting and Guiding — Statute of Limitations on Charges of Conspiracy:* While a prosecution under the federal Lacey Act, 16 U.S.C. 3371, et seq., which prohibits transportation or acquisition in interstate commerce of wildlife in violation of state laws, may not properly be had for the substantive acts of selling guiding services and hunting permits, a prosecution can be maintained for conspiracies to violate the Act while providing outfitting and guiding services, such as arranging for out-of-state hunters to use elk licenses and permits belonging to other hunters, knowing that any elk taken would be transported out of state. The Act applied when evidence was sufficient to establish the involvement of defendant, a hunting guide and outfitter, in a conspiracy to transport elk in interstate commerce in violation of Montana law. Further, the 5-year "catchall" statute of limitations set out in 18 U.S.C. 3282 applied to charges of conspiring to violate the Act. U.S. v. Thomas, 887 F2d 1341 (9th Cir. 1989), distinguishing U.S. v. Stenberg, 803 F2d 422 (9th Cir. 1986).

*Illegal Sale of Special Season Elk Tag Not an Offer to Sell Wildlife Prohibited by Federal Law:* The alleged sale of a special season elk tag in violation of 87-2-110 (now repealed, but see 87-6-304) did not constitute an illegal sale or offer to sell wildlife under the federal Lacey Act (16 U.S.C. 3372, 3373). U.S. v. Stenberg, 803 F2d 422 (9th Cir. 1986).

*Constitutionality:* The disparity in the treatment of residents and nonresidents under 87-2-505 is not an unconstitutional discrimination because it infringes upon no fundamental rights and therefore does not violate the due process or equal protection clauses; nor is the right to hunt for sport a privilege or immunity of citizens of the several states that Montana is required to grant equally to residents and nonresidents under Art. IV, sec. 2, U.S. Const. Mont. Outfitters Action Group v. Fish & Game Comm'n, 417 F. Supp. 1005 (D.C. Mont. 1976), affirmed in Baldwin v. Fish & Game Comm'n, 436 US 371, 56 L Ed 2d 354, 98 S Ct 1852 (1978).

*Tagging Game Killed by Another:* Tagging of game animal that someone else has killed or so far brought under control that one can walk up to it and cut its throat is not method of acquiring ownership contemplated by statute authorizing licensed hunter to pursue, hunt, shoot, and kill game animal and then to possess carcass with result that person tagging illegally killed elk is not entitled to possession. State ex rel. Visser v. St. Fish & Game Comm'n, 150 M 525, 437 P2d 373 (1968).

**Chapter Law Review Articles**

Is There a Middle Ground? One Approach to Resolution of Land Use Disputes in the Northwest, Gangle, 64 Mont. L. Rev. 493 (2003).

## Part 1
## General Provisions

### 87-2-101. Definitions.

**Compiler's Comments**

*2021 Amendment:* Chapter 507 substituted definition of wild buffalo or bison for definition of wild buffalo that read: ""Wild buffalo" means buffalo or bison that have not been reduced to captivity." Amendment effective May 14, 2021.

*2015 Amendment:* Chapter 105 in definition of angling in two places, in definition of hunt in three places, and in definition of trap in two places inserted references to harvesting; in definition of hunt in first sentence near beginning and in middle inserted reference to taking wildlife; and made minor changes in style. Amendment effective October 1, 2015.

*2011 Amendments — Composite Section — Coordination:* Chapter 19 in definitions of closed season (rendered void by Ch. 258) and open season substituted "game birds, game fish, game animals, and fur-bearing animals" for "game birds, fish, and game and fur-bearing animals"; in definition of game fish substituted "genus Sander" for "genus stizostedion"; and made minor changes in style. Amendment effective October 1, 2011.

Chapter 258 in introductory clause near beginning after "As used in" deleted "87-1-102"; deleted former definition that read: ""Closed season" means the time during which game birds, fish, and game and fur-bearing animals may not be lawfully taken"; deleted former definition that read: ""Commission" means the state fish, wildlife, and parks commission"; and made minor changes in style. Amendment effective October 1, 2011.

The amendment to this section made by sec. 2, Ch. 134, L. 2011, was rendered void by sec. 122, Ch. 258, L. 2011, a coordination section.

*Preamble:* The preamble attached to Ch. 258, L. 2011, provided: "WHEREAS, the 2007 Legislature passed House Joint Resolution No. 16, urging that revision of the criminal codes within Title 87 of the Montana Code Annotated be given priority; and

WHEREAS, House Joint Resolution No. 16 noted that practitioners, judges, and citizens find that the criminal codes intertwined within the fish and game laws in Title 87 are difficult to read, understand, and prosecute; and

WHEREAS, House Joint Resolution No. 16 directed that revision of the Title 87 criminal code should not include policy changes to current laws and should adhere to the intent of the legislatures that crafted the laws; and

WHEREAS, in 2008, the Director of Fish, Wildlife, and Parks appointed a Title 87 criminal code revision working group, consisting of Justices of the Peace, County Attorneys, an Assistant Attorney General, legal counsel and the enforcement administrator of the Department of Fish, Wildlife, and Parks, and legislative staff; and

WHEREAS, the working group met numerous times and spent countless hours crafting a revision that makes the Title 87 criminal code more understandable without making substantive or policy changes to present law; and

WHEREAS, revision of the fish and game criminal statutes will benefit the hunting and fishing public, magistrates, and prosecutors by codifying crimes and penalties in a separate chapter of Montana law, rather than being intertwined throughout Title 87."

*Saving Clause:* Section 5, Ch. 134, L. 2011, was a saving clause.

Section 131, Ch. 258, L. 2011, was a saving clause.

*Severability:* Section 132, Ch. 258, L. 2011, was a severability clause.

*2003 Amendments — Composite Section:* Chapter 84 in definition of game fish inserted "the species perca flavescens (yellow perch); all species of the genus pomoxis (crappie)"; and made minor changes in style. Amendment effective March 20, 2003.

Chapter 499 in definition of migratory game birds at end deleted "however, the open season on mourning doves is restricted to the open season on upland game birds as defined in subsection (15)"; in definition of upland game birds deleted "quail" and before "pheasant" inserted "ring-necked"; and made minor changes in style. Amendment effective July 1, 2003.

*1995 Amendment:* Chapter 417 in introductory clause inserted "and 87-1-102"; substituted definition of angling for former definition that read: ""Angling" or "fishing" means the taking of or attempting to take fish by hook and single line or single rod, in hand or within immediate control"; inserted definitions of bait, hunt, and trap; adjusted internal references; and made minor changes in style. Amendment effective July 1, 1995.

*Severability:* Section 37, Ch. 417, L. 1995, was a severability clause.

*1991 Name Change:* Section 2, Ch. 28, L. 1991, directed the Code Commissioner to change the name of the Fish and Game Commission to the Fish, Wildlife, and Parks Commission wherever the name appears in the MCA. Accordingly, the name was changed in this section as directed.

*1985 Amendment:* In (5) at end, after "bear", inserted "and wild buffalo".

*1983 Amendment:* In (7), inserted last clause relating to mourning doves and open season on mourning doves.

*Administrative Action Required:* Section 2, Ch. 46, L. 1979, provided: "It is the intent of this legislature that the department of fish and game take the necessary administrative action to remove lynx, northern swift fox, and wolverine from the listing of nongame species in need of management."

*Severability:* Section 19, Ch. 478, L. 1979, was a severability clause.

*Composite Section:* This section was amended by Ch. 44, Ch. 46, and Ch. 478, L. 1979, and a composite was prepared by the Code Commissioner, 1979. Chapter 478 added "Canada lynx" to the definition of "fur-bearing animals" in subsection (4), and Ch. 46 added "lynx" to that definition. The Ch. 46 language was chosen because it is more general and incorporates the additions intended by both Ch. 478 and Ch. 46.

### Attorney General's Opinions

*Game Harvesting — Game Ranch:* The Fish and Game Commission (now Fish, Wildlife, and Parks Commission) does not have the authority to regulate the hunting and killing of privately owned game through the imposition of licensing requirements on individual hunters or open and closed seasons. 36 A.G. Op. 112 (1976).

## 87-2-102. Resident defined.

### Compiler's Comments

*2021 Amendments — Composite Section:* Chapter 170 in (1)(a)(ii) in first sentence near middle before "course approved" inserted "and education" and at end inserted "or, if applicable, proof of completion of a trapper education course pursuant to 87-2-127"; and made minor changes in style. Amendment effective March 1, 2022.

Chapter 503 in (1)(a) near middle of introductory clause after "dependent, as defined in" substituted "subsection (1)(c)" for "15-30-2115"; inserted (1)(c) concerning a definition of the term dependent; and inserted (1)(d), (1)(d)(i), and (1)(d)(ii) concerning terms brother and sister and determining relationships. Amendment effective January 1, 2022.

*Effective Date — Applicability:* Section 69, Ch. 503, L. 2021, provided: "(1) Except as provided in subsection (2), [this act] is effective January 1, 2024, and applies to income tax years beginning after December 31, 2023.

(2) [Sections 14, 31, 32, 54, 59 through 64, 66, 68, and 69] [15-30-2303, 15-32-104, 15-32-106, 50-51-114, 70-9-803, 75-2-103, 75-5-103, 87-2-102, and 87-2-105] and this section are effective January 1, 2022, and apply to income tax years beginning after December 31, 2021."

*Severability:* Section 68, Ch. 503, L. 2021, was a severability clause.

*2017 Amendment:* Chapter 41 in (1)(a) before "dependent" inserted "spouse or" and before "household" deleted "Montana"; and in (1)(a)(i) after "subsection (4)" deleted "at the time the member entered the armed forces". Amendment effective February 22, 2017.

*2001 Amendment:* Chapter 60 inserted (1)(b) pertaining to residency status of a Montana resident with respect to a hunting, fishing, or trapping license if the resident is a member of the armed forces and obtains a resident hunting, fishing, or trapping license in another state; in (2) before "hunting" inserted "resident"; in (2)(d) at beginning inserted exception clause; and made minor changes in style. Amendment effective March 16, 2001.

*1999 Amendment:* Chapter 499 in (1)(b) substituted "proof of completion of a hunter safety course approved by the department" for "proof of competency". Amendment effective July 1, 1999.

*Saving Clause:* Section 10, Ch. 499, L. 1999, was a saving clause.

*1997 Amendment:* Chapter 187 in (1)(b), near middle of first sentence before "of competency", substituted "proof" for "a certificate"; and made minor changes in style. Amendment effective March 1, 1998.

*1995 Amendment:* Chapter 417 in (1)(b), near beginning after "currently", inserted "stationed in and", inserted third sentence concerning reassignment, and inserted fourth sentence concerning designation in armed forces record; deleted former (2) that read: "(2) A person who has been a resident of the state of Montana for a period of 6 months immediately prior to making application for a license is eligible to receive a resident hunting, fishing, or trapping license. A person is considered a resident if the person meets the following criteria"; inserted (2) concerning primary home or abode for 180 consecutive days; inserted (3) requiring continuing residence for 120 days a year; inserted (4) concerning additional criteria; substituted (4)(a) concerning primary home for former text that read: "the person lives in Montana or has a fixed intent to return to this state when the person leaves it"; in (4)(d), near beginning, substituted "possess or apply for" for "use", after "trapping" inserted "licenses from another state or country or exercise resident hunting, fishing, or trapping", and at end deleted "during the time the resident Montana license is valid"; inserted (5) concerning students; inserted (9) concerning disqualifying factors for residency; inserted (10) providing that license agent is not a representative of state; adjusted internal references; and made minor changes in style. Amendment effective July 1, 1995.

*Severability:* Section 37, Ch. 417, L. 1995, was a severability clause.

*1993 Amendments:* Chapter 219 in (1)(b), at end of first sentence, inserted reference to certificate of competency or other certificate. Amendment effective March 1, 1994.

Chapter 589 substituted (1) concerning determination of residency for member of armed forces or a dependent for former text that read: "Members of the regular armed forces of the United States or members of the armed forces of foreign governments attached to the armed forces of the United States who are assigned to active duty in Montana and their dependents, as defined in 15-30-113, who reside in their Montana household with them, after a period of 30 days within Montana, upon presenting assignment orders emanating from the proper unit commander, are considered residents for the purpose of this chapter. The 30-day residence requirement is waived in time of war"; substituted (5) concerning residency of an unmarried minor for former text that read: "An unmarried minor whose parents, legal guardian, or custodial parent is a resident for purposes of this section is also considered a resident for purposes of this section"; and made minor changes in style. Amendment effective April 29, 1993.

*1991 Amendment:* In (1), near beginning of first sentence before "armed forces", inserted "regular", near middle, before "duty", inserted "active", and after "dependents" inserted reference to 15-30-113; in (2), near beginning of first sentence after "Montana", deleted "as defined in 1-1-215" and inserted (2)(a) through (2)(e) establishing criteria for determining residency; in (4), near beginning after "person", substituted "who does not reside in Montana but who meets" for "meeting"; inserted (5) regarding residency of unmarried minors; and made minor changes in style. Amendment effective July 1, 1991.

*1985 Amendment:* Inserted (4) regarding criteria by which a nonresident may be considered a resident for hunting and fishing licensing purposes.

*1983 Amendment:* In middle of (1), substituted "their dependents who reside in their Montana household with them" for "members of their immediate families".

**Case Notes**

*Residency Requirements for Obtaining Hunting or Fishing License Not Unconstitutionally Vague:* Britton was charged in Justice's Court with various hunting license-related crimes, but moved for dismissal on grounds that Montana's residency laws are so vague as to violate due process. The motion was denied. Following conviction, Britton asserted in District Court that this section, defining residency for hunting and fishing license purposes, is vague because other statutes define residency differently for purposes such as voting, dissolution of marriage, college attendance, and taxation. The District Court held that fish and game residency requirements are neither vague nor ambiguous and affirmed the Justice's Court conviction. On appeal, Britton asserted that the various statutory definitions of residency might confuse a person of ordinary intelligence and operate as a trap for the innocent. However, the Supreme Court affirmed, noting that the other statutory residency provisions to which Britton referred clearly provide that those provisions are for specific acts or purposes other than obtaining a hunting license and that it strained credulity to suggest that a person of ordinary intelligence would be confused into thinking that any of those statutes define residency for the purpose of obtaining a hunting license. Britton failed to establish that the residency requirements for obtaining a hunting or fishing license are facially unconstitutional on vagueness grounds. St. v. Britton, 2001 MT 141, 306 M 24, 30 P3d 337 (2001).

*False Affirmation of Six-Month Residency Requirement Distinct From Constitutionality of Residency Requirement:* Still falsely affirmed on his applications for hunting licenses that he had been a resident of the state for 6 months. The Supreme Court declined to address the constitutionality of the residency requirement imposed by this section because Still violated 87-2-106, a separate statute. The Supreme Court held that if Still wanted to challenge the constitutionality of the residency requirement, he should have filled out the application truthfully and then challenged the subsequent denial of the license. St. v. Still, 273 M 261, 902 P2d 546, 52 St. Rep. 965 (1995).

*"Resident" Requirement for Hunting, Fishing, or Trapping License Not Unconstitutionally Vague:* After the state filed charges against appellants for making false statements concerning residency in order to obtain hunting licenses, appellants filed an action, claiming that the residency statute is unconstitutionally vague. Upholding the statute, the Supreme Court ruled that the fact that the statute may be difficult to apply does not render it unconstitutionally vague. Monroe v. St., 265 M 1, 873 P2d 230, 51 St. Rep. 327 (1994), followed, as to difficulty in the application insufficient to render the statute unconstitutional, in St. v. Stanko, 1998 MT 323, 292 M 214, 974 P2d 1139, 55 St. Rep. 1313 (1998).

**Attorney General's Opinions**

*Out-of-State Employment as Affecting Eligibility for Resident License:* A Montana resident who has resided in state 6 months or more but who is absent from the state by reason of employment prior to application for a resident fish and game license does not lose his residence by being employed out of state and need not reside 6 continuous months after his return to be eligible for a resident license. 27 A.G. Op. 27 (1957). (Annotator's note: See 1995 amendment, which attempted to clarify criteria for residency by a person who has established residency but who may not physically reside in the state more than 120 days a year.)

**Law Review Articles**

Montana Outfitters v. Fish and Game Commission: Of Elk and Equal Protection, Ramlow, 38 Mont. L. Rev. 387 (1977).

## 87-2-104. Number of licenses, permits, or tags allowed — fees.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 1, Ch. 404, L. 2023. Amendment effective March 1, 2024.

*2021 Amendment:* Chapter 166 inserted (2) concerning replacement licenses, permits, and tags; and made minor changes in style. Amendment effective April 8, 2021.

*2019 Amendment:* Chapter 381 inserted (2)(c) regarding issuance of Class A-9 resident antlerless elk B tag licenses and Class B-12 nonresident antlerless elk B tag licenses; deleted former (4) regarding antlerless elk licenses (see 2019 Session Law for former text); and made minor changes in style. Amendment effective May 8, 2019.

*2015 Amendment:* Chapter 449 in (4) substituted "$270" for "$273". Amendment effective March 1, 2016.

*2013 Amendments — Composite Section:* Chapter 13 in (2)(a) inserted "Class E-1 resident wolf, Class E-2 nonresident wolf". Amendment effective February 13, 2013.

Chapter 297 in (2)(a) inserted "Class E-1 resident wolf, Class E-2 nonresident wolf". Amendment effective April 25, 2013.

*Severability:* Section 8, Ch. 297, L. 2013, was a severability clause.

*2011 Amendment:* Chapter 258 deleted former (1) and (2) that read: "(1) It is unlawful for a person to apply for, purchase, or possess more than one license, permit, or tag of any one class or more than one special license for any one species listed in 87-2-701. This provision does not apply to Class B-4 or Class B-5 licenses or to licenses issued under subsection (4) for game management purposes. However, when more than one license, permit, or tag is authorized by the commission, it is unlawful to apply for, purchase, or possess more licenses, permits, or tags than are authorized.

(2) It is unlawful for the holder of a replacement license, permit, or tag to make the replacement license, permit, or tag available for use by another person"; and made minor changes in style. Amendment effective October 1, 2011.

*Preamble:* The preamble attached to Ch. 258, L. 2011, provided: "WHEREAS, the 2007 Legislature passed House Joint Resolution No. 16, urging that revision of the criminal codes within Title 87 of the Montana Code Annotated be given priority; and

WHEREAS, House Joint Resolution No. 16 noted that practitioners, judges, and citizens find that the criminal codes intertwined within the fish and game laws in Title 87 are difficult to read, understand, and prosecute; and

WHEREAS, House Joint Resolution No. 16 directed that revision of the Title 87 criminal code should not include policy changes to current laws and should adhere to the intent of the legislatures that crafted the laws; and

WHEREAS, in 2008, the Director of Fish, Wildlife, and Parks appointed a Title 87 criminal code revision working group, consisting of Justices of the Peace, County Attorneys, an Assistant Attorney General, legal counsel and the enforcement administrator of the Department of Fish, Wildlife, and Parks, and legislative staff; and

WHEREAS, the working group met numerous times and spent countless hours crafting a revision that makes the Title 87 criminal code more understandable without making substantive or policy changes to present law; and

WHEREAS, revision of the fish and game criminal statutes will benefit the hunting and fishing public, magistrates, and prosecutors by codifying crimes and penalties in a separate chapter of Montana law, rather than being intertwined throughout Title 87."

*Saving Clause:* Section 131, Ch. 258, L. 2011, was a saving clause.

*Severability:* Section 132, Ch. 258, L. 2011, was a severability clause.

*2007 Amendments — Composite Section:* Chapter 25 in (4)(a) near beginning after "A-3" inserted "resident deer A", after "A-4" substituted "resident deer B" for "Class A-5, Class A-7", after "B-7" inserted "nonresident deer A", after "B-8" inserted "nonresident deer B", deleted "Class B-10, Class B-11", and at end deleted former second sentence that read: "An applicant for these game management licenses is not at the time of application required to hold any license or permit of that class"; inserted (4)(b) allowing issuance of a special antlerless moose license, a special cow or calf bison license, or one or more special adult ewe mountain sheep licenses to an applicant; inserted (5) requiring the commission to establish the terms and conditions for use of licenses issued under subsection (4); in (6) deleted former second and third sentences that read: "An applicant must have a Class A-5 or Class A-7 license to be eligible for a Class A-9 license. An applicant must have a Class B-10 or Class B-13 license to be eligible for a Class B-12 license" and inserted second sentence establishing the fee for a Class B-12 license at $273; in (7) near middle after "subsection (4)" substituted "or (6) may be reduced" for "must be set" and at end after "department" deleted "and may not exceed the regular fee provided by law for that class or species"; and made minor changes in style. Amendment effective March 22, 2007.

Chapter 35 in (1) in three places and in (3) in two places after reference to license inserted reference to permit or tag; inserted (2) regarding use of a replacement license, permit, or tag; and made minor changes in style. Amendment effective March 22, 2007.

*2005 Amendment:* Chapter 470 in (4) in third sentence after "B-10" inserted "or Class B-13". Amendment effective March 1, 2006.

*2003 Amendments — Composite Section:* Chapter 201 inserted (4) concerning issuance of antlerless tag licenses for game management purposes; and made minor changes in style. Amendment effective April 1, 2003.

Chapter 228 in second sentence in (1) after "Class B-4" inserted "or Class B-5". Amendment effective April 3, 2003.

Chapter 553 in (3) inserted references to Class A-5, Class A-7, Class B-10, and Class B-11 licenses. Amendment effective May 5, 2003.

*1989 Amendment:* In (1) substituted language prohibiting a person from applying for, obtaining, or possessing more than one license of a class unless authorized by the Fish and Game Commission (now Fish, Wildlife, and Parks Commission) for "Except as authorized by the commission and except for class B-4 licenses, only one license of any one class shall be issued to any one person"; in (2), after "replacement license", deleted "of the same class" and at end substituted "a fee not to exceed $5" for "the original price of the lost, stolen, or destroyed license, not to exceed $5"; and in (4) substituted reference to subsection (3) for reference to subsection (2) and at end inserted "or species". Amendment effective April 4, 1989.

*1987 Amendment:* Inserted (2) relating to additional game management licenses; and substituted (3) relating to fees for former (2) and (3) that read: "(2) Except for Class A-4 licenses, the fee for additional licenses of any class issued as authorized by the commission is one-half the regular fee provided by law.

(3) The fee for additional Class A-4 licenses issued as authorized by the commission is the regular fee provided by law."

*1983 Amendment:* In (1), substituted "Except as authorized by the commission and except for Class B-4 licenses" for "except Class B-3 and B-4 licenses"; inserted (2) relating to fees for additional licenses; and inserted (3) relating to setting of fees annually.

*1981 Amendment:* At end of (1), changed "payment of the sum of $3 or the cost of the original license, whichever is the smaller amount" to "payment of the original price of the lost, stolen, or destroyed license, not to exceed $5".

**Administrative Rules**

ARM 12.3.513 Replacement licenses and permits.

## 87-2-105. Hunter safety and education required.

**Compiler's Comments**

*2021 Amendments — Composite Section:* Chapter 170 in (2) near end before "course approved" inserted "and education". Amendment effective March 1, 2022.

Chapter 503 in (2) near middle after "as defined in" substituted "87-2-102" for "15-30-2115". Amendment effective January 1, 2022.

*Effective Date — Applicability:* Section 69, Ch. 503, L. 2021, provided: "(1) Except as provided in subsection (2), [this act] is effective January 1, 2024, and applies to income tax years beginning after December 31, 2023.

(2) [Sections 14, 31, 32, 54, 59 through 64, 66, 68, and 69] [15-30-2303, 15-32-104, 15-32-106, 50-51-114, 70-9-803, 75-2-103, 75-5-103, 87-2-102, and 87-2-105] and this section are effective January 1, 2022, and apply to income tax years beginning after December 31, 2021."

*Severability:* Section 68, Ch. 503, L. 2021, was a severability clause.

*2017 Amendments — Composite Section:* Chapter 41 in (2) near middle after "or to a member's" substituted "spouse or dependent" for "dependents" and before "household" deleted "Montana"; and made minor changes in style. Amendment effective February 22, 2017.

Chapter 427 in (1) after "87-2-805(4) or" inserted "a person". Amendment effective July 1, 2017.

*2015 Amendment:* Chapter 449 in (1) after "87-2-805(4)" inserted "or who has been issued an apprentice hunting certificate pursuant to 87-2-810"; and made minor changes in style. Amendment effective May 8, 2015.

*2009 Amendment:* Chapter 68 inserted (1)(c) providing for issuance of a license to a person who qualifies for a provisional certificate; and made minor changes in style. Amendment effective March 1, 2010.

*2005 Amendment:* Chapter 80 in (1) at beginning inserted exception clause; and made minor changes in style. Amendment effective March 24, 2005.

*2003 Amendments — Composite Section:* Chapter 80 in (3) at end of first sentence and in (5) near middle of first sentence after "foundation" inserted "or any other bowhunter education program approved by the department"; and in (5) at end of second sentence substituted "bowhunter education instruction" for "the national bowhunter education foundation instruction" and in third sentence after "completion" deleted "from the national bowhunter education foundation". Amendment effective July 1, 2003.

Chapter 433 in (1) near middle substituted "person who is born after January 1, 1985" for "resident person who is under 18 years of age" and near end substituted "determines proof" for "receives a certificate"; in (1)(a) after "Montana" deleted "youth" and at end substituted "subsection (4) or (6)" for "subsection (5)"; substituted (1)(b) concerning course in other state or province for former (2) that read: "(2) A hunting license may not be issued to a nonresident person who is under 18 years of age unless the person authorized to issue the license receives a certificate of completion from the Montana youth hunter safety and education course established in subsection (5) or a certificate verifying that the nonresident has successfully completed a hunter safety course in any state or province"; in (2) near end after "license" substituted "determines" for "receives" and after "department or" deleted "certificate verifying that the member or dependent has successfully completed"; in (3) near middle of first sentence after "season or" substituted "determines" for "receives"; in (4) in two places before "hunter safety" deleted "youth" and in second sentence after "instructions" deleted "to youth"; in (6) after "hunter" inserted "safety and"; in (7) at end substituted "of a required course" for "or achievement"; and made minor changes in style. Amendment effective October 1, 2003.

*Saving Clause:* Section 8, Ch. 80, L. 2003, was a saving clause.

*Severability:* Section 9, Ch. 80, L. 2003, was a severability clause.

*1999 Amendment:* Chapter 499 in (1) substituted "a certificate of completion from the Montana youth hunter safety and education course established in subsection (5)" for "proof of competency as provided by this section"; in (2) substituted "a certificate of completion from the Montana youth hunter safety and education course established in subsection (5)" for "proof of competency, as provided in this section" and substituted "a hunter safety course" for "a course in the safe handling of firearms"; in (3) substituted "proof of completion of a hunter safety course approved by the department" for "proof of competency, as provided in this section"; in (5) in first sentence before "course" inserted "youth hunter safety and education" and at end substituted "promotion of hunter safety and education" for "promotion of safety in the handling of firearms", in second sentence substituted "instructions to youth in hunter safety and education, including the handling of firearms" for "instructions in the handling of firearms", and in third sentence substituted "certificate of completion from Montana's youth hunter safety and education course" for "certificate of competency in the safe handling of firearms"; inserted (7) authorizing development of adult hunter education course; at end of (8) substituted "proof of completion or achievement" for "proof of competency"; and made minor changes in style. Amendment effective July 1, 2001.

*Saving Clause:* Section 10, Ch. 499, L. 1999, was a saving clause.

*1997 Amendment:* Chapter 187 in (1), after "unless the", deleted "resident presents to the" and after "the license" substituted "receives proof" for "a certificate"; in (2), after "unless the", deleted "nonresident presents to the" and after "the license" substituted "receives proof" for "a certificate"; in (3), near middle after "unless the", deleted "member or dependent presents to the" and after "the license" substituted "receives proof" for "a certificate"; in (4), in first sentence after "unless the", deleted "resident or nonresident presents to the", after "the license" inserted "receives", and after "season or" substituted "receives proof of completion of a bowhunter education course" for "a certificate of completion" and deleted fourth sentence that read: "As part of those public information efforts, the department shall notify by mail all individuals who purchased a Class A-2 special bow and arrow license during the 1990-91 hunting season"; inserted (7) regarding adoption of rules concerning proof of competency; and made minor changes in style. Amendment effective March 1, 1998.

*1997 Statement of Intent:* The statement of intent attached to Ch. 187, L. 1997, provided: "A statement of intent is required for this bill because 87-2-105(7) and 87-2-903(8) grant rulemaking authority to the department of fish, wildlife, and parks regarding standards applicable to license agents.

It is intended that the rules adopted pursuant to 87-2-105(7) address the methods by which a license agent determines proof of competency in hunter safety, particularly the competency of nonresidents who apply for a Montana hunting license. It is intended that the rules recognize that a person who takes a hunter safety course from a department-authorized instructor will be considered competent for licensing purposes.

It is intended that rules adopted pursuant to 87-2-903(8) address compensation, system installation fees, and duties of license agents."

*1993 Amendment:* Chapter 219 inserted (3) prohibiting issuance of license without certificate of competency; and made minor changes in style. Amendment effective March 1, 1994.

*1991 Amendment:* In (3), near beginning of first sentence after "nonresident", deleted "person under the age of 18 years", near middle, after "the license", inserted "an archery license issued for a prior hunting season or", at end substituted "certificate of completion from the national bowhunter education foundation" for "certificate of competency in the safe handling of bow hunting tackle, in addition to the certificate of competency in the safe handling of firearms", and inserted second, third, and fourth sentences regarding provision of records of past archery license purchases and notification procedures; in (5), in first sentence after "instruction", substituted "from the national bowhunter education foundation" for "in the safe handling of bow hunting tackle", at end of second sentence substituted "the national bowhunter education foundation instruction" for "instructions in the handling of bow hunting tackle", and in third sentence substituted "completion from the national bowhunter education foundation" for "competency in the safe handling of bow hunting tackle"; and made minor changes in style. Amendment effective March 1, 1992.

*1987 Amendment:* Near beginning of (1) and (2) substituted "may" for "shall"; redesignated former (2) as (4) and made minor changes in phraseology; inserted (3) relating to nonresident minors; and inserted (5) relating to bowhunting safety instruction. Amendment effective March 1, 1988.

**Administrative Rules**

Title 12, chapter 10, subchapter 1, ARM Shooting range development grants.

### 87-2-106. Application for license.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 12, Ch. 507, L. 2023. Amendment effective July 1, 2023.

*2021 Amendment:* Chapter 85 in (1) in second sentence before "street address" deleted "occupation"; and made minor changes in style. Amendment effective March 1, 2022.

*2013 Amendment:* Chapter 96 in (1) in last sentence after "subscribed to" substituted "by the applicant" for "before the officer or agent issuing the license"; in (2) deleted former second sentence that read: "Statements on an application for a license to be issued by telephone, by mail, on the internet, or by other electronic means need not be subscribed to before the employee or officer"; and in (3) in first sentence after "shall" substituted "subscribe" for "submit at the time of application a notarized affidavit that attests". Amendment effective October 1, 2013.

*2011 Amendment:* Chapter 258 in (1) deleted former fifth sentence that read: "It is a misdemeanor for a license agent to sell a hunting, fishing, or trapping license to an applicant who fails to produce the required identification at the time of application for licensure"; deleted former (6) that read: "(6) It is unlawful to subscribe to or make any statement, on an application or license, that is materially false. Any material false statement contained in an application renders the license issued pursuant to it void. A person violating any provision of this subsection is guilty of a misdemeanor"; in (6) at end substituted "87-6-922(2)" for "87-1-102(1)"; deleted former (8), (9), and (10) that read: "(8) It is unlawful for a nonresident to apply for or purchase for a nonresident's use the following resident licenses and permits:

(a) wildlife conservation license;
(b) hunting license or permit; or
(c) fishing license or permit.

(9) (a) A person not meeting the residency criteria set out in 87-2-102 who is convicted of affirming to or making a false statement to obtain a resident license or who is convicted of applying for or purchasing a resident license in violation of subsection (8) shall be:

(i) fined not less than the greater of $100 or twice the cost of the nonresident license that authorized the sought-after privilege or more than $1,000;
(ii) imprisoned in the county jail for not more than 6 months; or
(iii) both fined and imprisoned.

(b) In addition to the penalties specified in subsection (9)(a), upon conviction or forfeiture of bond or bail, the person shall forfeit any current hunting, fishing, and trapping licenses and the privilege to hunt, fish, and trap in Montana for not less than 18 months.

(10) It is a misdemeanor for a person to purposely or knowingly assist an unqualified applicant in obtaining a resident license in violation of this section"; and made minor changes in style. Amendment effective October 1, 2011.

*Preamble:* The preamble attached to Ch. 258, L. 2011, provided: "WHEREAS, the 2007 Legislature passed House Joint Resolution No. 16, urging that revision of the criminal codes within Title 87 of the Montana Code Annotated be given priority; and

WHEREAS, House Joint Resolution No. 16 noted that practitioners, judges, and citizens find that the criminal codes intertwined within the fish and game laws in Title 87 are difficult to read, understand, and prosecute; and

WHEREAS, House Joint Resolution No. 16 directed that revision of the Title 87 criminal code should not include policy changes to current laws and should adhere to the intent of the legislatures that crafted the laws; and

WHEREAS, in 2008, the Director of Fish, Wildlife, and Parks appointed a Title 87 criminal code revision working group, consisting of Justices of the Peace, County Attorneys, an Assistant Attorney General, legal counsel and the enforcement administrator of the Department of Fish, Wildlife, and Parks, and legislative staff; and

WHEREAS, the working group met numerous times and spent countless hours crafting a revision that makes the Title 87 criminal code more understandable without making substantive or policy changes to present law; and

WHEREAS, revision of the fish and game criminal statutes will benefit the hunting and fishing public, magistrates, and prosecutors by codifying crimes and penalties in a separate chapter of Montana law, rather than being intertwined throughout Title 87."

*Saving Clause:* Section 131, Ch. 258, L. 2011, was a saving clause.

*Severability:* Section 132, Ch. 258, L. 2011, was a severability clause.

*2009 Amendment:* Chapter 253 in both versions inserted (7) providing that person whose hunting, fishing, or trapping privileges are revoked is not eligible to purchase any license until all sentencing terms are met; and made minor changes in style. Amendment effective April 17, 2009.

*2007 Amendments — Composite Section:* Chapter 180 in (1) in third sentence inserted "tribal identification card"; and made minor changes in style. Amendment effective October 1, 2007.

Chapter 237 in (1) in second sentence at beginning of bracketed language inserted "last four digits of the applicant's". Amendment effective April 24, 2007, and terminates on occurrence of contingency.

*2003 Amendment:* Chapter 80 in (1) near beginning of fifth sentence and in (9) near beginning after "It is" deleted "unlawful and"; in (2) at end of first sentence and near middle of second sentence substituted "by telephone, by mail, on the internet, or by other electronic means" for "by mail"; in (5) at end deleted "and by an employee or officer of the department or by a license agent or an authorized representative of the license agent"; in (6) near beginning of first sentence after "subscribe to" inserted "or make"; inserted (7) concerning unlawful conduct by a nonresident applying for enumerated resident licenses and permits; in (8)(a) after "affirming to" inserted "or making" and after "resident license" inserted "or who is convicted of applying for or purchasing a resident license in violation of subsection (7)"; and made minor changes in style. Amendment effective July 1, 2003.

*Saving Clause:* Section 8, Ch. 80, L. 2003, was a saving clause.

*Severability:* Section 9, Ch. 80, L. 2003, was a severability clause.

*2001 Amendment:* Chapter 321 in (1) in second sentence inserted brackets around "social security number"; in (9) inserted brackets; and in (10) inserted brackets. Amendment effective April 21, 2001.

*1999 Amendment:* Chapter 29 in (1) in second sentence near beginning inserted "social security number"; inserted (9) requiring applicant's social security number to be kept confidential; and inserted (10) requiring deletion of applicant's social security number after 5 years. Amendment effective July 1, 1999.

*Applicability:* Section 7, Ch. 29, L. 1999, provided: "(1) [Sections 2 and 3] [61-5-107 and 61-5-111] apply to driver's licenses issued on or after October 1, 2000.

(2) [Sections 4 and 5] [87-2-106 and 87-2-202] apply to license years beginning on or after March 1, 2000."

*1997 Amendment:* Chapter 187 in (1), in second sentence before "address", inserted "street", after "residence" substituted "mailing" for "and post-office", and after "Montana" substituted "and status as" for "whether"; and made minor changes in style. Amendment effective March 1, 1998.

*1995 Amendment:* Chapter 417 in (1), in second sentence, substituted "address of permanent residence" for "place of residence"; in (3), in two places, substituted "87-2-102(7)" for "87-2-102(4)"; in (6), near end, substituted "subsection" for "statute"; and made minor changes in style. Amendment effective July 1, 1995.

*Severability:* Section 37, Ch. 417, L. 1995, was a severability clause.

*1991 Amendments:* Chapter 277 deleted former (7) that read: "(7) The department may bring an action to prosecute a violation of this section within 3 years of the date of application for licensure". Amendment effective July 1, 1991.

Chapter 321 in (1), near middle of second sentence before "length", inserted "qualifying", after "time" inserted "as a resident", and inserted third through fifth sentences regarding documentation required for license application and providing penalty for sale of a license to an applicant who fails to produce required identification; inserted (7) establishing penalty for affirming to a false statement; inserted (8) establishing penalty for assisting an unqualified applicant in obtaining a resident license; and made minor changes in style. Amendment effective July 1, 1991.

*1989 Amendments:* Chapter 83 in (4), after "hunting license", substituted "or fishing license" for "and fishing license" and at end changed "licenses" to "license".

Chapter 416 inserted (7) relating to prosecution of license application violation within 3 years. Amendment effective April 3, 1989.

*1987 Amendment:* In (1), in exception clause of last sentence, substituted "subsections (2) through (4)" for "subsections (2) and (3)"; and inserted (4) allowing purchase of license by spouse or sibling.

*1985 Amendment:* In (1) in third sentence, changed "subsection (2)" to "subsections (2) and (3)"; at beginning of (2), inserted exception clause; and inserted (3) relating to application for a license under 87-2-102(4).

*1983 Amendment:* In (1), inserted exception clause at beginning of last sentence; inserted (2) providing for issuance of licenses by mail; inserted (3) requiring license to be subscribed to by the licensee and the licensing authority; and in (4), in first sentence after "subscribe to" substituted "any statement, on any application or license, that is materially false" for "any application containing a material false statement", and in second sentence before "license" substituted "the" for "if and any".

**Administrative Rules**

ARM 12.3.209 Regulations for issuance of fish and game licenses.
ARM 12.3.502 Forms of identification.

**Case Notes**

*No Crime in Assisting Montana Undercover Agent to Obtain Resident License:* Ruiz was charged by Montana officers in a fish and game sting operation with assisting an unqualified person in obtaining a resident license. Ruiz moved for a directed verdict, but the motion was denied. One of the officers had posed as a hunter from Iowa, and Ruiz allowed the officer to use Ruiz's Montana address to obtain a resident license. However, as a Montana resident, the officer was in fact qualified to receive a resident license, so the state did not meet the burden of proving that Ruiz assisted an unqualified person in obtaining a resident license. Ruiz's directed verdict motion should have been granted, and the case was remanded for entry of an amended judgment dismissing the charge. St. v. Ruiz, 2004 MT 135, 321 M 357, 91 P3d 565 (2004).

*Residency Requirements for Obtaining Hunting or Fishing License Not Unconstitutionally Vague:* Britton was charged in Justice's Court with various hunting license-related crimes, but moved for dismissal on grounds that Montana's residency laws are so vague as to violate due process. The motion was denied. Following conviction, Britton asserted in District Court that 87-2-102, defining residency for hunting and fishing license purposes, is vague because other statutes define residency differently for purposes such as voting, dissolution of marriage, college attendance, and taxation. The District Court held that fish and game residency requirements are neither vague nor ambiguous and affirmed the Justice's Court conviction. On appeal, Britton asserted that the various statutory definitions of residency might confuse a person of ordinary intelligence and operate as a trap for the innocent. However, the Supreme Court affirmed, noting that the other statutory residency provisions to which Britton referred clearly provide that those provisions are for specific acts or purposes other than obtaining a hunting license and that it strained credulity to suggest that a person of ordinary intelligence would be confused into thinking that any of those statutes define residency for the purpose of obtaining a hunting license. Britton failed to establish that the residency requirements for obtaining a hunting or fishing license are facially unconstitutional on vagueness grounds. St. v. Britton, 2001 MT 141, 306 M 24, 30 P3d 337 (2001).

*False Affirmation of Six-Month Residency Requirement Distinct From Constitutionality of Residency Requirement:* Still falsely affirmed on his applications for hunting licenses that he had been a resident of the state for 6 months. The Supreme Court declined to address the constitutionality of the residency requirement imposed by 87-2-102 because Still violated this section, a separate statute. The Supreme Court held that if Still wanted to challenge the constitutionality of the residency requirement, he should have filled out the application truthfully and then challenged the subsequent denial of the license. St. v. Still, 273 M 261, 902 P2d 546, 52 St. Rep. 965 (1995).

*Bear Killed Unlawfully — State Prosecution Barred:* Defendant was charged in state District Court for subscribing to a materially false statement on an application for a grizzly bear trophy license and was charged and convicted in federal District Court for violating the Endangered Species Act for taking the same trophy. The federal court and the state court have concurrent jurisdiction, and the state prosecution is barred as it is based on an offense arising out of the same transaction as the federal charge. St. v. Sword, 229 M 370, 747 P2d 206, 44 St. Rep. 2053 (1987), distinguishing St. v. Pierce, 199 M 57, 647 P2d 847 (1982), and Blockburger v. U.S., 284 US 299, 76 L Ed 306, 52 S Ct 180 (1932).

*Refusal to Sell License — Liability:* The Director (the Fish and Game Warden under former law) is not liable in damages for failure to sell fishing licenses to a particular person. Meinecke v. McFarland, 122 M 515, 206 P2d 1012 (1949).

### 87-2-107. License form.

**Compiler's Comments**

*2015 Amendment:* Chapter 44 at end inserted "or signed electronically." Amendment effective February 18, 2015.

*2003 Amendment:* Chapter 80 at end of second sentence after "department" deleted "and be countersigned by the officer or person issuing the same"; and made minor changes in style. Amendment effective July 1, 2003.

*Saving Clause:* Section 8, Ch. 80, L. 2003, was a saving clause.

*Severability:* Section 9, Ch. 80, L. 2003, was a severability clause.

### 87-2-111. Termination of license.

**Compiler's Comments**

*1985 Amendment:* Inserted exception clause at end of section.

*1983 Amendment:* Substituted "the last day of February" for "April 30".

### 87-2-113. Application fees.

**Compiler's Comments**

*2017 Amendment:* Chapter 349 in (2)(a) and (2)(b) after "participates in" substituted "the bonus point system" for "a preference system" and at end deleted "to fund the administration of the preference system". Amendment effective May 7, 2017.

*2013 Amendment:* Chapter 298 in (1)(a) inserted exception clause and substituted "application fee" for "drawing fee with each application submitted"; inserted (1)(b) regarding special license application fees; in (2)(a) and (2)(b) substituted "per species" for "for each application form"; in (3) at beginning substituted "Application fees" for "Drawing fees"; in (4) substituted "an application fee" for "a drawing fee"; and made minor changes in style. Amendment effective March 1, 2014.

*2005 Amendment:* (Version effective March 1, 2006) Chapter 585 in (1) increased drawing fee from $3 to $5. Amendment effective March 1, 2006.

*1999 Amendment:* Chapter 533 inserted (2) concerning participation in preference system; at beginning of (3) substituted "Drawing fees collected pursuant to this section" for "This fee"; and made minor changes in style. Amendment effective October 1, 2000.

*1991 Amendment:* In (1) increased species drawing fee from $2 to $3. Amendment effective March 1, 1992.

*Preamble:* The preamble attached to Ch. 592, L. 1991, provided: "WHEREAS, an increase in Montana hunting and fishing license fees is necessary to raise revenue in order for the Department of Fish, Wildlife, and Parks to meet an anticipated revenue shortfall."

*1983 Amendment:* Substituted reference to state special revenue fund for reference to earmarked revenue fund.

### 87-2-115. Nonresident elk and deer license preference point system.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 2, Ch. 487, L. 2023. Amendment effective March 1, 2024.

*2021 Amendment:* Chapter 552 in (2) increased payment from $50 to $100; in (3)(a) at end inserted "except a nonresident hunting with an outfitter licensed pursuant to Title 37, chapter 47, part 3, and providing the documentation required in subsection (8), may purchase two preference points per license year. No applicant may accumulate more than three preference points total"; in (3)(b) changed the date for license purchase from September 30 to December 31 and deleted second sentence that read: "The department shall delete an applicant's accumulated preference points if the applicant does not apply for a Class B-10 or Class B-11 license for 3 consecutive years"; in (4) substituted current (4)(a) and (b) relating to deletion of an applicant's accumulated preference points for text former that read: "Except as provided in subsection (3)(b), the department may not delete an applicant's accumulated preference points unless the applicant obtains the license applied for, in which case the department shall delete the applicant's accumulated preference points"; in (7) in third sentence at end substituted "The department shall calculate the average rounded to the third decimal place" for "The department shall use any fraction that results from the calculation of an average when determining that priority"; inserted (8) relating to written affirmations for a nonresident purchasing a second preference point; inserted (9) relating to allocation of fees collected from a nonresident purchasing a second preference point; and made minor changes in style. Amendment effective March 1, 2022.

*2019 Amendments — Composite Section:* Chapter 221 in (2) at beginning deleted "In addition to payment of any fees established in 87-2-113, 87-2-505, and 87-2-510"; and made minor changes in style. Amendment effective March 1, 2020.

Chapter 280 in (3)(b) near end of second sentence substituted "of that license year" for "prior to the applicable license year" and in last sentence substituted "3 consecutive years" for "2 consecutive years"; and in (7) in last sentence after "department shall" substituted "use" for "consider". Amendment effective March 1, 2020.

*Effective Date:* Section 4, Ch. 391, L. 2011, provided that this section is effective July 1, 2011.

**Administrative Rules**

ARM 12.3.604 Outfitter preference points.

## 87-2-116. Base hunting license prerequisite for other hunting licenses — fee.

**Compiler's Comments**

*2019 Amendment:* Chapter 63 in (2) and (3) after "hunting access" deleted "enhancement" and at end substituted "authorized in 87-1-265" for "established in 87-1-265 through 87-1-267". Amendment effective March 19, 2019.

*Effective Date:* Section 42, Ch. 449, L. 2015, provided that this section is effective March 1, 2016.

## 87-2-117. License bonus point system.

**Compiler's Comments**

*2021 Amendment:* Chapter 95 in (2)(b) at beginning inserted "if the person is otherwise eligible to apply for a license, tag, or permit"; and made minor changes in style. Amendment effective March 1, 2022.

*2019 Amendments — Composite Section:* Chapter 208 in (7)(a) at beginning inserted exception clause; inserted (7)(b) concerning the calculation of bonus points for persons applying for licenses, tags, or permits as a party; and made minor changes in style. Amendment effective July 1, 2019.

Chapter 360 in (1) near middle before "license" deleted "hunting". Amendment effective March 1, 2020.

*Effective Date:* Section 7, Ch. 349, L. 2017, provided: "[This act] is effective on passage and approval." Approved May 7, 2017.

## 87-2-119. Electronic validation of hunting licenses and tags — rulemaking.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 1, Ch. 71, L. 2023. Amendment effective March 16, 2023.

*2019 Amendment:* Chapter 238 in (3) at beginning of second sentence inserted exception clause; and made minor changes in style. Amendment effective October 1, 2019.

*Effective Date:* Section 5, Ch. 75, L. 2017, provided: "[This act] is effective on passage and approval." Approved March 15, 2017.

## 87-2-121. Lawful method of hunting on landowner's private property.

**Compiler's Comments**

*Preamble:* The preamble attached to Ch. 164, L. 2005, provided: "WHEREAS, Montanans cherish the rights that have been reserved to them in the Montana Constitution; and

WHEREAS, among those cherished rights are the right to acquire and possess property in all lawful ways and the opportunity to harvest wild game animals."

*Effective Date:* Section 3, Ch. 164, L. 2005, provided that this section is effective on passage and approval. Approved April 7, 2005.

## 87-2-124. Option to direct limited drawing refunds to block management program.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 17, Ch. 166, L. 2023. Amendment effective October 1, 2023.

*Effective Date:* Section 4, Ch. 106, L. 2019, provided: "[This act] is effective March 1, 2022."

**87-2-125. Eligibility standards for licenses or permits obtained by telephone, mail, or electronic means — rulemaking.**

**Compiler's Comments**

*Saving Clause:* Section 8, Ch. 80, L. 2003, was a saving clause.

*Severability:* Section 9, Ch. 80, L. 2003, was a severability clause.

*Effective Date:* Section 10, Ch. 80, L. 2003, provided: "[This act] is effective July 1, 2003."

**87-2-126. Provisional hunter safety and education certificate for person with developmental disability — conditions of licensure — definition.**

**Compiler's Comments**

*Effective Date:* Section 4, Ch. 68, L. 2009, provided that this section is effective March 1, 2010.

**87-2-127. Trapper education required.**

**Compiler's Comments**

*Effective Date:* Section 8, Ch. 170, L. 2021, provided: "[This act] is effective March 1, 2022."

**87-2-130. Aquatic invasive species prevention pass.**

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 1, Ch. 318, L. 2023. Amendment effective May 1, 2023.

*2019 Amendment:* Chapter 356 in (1) near middle after "person" inserted "who is 16 years of age or older"; in (3) decreased the fee for a pass to $7.50; and made minor changes in style. Amendment effective March 1, 2020.

*Termination Provision Removed:* Section 14, Ch. 356, L. 2019, amended sec. 21, Ch. 387, L. 2017, to remove the termination of this section. Effective May 7, 2019.

*Effective Date:* Section 19(1), Ch. 387, L. 2017, provided that this section is effective May 15, 2017. However, Ch. 387, L. 2017, was not signed and approved until May 18, 2017.

*Termination:* Section 21(1), Ch. 387, L. 2017, provided that this section terminates February 29, 2020.

## Part 2
## Wildlife Conservation License

**87-2-201. Conservation license required and prerequisite for other licenses.**

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 13, Ch. 507, L. 2023. Amendment effective July 1, 2023.

*2019 Amendment:* Chapter 221 in (1) after "87-2-803(6)" inserted "and 87-2-815" and after "for any person to purchase" inserted "or apply for". Amendment effective March 1, 2020.

*2009 Amendment:* Chapter 2 near beginning substituted "87-2-803(6)" for "87-2-803(5)"; and made minor changes in style. Amendment effective October 1, 2009.

*1989 Amendment:* At beginning inserted exception clause; and made minor change in style. Amendment effective February 24, 1989.

**Attorney General's Opinions**

*Game Harvesting — Game Ranch:* The Fish and Game Commission (now Fish, Wildlife, and Parks Commission) does not have the authority to regulate the hunting and killing of privately owned game through the imposition of licensing requirements on individual hunters or open and closed seasons. 36 A.G. Op. 112 (1976).

**87-2-202. Application — fee.**

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 14, Ch. 507, L. 2023. Amendment effective July 1, 2023.

*2021 Amendments — Composite Section:* Chapter 85 in (1) in second sentence before "street address" deleted "occupation"; and made minor changes in style. Amendment effective March 1, 2022.

Chapter 563 in (3)(a) and (3)(b) at end substituted "voluntary search and rescue donation" for "search and rescue surcharge"; and inserted (3)(c) regarding a written election not to pay the donation. Amendment effective March 1, 2022.

*2015 Amendment:* Chapter 449 in (1) near beginning and at end substituted "87-2-817(2)" for "87-2-803(12)"; deleted former (3)(c), (3)(d), and (4) that read: "(c) In addition to the fee in subsection

(3)(a), the first time in any license year that a resident uses the wildlife conservation license as a prerequisite to purchase a hunting license, an additional hunting access enhancement fee of $2 is assessed. The additional fee may be used by the department only to encourage enhanced hunting access through the hunter management and hunting access enhancement programs established in 87-1-265 through 87-1-267. The wildlife conservation license must be marked appropriately when the hunting access enhancement fee is paid. The resident hunting access enhancement fee is chargeable only once during any license year.

(d) In addition to the fee in subsection (3)(b), the first time in any license year that a nonresident uses the wildlife conservation license as a prerequisite to purchase a hunting license, an additional hunting access enhancement fee of $10 is assessed. The additional fee may be used by the department only to encourage enhanced hunting access through the hunter management and hunting access enhancement programs established in 87-1-265 through 87-1-267. The wildlife conservation license must be marked appropriately when the hunting access enhancement fee is paid. The nonresident hunting access enhancement fee is chargeable only once during any license year.

(4) Licenses issued are void after the last day of February next succeeding their issuance"; and made minor changes in style. Amendment effective March 1, 2016.

*2011 Amendment:* Chapter 258 in (1) deleted former last sentence that read: "It is unlawful and a misdemeanor for a license agent to sell a wildlife conservation license to an applicant who fails to produce the required identification at the time of application for licensure." Amendment effective October 1, 2011.

*Preamble:* The preamble attached to Ch. 258, L. 2011, provided: "WHEREAS, the 2007 Legislature passed House Joint Resolution No. 16, urging that revision of the criminal codes within Title 87 of the Montana Code Annotated be given priority; and

WHEREAS, House Joint Resolution No. 16 noted that practitioners, judges, and citizens find that the criminal codes intertwined within the fish and game laws in Title 87 are difficult to read, understand, and prosecute; and

WHEREAS, House Joint Resolution No. 16 directed that revision of the Title 87 criminal code should not include policy changes to current laws and should adhere to the intent of the legislatures that crafted the laws; and

WHEREAS, in 2008, the Director of Fish, Wildlife, and Parks appointed a Title 87 criminal code revision working group, consisting of Justices of the Peace, County Attorneys, an Assistant Attorney General, legal counsel and the enforcement administrator of the Department of Fish, Wildlife, and Parks, and legislative staff; and

WHEREAS, the working group met numerous times and spent countless hours crafting a revision that makes the Title 87 criminal code more understandable without making substantive or policy changes to present law; and

WHEREAS, revision of the fish and game criminal statutes will benefit the hunting and fishing public, magistrates, and prosecutors by codifying crimes and penalties in a separate chapter of Montana law, rather than being intertwined throughout Title 87."

*Saving Clause:* Section 131, Ch. 258, L. 2011, was a saving clause.

*Severability:* Section 132, Ch. 258, L. 2011, was a severability clause.

*2010 Amendment by Initiative:* Initiative Measure No. 161, proposed by initiative petition and approved at the general election held November 2, 2010, in (3)(d) in first sentence after "hunting license" deleted "except a variably priced outfitter-sponsored Class B-10 or Class B-11 license issued under 87-1-268". Amendment effective March 1, 2011.

*2007 Amendments — Composite Section:* Chapter 180 in (1) in third sentence inserted "a tribal identification card"; and made minor changes in style. Amendment effective October 1, 2007.

Chapter 237 in (1) in second sentence at beginning of bracketed language inserted "last four digits of the applicant's". Amendment effective April 24, 2007, and terminates on occurrence of contingency.

Chapter 452 in (1) near beginning of first sentence and at end of fourth sentence after "87-2-803(12)" inserted reference to 87-2-805(5) and near middle of fifth sentence after "sell" inserted "or give". Amendment effective May 8, 2007, and terminates February 28, 2009.

*2005 Amendments — Composite Section:* Chapter 573 in (1) at beginning inserted exception clause and in fourth sentence at end inserted "or to receive a free wildlife conservation license pursuant to 87-2-803(12)". Amendment effective May 2, 2005.

(Version effective March 1, 2006) Chapter 585 in (3)(a) increased resident wildlife conservation license fee from $6.25 to $8; and in (3)(b) increased nonresident wildlife conservation license fee from $9.25 to $10. Amendment effective March 1, 2006.

*Termination Provision Repealed:* Section 4, Ch. 235, L. 2005, repealed sec. 9, Ch. 216, L. 2001, that terminated subsections (3)(c) and (3)(d) of this section on March 1, 2006. Effective April 15, 2005.

*2003 Amendments — Composite Section — Coordination:* (Version effective March 1, 2004) Chapter 534 in (3)(a) increased fee from $4 to $4.25 with a 25-cent search and rescue surcharge; in (3)(b) increased fee from $7 to $7.25 with a 25-cent search and rescue surcharge; and made minor changes in style. Amendment effective March 1, 2004.

Chapter 596 in (3)(a) increased fee from $4 to $6; and in (3)(b) increased fee from $7 to $9. Amendment effective March 1, 2004.

Pursuant to sec. 10, Ch. 596, L. 2003, a coordination section, in (3)(a) and (3)(b) increased fees by 25 cents.

*Preamble:* The preamble attached to Ch. 596, L. 2003, provided: "WHEREAS, the Department of Natural Resources and Conservation presently authorizes the public to use state school trust land through individual recreational use licenses; and

WHEREAS, the primary recreational uses of state school trust land are hunting and fishing; and

WHEREAS, the Department of Natural Resources and Conservation and the Department of Fish, Wildlife, and Parks wish to provide a more efficient system for authorizing public recreational use for hunting, fishing, and trapping on state trust land and concurrently provide greater benefit to the institutional beneficiaries of the trust; and

WHEREAS, the Department of Fish, Wildlife, and Parks has the discretionary authority in section 87-1-209, MCA, to enter into an agreement to compensate state trust land beneficiaries for the use and impacts associated with hunting, fishing, and trapping on legally accessible state trust land as defined by department of natural resources and conservation rule; and

WHEREAS, the Department of Fish, Wildlife, and Parks needs additional revenue to offset the cost of an agreement with the Department of Natural Resources and Conservation to compensate state trust land beneficiaries for the use and impacts associated with hunting, fishing, and trapping on legally accessible state trust land; and

WHEREAS, the Department of Natural Resources and Conservation and the Department of Fish, Wildlife, and Parks have reached an agreement that, given the legislative authority, they intend to enter into an agreement for the recreational use of school trust land parcels for hunting, fishing, and trapping purposes."

*Severability:* Section 11, Ch. 596, L. 2003, was a severability clause.

*2001 Amendments — Composite Section:* Chapter 216 inserted (3)(c) concerning additional $2 resident hunting access enhancement fee; and inserted (3)(d) concerning additional $10 nonresident hunting access enhancement fee. Amendment effective March 1, 2002, and terminates March 1, 2006.

Chapter 321 in (1) in second sentence inserted brackets around "social security number"; in (5) inserted brackets; and in (6) inserted brackets. Amendment effective April 21, 2001.

Chapter 528 in (3)(b) increased nonresident wildlife conservation license fee from $5 to $7. Amendment effective March 1, 2002.

*Preamble:* The preamble attached to Ch. 216, L. 2001, provided: "WHEREAS, the Private Land/Public Wildlife Advisory Council is charged with the responsibility to make suggestions for funding, modification, or improvement of the hunting access enhancement program; and

WHEREAS, although the hunting access enhancement program has enjoyed considerable success to date in providing greater opportunities for Montana hunters, the Private Land/Public Wildlife Advisory Council recognizes the potential to increase hunting access through expansion of the program; and

WHEREAS, increasing the size of the current program through a once-a-season hunting access enhancement fee on resident and most nonresident hunters would provide revenue to allow greater landowner incentives, improve hunting access to private and public lands, improve program management and services, increase upland bird hunting opportunities, and provide for future increased program costs because of inflation."

*1999 Amendment:* Chapter 29 in (1) in second sentence near beginning inserted "social security number"; inserted (5) requiring applicant's social security number to be kept confidential; and inserted (6) requiring deletion of applicant's social security number after 5 years. Amendment effective July 1, 1999.

*Applicability:* Section 7, Ch. 29, L. 1999, provided: "(1) [Sections 2 and 3] [61-5-107 and 61-5-111] apply to driver's licenses issued on or after October 1, 2000.

(2) [Sections 4 and 5] [87-2-106 and 87-2-202] apply to license years beginning on or after March 1, 2000."

*1997 Amendment:* Chapter 187 in (1), in first sentence after "occupation," substituted "street address of permanent residence, mailing address" for "place of residence, post-office address", after "Montana" substituted "and status as" for "state whether the applicant is", and near end substituted "signed" for "subscribed"; in (2), after "licenses", substituted "issued in a form determined by the department" for "in the form of tags or stamps issued to a holder of a wildlife conservation license", after "must be" deleted "affixed to or", and after "recorded" deleted "on the wildlife conservation license"; and made minor changes in style. Amendment effective March 1, 1998.

*1991 Amendments:* Chapter 321 in (1), near middle of second sentence before "length", inserted "the qualifying" and after "time" inserted "as a resident", in third sentence, before "driver's license", inserted "valid Montana", inserted reference to driver's examiner's identification card, and inserted language regarding required information specified by Department, and inserted fourth and fifth sentences regarding documentation required for license application and making it unlawful for an agent to sell a conservation license without adequate documentation; and made minor changes in style. Amendment effective July 1, 1991.

Chapter 592 in (3)(a), after "Resident", deleted "and nonresident" and increased wildlife conservation license fee from $2 to $4; and inserted (3)(b) establishing $5 nonresident wildlife conservation license fee. Amendment effective March 1, 1992.

*Preamble:* The preamble attached to Ch. 592, L. 1991, provided: "WHEREAS, an increase in Montana hunting and fishing license fees is necessary to raise revenue in order for the Department of Fish, Wildlife, and Parks to meet an anticipated revenue shortfall."

*1983 Amendment:* In (4), substituted "the last day of February" for "April 30".

*1981 Amendment:* Changed fee in (3) from "$1" to "$2".

**Case Notes**

*Collection of Social Security Number for Issuance of Conservation License Rationally Related to Legitimate State Interests — Right to Privacy Not Violated:* Plaintiffs contended that the state's collection of a partial Social Security number as a condition for issuance of a wildlife conservation license violated the fundamental right to privacy. After concluding that plaintiffs' privacy rights were not implicated, the Supreme Court applied rational basis review and held that the state's interest in collecting the last four digits of Social Security numbers from applicants for wildlife conservation licenses was legitimate and rationally related to the state's interest in maintaining access to federal funding and federal tools for locating parents owing child support under 42 U.S.C. 666(a)(13). Thus, the District Court correctly denied plaintiffs' request that they not be required to supply a Social Security number when applying for a wildlife conservation license. Mont. Shooting Sports Ass'n, Inc. v. St., 2010 MT 8, 355 Mont. 49, 224 P.3d 1240.

### 87-2-204. Disposition of conservation license fees.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 15, Ch. 507, L. 2023. Amendment effective July 1, 2023.

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

*1983 Amendment:* Substituted reference to state special revenue fund for reference to earmarked revenue fund.

## Part 3
## Fishing Licenses

**Part Case Notes**

*Constitutionality:* The disparity in the treatment of residents and nonresidents under 87-2-505 is not an unconstitutional discrimination because it infringes upon no fundamental rights and therefore does not violate the due process or equal protection clauses; nor is the right to hunt for sport a privilege or immunity of citizens of the several states that Montana is required to grant equally to residents and nonresidents under Art. IV, sec. 2, U.S. Const. Mont. Outfitters Action Group v. Fish & Game Comm'n, 417 F. Supp. 1005 (D.C. Mont. 1976), affirmed in Baldwin v. Fish and Game Comm'n, 436 US 371, 56 L Ed 2d 354, 98 S Ct 1852 (1978).

**Part Law Review Articles**

Montana Outfitters v. Fish and Game Commission: Of Elk and Equal Protection, Ramlow, 38 Mont. L. Rev. 387 (1977).

### 87-2-301. Class A—resident fishing license.

**Compiler's Comments**

*2015 Amendment:* Chapter 449 near beginning substituted "$21" for "$18". Amendment effective March 1, 2016.

*2005 Amendment:* (Version effective March 1, 2006) Chapter 585 near beginning after "fee of" substituted "$18 is entitled to" for "$11 beginning March 1, 1992, and $13 beginning March 1, 1994, shall" and near end after "rod as" substituted "prescribed by rules" for "authorized by regulations"; and made minor changes in style. Amendment effective March 1, 2006.

*1991 Amendment:* Increased resident fishing license fee from $9.50 to $11 beginning March 1, 1992, and to $13 beginning March 1, 1994. Amendment effective March 1, 1992.

*Preamble:* The preamble attached to Ch. 592, L. 1991, provided: "WHEREAS, an increase in Montana hunting and fishing license fees is necessary to raise revenue in order for the Department of Fish, Wildlife, and Parks to meet an anticipated revenue shortfall."

*1989 Amendment:* Changed "$9" to "$9.50". Amendment effective July 1, 1989.

*Applicability:* Section 11, Ch. 601, L. 1989, provided that this section applies to licenses for fishing seasons that begin on or after March 1, 1990.

*1985 Amendment:* Increased license fee from $8 to $9 effective March 1, 1986.

*1983 Amendment:* Increased license fee from $7 to $8 effective March 1, 1984.

*1981 Amendment:* Changed fee from "$5" to "$7".

### 87-2-302. Class B—nonresident fishing license.

**Compiler's Comments**

*2021 Amendment:* Chapter 353 increased nonresident fishing license fee from $86 to $100. Amendment effective March 1, 2022.

*2015 Amendment:* Chapter 449 near beginning substituted "$86" for "$60". Amendment effective March 1, 2016.

*2001 Amendment:* Chapter 528 after "sum of" substituted "$60" for "$40 beginning March 1, 1992, and $45 beginning March 1, 1994"; and made minor changes in style. Amendment effective March 1, 2002.

*1991 Amendment:* Increased nonresident fishing license fee from $36 to $40 beginning March 1, 1992, and to $45 beginning March 1, 1994. Amendment effective March 1, 1992.

*Preamble:* The preamble attached to Ch. 592, L. 1991, provided: "WHEREAS, an increase in Montana hunting and fishing license fees is necessary to raise revenue in order for the Department of Fish, Wildlife, and Parks to meet an anticipated revenue shortfall."

*1989 Amendment:* Changed "$35" to "$36". Amendment effective July 1, 1989.

*Applicability:* Section 11, Ch. 601, L. 1989, provided that this section applies to licenses for fishing seasons that begin on or after March 1, 1990.

*1985 Amendment:* Increased license fee from $30 to $35 effective March 1, 1986.

*1981 Amendment:* Changed fee from "$20" to "$30".

### 87-2-304. Class B-4—one-day nonresident fishing license.

**Compiler's Comments**

*2021 Amendment:* Chapter 353 in (1) substituted "$14" for "$25", substituted "1-day" for "2-day", and substituted "1 calendar day" for "2 days as indicated on the license"; inserted (2) concerning requirements for and limitations on the purchase of a 1-day nonresident fishing license; and made minor changes in style. Amendment effective March 1, 2022.

*2019 Amendment:* Chapter 221 near beginning after "as defined in 87-2-102" deleted "who is a holder of a valid wildlife conservation license". Amendment effective March 1, 2020.

*2015 Amendment:* Chapter 449 in middle substituted "$25" for "$15". Amendment effective March 1, 2016.

*2001 Amendment:* Chapter 528 after "sum of" increased fee amount from $10 to $15; and made minor changes in style. Amendment effective March 1, 2002.

*1991 Amendment:* Increased 2-day nonresident fishing license fee from $8 to $10. Amendment effective March 1, 1992.

*Preamble:* The preamble attached to Ch. 592, L. 1991, provided: "WHEREAS, an increase in Montana hunting and fishing license fees is necessary to raise revenue in order for the Department of Fish, Wildlife, and Parks to meet an anticipated revenue shortfall."

*1985 Amendment:* Increased license fee from $6 to $8 effective March 1, 1986.

*1983 Amendment:* Increased license fee from $4 to $6 effective March 1, 1984.

*1981 Amendment:* Changed fee from "$2" to "$4"; and changed language from 1 day to 2 days throughout.

**87-2-305. Navigable waters subject to fishing rights.**

**Case Notes**

*Lakeside Property Dispute — Presumption That Grantee Takes Land to Low-Water Mark:* In a property dispute relating to a subdivided lakeside parcel, the defendant asserted ownership of all land between the high- and low-water marks on the lake. The Army Corps of Engineers previously declared that the lake was a nonnavigable intrastate body and not subject to the Corps' jurisdiction. The District Court held that the plaintiff owned the land between the high- and low-water marks of the lake bordering her property. On appeal, the Supreme Court held that Montana's public trust easement was not at issue, that a conveyance of riparian property by reference to a specific metes and bounds description along the high-water mark is insufficient alone to overcome the presumption of 70-16-201 that the grantee takes at least to the low-water mark, and that the District Court correctly held that the plaintiff's property included the disputed land between the high- and low-water marks of the lake. Ash v. Merlette, 2017 MT 305, 389 Mont. 486, 407 P.3d 304.

*Public Recreational Use Rights Statute — Constitutionality:* Following Curran and Hildreth decisions (see below), which held that the public trust doctrine provides the public with a constitutional right to use the bed and banks of navigable streams up to the high-water mark despite a landowner's fee title, the Legislature enacted 23-2-302 providing public recreational use of streams. Plaintiff filed suit requesting the court to declare the recreational use statute an unconstitutional taking or private property without just compensation. Plaintiff then appealed after the trial court upheld the statute's constitutionality and awarded the state summary judgment. The Supreme Court ruled unconstitutional 23-2-302(2)(d), (2)(e), and (2)(f), which provided the public a right to hunt big game, build duck blinds and boat moorages, and camp overnight so long as not within sight of an occupied dwelling or within 500 yard of an occupied dwelling, whichever is less. The court further held as unconstitutional 23-2-311(3)(e), which required a landowner to pay costs of constructing a portage route around artificial barriers. The public has a right of use of the bed and banks up to the high-water mark but only such use as is necessary to utilization of the water itself. Any use of the bed and banks must be of minimal impact. Galt v. St., 225 M 142, 731 P2d 912, 44 St. Rep. 103 (1987).

*Public Right to Use Beaverhead River for Recreational Purposes:* Following the decision in Mont. Coalition for Stream Access v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984), the Supreme Court held that: (1) the Beaverhead River is navigable for recreational purposes and the public has a right to use its bed and banks up to the ordinary high-water mark with limited right to portage across private property in order to bypass barriers in the water; (2) determination of navigability for title is not necessary; (3) the public does not have the right to trespass over private property in order to reach the state-owned waters; and (4) plaintiff's action did not constitute inverse condemnation because public use of waters, rather than title, was determined. Mont. Coalition for Stream Access, Inc. v. Hildreth, 211 M 29, 684 P2d 1088, 41 St. Rep. 1192 (1984).

*Determination of Public's Right to Use Dearborn River — Standing of Coalition of Citizens:* In action for determination of the public's right to use the Dearborn River, whether the Montana Coalition for Stream Access, Inc., had standing to bring suit was immaterial because the Department of State Lands (now Department of Natural Resources and Conservation) and the Department of Fish, Wildlife, and Parks were also plaintiffs. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984).

*Determining Public's Right to Use Dearborn River — Indispensable Parties:* Stream access coalition, the Department of State Lands (now Department of Natural Resources and Conservation), and the Department of Fish, Wildlife, and Parks sued landowner along the Dearborn River, seeking a determination of the public's right to use the river. The District Court did not err for failure to dismiss the plaintiffs' claims for failure to join indispensable parties. When litigation seeks vindication of a public right, those who may be adversely affected by a decision do not thereby become indispensable parties. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984).

*Navigability for Title Purposes — Federal Test — Dearborn River Navigable:* Federal law controlled the issue of whether the Dearborn River was, at the time Montana became a state, navigable for the purpose of determining title to its bed. Under federal law, rivers are navigable in law if they are navigable in fact, and they are navigable in fact if they were used or capable of being used, in their ordinary condition, as highways for commerce over which trade and travel were or could be conducted in the customary modes of trade and travel on the water at the time of the state's admission to the Union. Navigability in fact can be determined by using the log-floating test. That test was satisfied by evidence that in 1887, 2 years before Montana became a state, the Dearborn was used to float about 100,000 railroad ties and that in 1888 or 1889, one or two log drives a year were floated down the river, one of them containing 700,000 board feet. Title to the riverbed was thus in the federal government when Montana became a state in 1889 and was transferred to the State upon its admission to the Union. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984).

*Navigability for Title Purposes — Summary Judgment — Dearborn River:* The District Court properly granted the coalition for stream access and two state departments summary judgment on the issue of navigability of the Dearborn River in 1889 for title purposes. The affidavits and depositions of plaintiffs' two competent historians were admissible because the historians were qualified experts who provided evidence of the history of the river, their affidavits and depositions disclosed circumstantial guarantees of trustworthiness, and the facts and data they relied on were of a type reasonably relied on by experts in their field; the facts and data did not themselves have to be admissible. The affidavits of defendant landowner's witnesses were worthless, were not admissible, and did not create any genuine issue of material fact concerning the navigability of the river at the time Montana became a state in 1889. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984).

*Public Recreational Use Rights on Dearborn River — Limits:* Navigability for public use is governed by state law and is separate from the question of navigability under federal law for title purposes. The question is whether waters owned by the State under Art. IX, sec. 3(3), Mont. Const., are susceptible to recreational use by the public. The capability of use of the waters for recreational purposes determines the availability of the waters for recreational use by the public. Whether or not a private party owns the bed beneath the waters is irrelevant. The constitution and the Public Trust Doctrine bar a private party from interfering with the public's right to use of the surface of the waters owned by the State, and any surface waters that are capable of recreational use may be so used by the public without regard to streambed ownership or navigability for nonrecreational purposes. The public's recreational use right extends to the point of the high-water marks. The public does not have the right to cross over private property to reach waters upon which they have a recreational use right, though they may portage around barriers in the water in the least intrusive way possible, avoiding damage to any private property holder's rights. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984).

*Public Recreational Use of Dearborn River — No Inverse Condemnation:* Landowner along Dearborn River was sued by parties seeking a determination of the public's right to use the river for recreational uses. Landowner counterclaimed for inverse condemnation, basing the counterclaim on his claim to ownership of the riverbed. The Supreme Court held that the question of title to the bed was irrelevant to determining navigability for use by the public; that landowner had no claim to the waters; that since there was no claim to the waters, nothing was taken and thus there was no ground for an inverse condemnation claim; and that consequently, the District Court did not err in dismissing the counterclaim. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984).

*Title to and Public Recreation on Dearborn River — Ex Post Facto, Contract Clause, and Irrevocable Privileged Considerations:* The Supreme Court held that the State, not the landowner along the Dearborn River, held title to the bed of the river under the federal test of navigability (at the time Montana became a state) for purposes of determining title to the riverbed. The court also held that landowner had no right to exclude the public from recreational use of the waters of the Dearborn. Because of these holdings, landowner's questions relating to ex post facto laws, violation of the contract clause of the constitution, and irrevocable rights and privileges were not germane to the case. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984).

*Title to and Public Use of Dearborn River — Federal Commerce Clause Navigability Immaterial:* In action for determination of the public's right to use the Dearborn River, whether Montana has adopted the log-floating test of commercial navigability and whether the Dearborn is navigable under the federal commercial use test were immaterial because the question was one of recreational use or navigability, not commercial navigability. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984).

*Title to and Public Use of Dearborn River — Subject Matter Jurisdiction Found:* Landowner along the Dearborn River claimed the District Court lacked subject matter jurisdiction over action for determination of the public's right to use the river, basing his claim on the presumption that he held title to the riverbed and that the State had no power to strip him of that title under the guise of determining navigability of the waters over the riverbed. The claim lacked merit because the State holds title to the riverbed and the water flowing over it, so that there was no question of the District Court's subject matter jurisdiction. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984).

*Summary of Holdings in Litigation Over Hunting and Fishing Rights on Crow Indian Reservation:* "The explicit holdings of the Supreme Court in Montana v. United States, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981), and of the 9th Circuit Court of Appeals in United States v. State of Montana, 604 F.2d 1162 (9th Cir. 1979), to the extent not reversed by the Supreme Court, are as follows:

1. The Crow Tribe can proscribe all hunting and fishing by non-members on those lands described in 18 U.S.C. § 1165. Montana v. United States, 450 U.S. at 557, 101 S.Ct. at 1254.

2. The Crow Tribe, within 18 U.S.C. § 1165 lands, has power to regulate hunting and fishing by non-members of the tribe (whether Indian or non-Indian) subject to the following conditions:

(a) That the Crow Tribe lacks the power to impose criminal sanctions on non-Indians who violate its hunting and fishing regulations,

(b) That the exercise by the Crow Tribe of its power to regulate hunting and fishing by non-Indians must be within the constraints recognized by this court in Quechan Tribe of Indians v. Rowe, 531 F.2d 408 (9th Cir. 1976). Montana v. United States, 450 U.S. at 557, 101 S.Ct. at 1254; United States v. Montana, 604 F.2d at 1165, 1170.

3. The title to the bed and banks of the Big Horn is in the State of Montana. 450 U.S. at 556-57, 101 S.Ct. at 1253-54.

4. The Crow Tribe has no power to regulate hunting and fishing by non-members on non-member owned fee patent land located within the exterior boundaries of the Crow Reservation. Id. at 557, 101 S.Ct. at 1254.

5. The State of Montana cannot regulate hunting and fishing by members of the Crow Tribe within 18 U.S.C. § 1165 lands. 604 F.2d at 1172.

6. The State of Montana has the power to regulate hunting and fishing by non-members of the Crow Tribe within the exterior boundaries of the Crow Reservation subject to the following limitations:

(a) That such regulations of the State of Montana not regulate indirectly the hunting and fishing by members of the Crow Tribe on 18 U.S.C. § 1165 lands.

(b) That such regulations of the State of Montana must have as their purpose the conservation and proper management of game and fish and not to discriminate against, nor to impede, authorized regulation by the Crow Tribe. Id. at 1166.

7. Such rights as the State of Montana has to regulate fishing on the Big Horn River by the Crows and all others are not limited by either (a) the treaties of 1851 and 1868 (except to such extent as these treaties might acknowledge pertinent aboriginal title rights of the Crow Tribe not heretofore asserted or recognized in this litigation) or (b) the inherent sovereignty of the Crow Tribe. 604 F.2d at 1170-71." (Quoting from U.S. v. Mont., 686 F2d 766 (9th Cir. 1982), at pp. 768-769.)

*Tribal Regulation of Flathead Lake Usage:* Confederated Salish and Kootenai Tribes of the Flathead Reservation have authority to regulate federal common-law riparian rights of non-Indians who own reservation land bordering the south half of Flathead Lake. The Circuit Court held that the decision in Mont. v. U.S., 450 US 544, 67 L Ed 2d 493, 101 S Ct 1245 (1981), regarding ownership and control of the Bighorn River, was not controlling. The decision in Mont. Power Co. v. Rochester, 127 F2d 189 (9th Cir. 1942), was given deference under the principle of stare decisis. Rochester held that the United States holds title to the bed and banks of the south half of Flathead Lake in trust for the tribes. Confederated Salish & Kootenai Tribes of the Flathead Reservation v. Namen, 665 F2d 951 (9th Cir. 1982), followed in In re Estate of Hobbs, 2002 MT 85, 309 M 308, 46 P3d 594 (2002).

**Law Review Articles**

Public Use of the Banks and Beds of Montana Streams, Stone, 52 Mont. L. Rev. 107 (1991).

Colville Confederated Tribes v. Walton: Indian Water Rights and Regulation in the Ninth Circuit, Isham, 43 Mont. L. Rev. 247 (1982).

The Legal Background on Recreational Use of Montana Water, Stone, 32 Mont. L. Rev. 1 (1971).

The Remarkable Odyssey of Stream Access in Montana, Lane, 36 Pub. Land. & Resources L. Rev. 69 (2015).

Stream Access in Montana After Galt v. State, Hunter, 8 Pub. Land L. Rev. 177 (1987).

## 87-2-306. Paddlefish tags.

### Compiler's Comments

*2015 Amendment:* Chapter 449 substituted "holders of valid Class A, Class A-8, Class B, Class B-4, and Class B-5 fishing licenses" for "persons listed in subsection (2)"; deleted former (2) that read: "(2) The following persons may obtain paddlefish tags pursuant to this section:

(a) holders of valid Class A, Class A-8, Class B, Class B-4, and Class B-5 fishing licenses;

(b) residents under 15 years of age with a valid wildlife conservation license; and

(c) residents 62 years of age or older with a valid wildlife conservation license"; and made minor changes in style. Amendment effective March 1, 2016.

*2005 Amendment:* (Version effective March 1, 2006) Chapter 585 in (1) increased resident license fee from $5 to $6.50. Amendment effective March 1, 2006.

*2003 Amendments — Composite Section:* Chapter 84 in (2)(a) inserted "Class A-8"; and made minor changes in style. Amendment effective March 20, 2003.

Chapter 228 in (2)(a) after "Class B-4" inserted "and Class B-5"; and made minor changes in style. Amendment effective April 3, 2003.

*2001 Amendment:* Chapter 3 in (1) near beginning of first sentence after "tags to" substituted "persons listed in subsection (2)" for "holders of valid Class A, Class B, and Class B-4 fishing licenses"; inserted (2) listing persons eligible to obtain paddlefish tags; and made minor changes in style. Amendment effective February 7, 2001.

*1991 Amendment:* Increased resident paddlefish tag fee from $3 to $4 beginning March 1, 1992, and to $5 beginning March 1, 1994, and increased nonresident fee from $10 to $15. Amendment effective March 1, 1992.

*Preamble:* The preamble attached to Ch. 592, L. 1991, provided: "WHEREAS, an increase in Montana hunting and fishing license fees is necessary to raise revenue in order for the Department of Fish, Wildlife, and Parks to meet an anticipated revenue shortfall."

*1985 Amendment:* At end of first sentence, after "$3", inserted "for residents and $10 for nonresidents", effective March 1, 1986.

## 87-2-307. Class B-5—five-day nonresident fishing license.

### Compiler's Comments

*2021 Amendment:* Chapter 353 in (1) near middle substituted "5-day" for "10-day" and at end substituted "5 consecutive days" for "10 consecutive days as indicated on license"; inserted (2) concerning requirements for and limitations on the purchase of a 5-day nonresident fishing license; and made minor changes in style. Amendment effective March 1, 2022.

*2019 Amendment:* Chapter 221 near beginning after "as defined in 87-2-102" deleted "who is a holder of a valid wildlife conservation license". Amendment effective March 1, 2020.

*2015 Amendment:* Chapter 449 in middle substituted "$56" for "$43.50". Amendment effective March 1, 2016.

*Effective Date:* Section 8, Ch. 228, L. 2003, provided: "[This act] is effective on passage and approval." Approved April 3, 2003.

## 87-2-308. Class A-8—resident temporary fishing license.

### Compiler's Comments

*2019 Amendment:* Chapter 221 in (1) near beginning after "as defined in 87-2-102" deleted "who is a holder of a valid wildlife conservation license". Amendment effective March 1, 2020.

## 87-2-311. Free fishing weekends.

### Compiler's Comments

*2021 Amendment:* Chapter 16 inserted reference to Mother's Day weekend; and made minor changes in style. Amendment effective February 23, 2021.

*Effective Date:* Section 2, Ch. 316, L. 2011, provided that this section is effective on passage and approval. Approved May 5, 2011.

## Part 4
## Game Bird Licenses

**Part Case Notes**

*Constitutionality:* The disparity in the treatment of residents and nonresidents under 87-2-505 is not an unconstitutional discrimination because it infringes upon no fundamental rights and therefore does not violate the due process or equal protection clauses; nor is the right to hunt for sport a privilege or immunity of citizens of the several states that Montana is required to grant equally to residents and nonresidents under Art. IV, sec. 2, U.S. Const. Mont. Outfitters Action Group v. Fish & Game Comm'n, 417 F. Supp. 1005 (D.C. Mont. 1976), affirmed in Baldwin v. Fish & Game Comm'n, 436 US 371, 56 L Ed 2d 354, 98 S Ct 1852 (1978).

**Part Law Review Articles**

Montana Outfitters v. Fish and Game Commission: Of Elk and Equal Protection, Ramlow, 38 Mont. L. Rev. 387 (1977).

### 87-2-401. Class A-1—resident upland game bird license.

**Compiler's Comments**

*2005 Amendment:* (Version effective March 1, 2006) Chapter 585 near middle increased resident license fee from $6 to $7.50. Amendment effective March 1, 2006.

*1999 Amendment:* Chapter 533 after first "older" inserted "or who will turn 12 years old before or during the season for which the license is issued" and after "holder" inserted "who is 12 years of age or older"; and made minor changes in style. Amendment effective October 1, 2000.

*1995 Amendments:* Chapter 32 in two places, after "game birds", deleted "cranes, rails, snipes, and mourning doves"; and made minor changes in style. Amendment effective March 1, 1996.

Chapter 417 near middle, after "holder to", deleted "pursue" and after "hunt" deleted "shoot, and kill"; and made minor changes in style. Amendment effective July 1, 1995.

*Severability:* Section 37, Ch. 417, L. 1995, was a severability clause.

*1987 Amendments:* Chapter 105 throughout section inserted "upland" before "game" and after "birds" inserted "cranes, rails, snipes, and mourning doves".

Chapter 636 increased fee from $4 to $6.

### 87-2-402. Class B-1—nonresident upland game bird license.

**Compiler's Comments**

*1999 Amendments — Composite Section:* Chapter 525 in (1) increased fee from $55 to $110; inserted (2) pertaining to the issuance of nonresident upland game bird licenses; inserted (3) requiring a report to the legislature on upland game bird populations if nonresident license limits are adopted; inserted (4) authorizing rule adoption for group applicant participation in drawing system; and made minor changes in style. Amendment effective March 1, 2000, and terminates January 1, 2003; however, the amendment in (1) was made permanent by Ch. 544.

Chapter 533 after first "older" inserted "or who will turn 12 years old before or during the season for which the license is issued" and after "holder" inserted "who is 12 years of age or older"; and made minor changes in style. Amendment effective October 1, 2000.

Chapter 544 increased fee from $55 to $110. Amendment effective March 1, 2000.

*1995 Amendments:* Chapter 32 in two places, after "game birds", deleted "cranes, rails, snipes, and mourning doves"; and made minor changes in style. Amendment effective March 1, 1996.

Chapter 417 near middle, after "holder to", deleted "pursue" and after "hunt" deleted "shoot, and kill"; and made minor changes in style. Amendment effective July 1, 1995.

*Severability:* Section 37, Ch. 417, L. 1995, was a severability clause.

*1991 Amendment:* Increased upland game bird license fee from $53 to $55. Amendment effective March 1, 1992.

*Preamble:* The preamble attached to Ch. 592, L. 1991, provided: "WHEREAS, an increase in Montana hunting and fishing license fees is necessary to raise revenue in order for the Department of Fish, Wildlife, and Parks to meet an anticipated revenue shortfall."

*1987 Amendments:* Chapter 105 throughout section inserted "upland" before "game" and after "birds" inserted "cranes, rails, snipes, and mourning doves".

Chapter 636 increased fee from $30 to $53.

**Administrative Rules**

ARM 12.9.305 Sale of nonresident upland game bird licenses.

## 87-2-403. Wild turkey tags and fee.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 16, Ch. 507, L. 2023. Amendment effective July 1, 2023.

*2015 Amendment:* Chapter 449 in (1) at end of first sentence deleted "or as set out in subsection (3)"; in (2) substituted "one-half of the nonresident fee" for "$55"; and deleted former (3) that read: "(3) Subject to the provisions of subsection (2), a person who is 62 years of age or older as provided in 87-2-801, certified as disabled under 87-2-803, or a resident minor as described in 87-2-805 may purchase a wild turkey tag upon presentation of that person's wildlife conservation license." Amendment effective March 1, 2016.

*2005 Amendments — Composite Section:* Chapter 150 in (2) in first sentence after "nonresident" inserted "except that a nonresident holder of a valid Class B-1, Class B-10, or Class B-11 license may purchase a wild turkey tag for $55"; and made minor changes in style. Amendment effective April 8, 2005.

(Version effective March 1, 2006) Chapter 585 in (2) increased resident license fee from $5 to $6.50. Amendment effective March 1, 2006.

*Termination Provision Repealed:* Section 1, Ch. 50, L. 2005, repealed sec. 12, Ch. 598, L. 1987, sec. 3, Ch. 319, L. 1991, and secs. 1 and 2, Ch. 241, L. 1993, which terminated amendments to this section March 1, 2006. Effective March 24, 2005.

*2001 Amendment:* (Version effective March 1, 2002) Chapter 528 in (1) substituted "nonresident wildlife conservation license" for "Class B-1 license"; and in (2) in first sentence substituted "$5 for a resident and $115 for a nonresident" for "$4 beginning March 1, 1992, and $5 beginning March 1, 1994, for residents and $13 for nonresidents".

(Version effective March 1, 2006) In (1) substituted "nonresident wildlife conservation license" for "Class B-1 license"; and in (2) in first sentence after "$5" inserted "for a resident and $105 for a nonresident".

*1995 Amendment:* Chapter 417 in (1), after "holder to", deleted "pursue", after "hunt" deleted "shoot, and kill", and near end substituted "commission" for "department"; and made minor changes in style. Amendment effective July 1, 1995.

*Severability:* Section 37, Ch. 417, L. 1995, was a severability clause.

*Extension of Termination Date:* Section 1, Ch. 241, L. 1993, amended sec. 12, Ch. 598, L. 1987, to provide that the wildlife habitat acquisition program terminates March 1, 2006. Section 2, Ch. 241, L. 1993, amended sec. 3, Ch. 319, L. 1991, to provide that the wildlife habitat acquisition program terminates March 1, 2006.

*1991 Amendment:* (Version effective March 1, 1992) In (2) increased resident turkey tag fee from $3 to $4 beginning March 1, 1992, and to $5 beginning March 1, 1994.

(Version effective March 1, 1996) In (2) increased turkey tag fee from $3 to $5. Amendments effective March 1, 1992.

*Preamble:* The preamble attached to Ch. 592, L. 1991, provided: "WHEREAS, an increase in Montana hunting and fishing license fees is necessary to raise revenue in order for the Department of Fish, Wildlife, and Parks to meet an anticipated revenue shortfall."

*Extension of Termination Date:* Section 3, Ch. 319, L. 1991, amended sec. 12, Ch. 598, L. 1987, to provide that the wildlife habitat acquisition program terminates March 1, 1996. Amendment effective April 2, 1991.

*1987 Amendment:* In (2) inserted nonresident fee and made minor change in phraseology.

*1985 Amendment:* In (1) inserted "or as set out in subsection (3)"; and inserted (3) removing turkey tag fee for certain applicants.

*1981 Amendment:* Changed fee in (2) from "$2" to "$3".

## 87-2-404. Three-day nonresident captive-reared bird hunting stamp.

**Compiler's Comments**

*2015 Amendment:* Chapter 449 at beginning inserted exception clause; and made minor changes in style. Amendment effective May 8, 2015.

*1999 Amendment:* Chapter 533 after first "older" inserted "or who will turn 12 years old before or during the season for which the license is issued" and after "holder" inserted "who is 12 years of age or older"; and made minor changes in style. Amendment effective October 1, 2000.

*1995 Amendment:* Chapter 417 near end, after "holder to", deleted "pursue" and after "hunt" deleted "shoot, and kill"; and made minor changes in style. Amendment effective July 1, 1995.

*Severability:* Section 37, Ch. 417, L. 1995, was a severability clause.

## 87-2-405. Class B-2—3-day nonresident upland game bird license.

**Compiler's Comments**

*Termination Provision Repealed:* Section 1, Ch. 35, L. 2019, repealed sec. 6, Ch. 204, L. 2013, which terminated this section June 30, 2019. Effective February 28, 2019.

*Effective Date:* Section 5, Ch. 204, L. 2013, provided: "[This act] is effective on passage and approval." Approved April 15, 2013.

*Termination:* Section 6, Ch. 204, L. 2013, provided: "[This act] terminates June 30, 2019."

## 87-2-411. Migratory game bird licenses — fees — disposition of proceeds.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 1, Ch. 626, L. 2023. Amendment effective March 1, 2024.

*2011 Amendment:* Chapter 258 in (1) deleted former first sentence that read: "A person 16 years of age or older may not hunt migratory game birds without first having obtained a valid migratory bird license from the department" and in two places before "license" inserted "migratory game bird". Amendment effective October 1, 2011.

*Preamble:* The preamble attached to Ch. 258, L. 2011, provided: "WHEREAS, the 2007 Legislature passed House Joint Resolution No. 16, urging that revision of the criminal codes within Title 87 of the Montana Code Annotated be given priority; and

WHEREAS, House Joint Resolution No. 16 noted that practitioners, judges, and citizens find that the criminal codes intertwined within the fish and game laws in Title 87 are difficult to read, understand, and prosecute; and

WHEREAS, House Joint Resolution No. 16 directed that revision of the Title 87 criminal code should not include policy changes to current laws and should adhere to the intent of the legislatures that crafted the laws; and

WHEREAS, in 2008, the Director of Fish, Wildlife, and Parks appointed a Title 87 criminal code revision working group, consisting of Justices of the Peace, County Attorneys, an Assistant Attorney General, legal counsel and the enforcement administrator of the Department of Fish, Wildlife, and Parks, and legislative staff; and

WHEREAS, the working group met numerous times and spent countless hours crafting a revision that makes the Title 87 criminal code more understandable without making substantive or policy changes to present law; and

WHEREAS, revision of the fish and game criminal statutes will benefit the hunting and fishing public, magistrates, and prosecutors by codifying crimes and penalties in a separate chapter of Montana law, rather than being intertwined throughout Title 87."

*Saving Clause:* Section 131, Ch. 258, L. 2011, was a saving clause.

*Severability:* Section 132, Ch. 258, L. 2011, was a severability clause.

*2005 Amendment:* (Version effective March 1, 2006) Chapter 585 in (1) at end of second sentence increased resident license fee from $5 to $6.50. Amendment effective March 1, 2006.

*2003 Amendment:* Chapter 381 inserted (2) requiring funds received from the sale of migratory game bird licenses to be expended for the protection, conservation, and development of wetlands in Montana; and made minor changes in style. Amendment effective April 18, 2003.

*2001 Amendment:* Chapter 129 in second sentence inserted "a resident to purchase" and inserted third sentence establishing $50 license fee for nonresident. Amendment effective March 1, 2002.

*Termination Provision Repealed:* Section 2, Ch. 49, L. 2001, repealed sec. 4, Ch. 568, L. 1999, which terminated the amendments to this section February 28, 2002. Effective March 16, 2001.

*1999 Amendment:* Chapter 568 near beginning of first sentence after "person" substituted "16" for "15". Amendment effective March 1, 2000, and terminates February 28, 2002.

*Preamble:* The preamble attached to Ch. 568, L. 1999, provided: "WHEREAS, Montana's youth should be encouraged to take advantage of Montana's abundant outdoor recreational opportunities; and

WHEREAS, a person who learns early in life to fish and hunt responsibly and ethically is likely to continue that behavior throughout the person's life; and

WHEREAS, Montana's fishing and hunting heritage will be preserved for future generations as more youth are introduced to those sports; and

WHEREAS, providing an affordable combination license that allows a young person to fish and hunt upland game birds, deer, and elk will be an effective way to cultivate an appreciation for the state's wildlife resources among Montana's youth."

*1997 Amendment:* Chapter 187 in two places substituted "license" for "stamp". Amendment effective March 1, 1998.

*1995 Amendments:* Chapter 32 in two places substituted reference to migratory game birds for reference to waterfowl; deleted (2) that read: "(2) For the purpose of this section, the term "waterfowl" means wild ducks, wild geese, brant, and swans"; and made minor changes in style. Amendment effective March 1, 1996.

Chapter 417 after "older to" deleted "pursue" and after "hunt" deleted "shoot, or kill"; and made minor changes in style. Amendment effective July 1, 1995.

*Severability:* Section 37, Ch. 417, L. 1995, was a severability clause.

*1989 Amendment:* In (1) reduced age limit of persons who must obtain a waterfowl stamp to hunt waterfowl from 16 years to 15 years. Amendment effective April 4, 1989.

## Part 5
## Game Animal Licenses

### Part Case Notes

*Constitutionality:* The disparity in the treatment of residents and nonresidents under 87-2-505 is not an unconstitutional discrimination because it infringes upon no fundamental rights and therefore does not violate the due process or equal protection clauses; nor is the right to hunt for sport a privilege or immunity of citizens of the several states that Montana is required to grant equally to residents and nonresidents under Art. IV, sec. 2, U.S. Const. Mont. Outfitters Action Group v. Fish & Game Comm'n, 417 F. Supp. 1005 (D.C. Mont. 1976), affirmed in Baldwin v. Fish & Game Comm'n, 436 US 371, 56 L Ed 2d 354, 98 S Ct 1852 (1978).

*Tagging Game Killed by Another:* Tagging of game animal that someone else has killed or so far brought under control that one can walk up to it and cut its throat is not a method of acquiring ownership contemplated by the statute authorizing a licensed hunter to pursue, hunt, shoot, and kill game animals and then to possess the carcass, with the result that the person tagging illegally killed elk is not entitled to possession. State ex rel. Visser v. St. Fish & Game Comm'n, 150 M 525, 437 P2d 373 (1968).

### Part Law Review Articles

Montana Outfitters v. Fish and Game Commission: Of Elk and Equal Protection, Ramlow, 38 Mont. L. Rev. 387 (1977).

### 87-2-501. Class A-3, A-4, A-5, A-6, and A-9 resident deer, elk, and bear licenses — fees.

### Compiler's Comments

*2021 Amendment:* Chapter 486 in (1) near beginning after "87-2-102" deleted "or a nonresident who wishes to purchase a Class A-7 elk license only and"; deleted former (1)(e) that read: "(e) Class A-7, antlerless elk tag, $20"; deleted former (2)(a) that read: "(a) The holder of a Class A-7 antlerless elk license who is 12 years of age or older is entitled to hunt antlerless elk in areas designated by the commission and at the times and upon the terms set forth by the commission"; in (2) at end deleted "A person holding a Class A-7 antlerless elk tag may not take an elk during the same license year with a Class A-5 license or nonresident elk tag. The use of Class A-7 antlerless elk licenses does not preclude the department's use of special elk permits"; deleted former (2)(c) that read: "(c) Subject to the management provisions provided in 87-1-321 through 87-1-325, a nonresident shall hold a nonresident Class B-10 license as a prerequisite to application for a Class A-7 license"; deleted former (3) that read: "(3) Subject to the limitation of subsection (5), a person who owns or is contracting to purchase 640 acres or more of contiguous land, at least some of which is used by elk, in a hunting district where Class A-7 licenses are awarded under this section must be issued, upon application, a Class A-7 license"; deleted former (4) that read: "(4) An applicant who receives a Class A-7 license under subsection (3) may designate that the license be issued to an immediate family member or a person employed by the landowner. A corporation owning qualifying land under subsection (3) may designate one of its shareholders to receive the license"; deleted former (5) that read: "(5) Subject to the management provisions provided in 87-1-321 through 87-1-325, 15% of the Class A-7 licenses available each year under this section in a hunting district must be available to landowners under subsection (3)"; and made minor changes in style. Amendment effective March 1, 2022.

*2019 Amendment:* Chapter 381 in (2)(b) near middle of first sentence substituted "three elk" for "two elk". Amendment effective May 8, 2019.

*2005 Amendment:* (Version effective March 1, 2006) Chapter 585 in (1)(a) increased fee from $13 to $16; in (1)(b) increased fee from $8 to $10; in (1)(c) increased fee from $16 to $20; in (1)(d) increased fee from $15 to $19; in (1)(e) increased fee from $16 to $20; and in (1)(f) increased fee from $16 to $20. Amendment effective March 1, 2006.

*2003 Amendments — Composite Section:* Chapter 201 inserted (1)(f) concerning Class A-9 resident antlerless elk B tag; in (2)(b) in first sentence increased number of elk from one to two and at end inserted restriction on one elk being antlered; and made minor changes in style. Amendment effective April 1, 2003.

Chapter 553 at beginning of (2)(b), (2)(c), and (5) inserted provision relating to 87-1-321 through 87-1-325; and made minor changes in style. Amendment effective May 5, 2003.

*1999 Amendment:* Chapter 533 in (1) after "who" substituted "is" for "will be", after "older" substituted "or who will turn 12 years old before or during" for "prior to September 15 of", and after "holder" inserted "who is 12 years of age or older"; in (2)(a) after "license" inserted "who is 12 years of age or older"; and made minor changes in style. Amendment effective October 1, 2000.

*1995 Amendments:* Chapter 263 in (1)(a) through (1)(e) deleted former license fees and dates upon which fees became effective (see 1995 Session Law for text); in (1)(d), after "black", deleted "or brown"; and made minor changes in style. Amendment effective March 1, 1996.

Chapter 417 in (1), after "holder to", deleted "pursue" and after "hunt" deleted "shoot, and kill"; in (1)(a), after "tag", deleted "$11 beginning March 1, 1992, and" and after "$13" deleted "beginning March 1, 1994"; in (1)(b), after "tag", deleted "$7 beginning March 1, 1992, and" and after "$8" deleted "beginning March 1, 1994"; in (1)(c), after "tag", deleted "$13 beginning March 1, 1992, and" and after "$16" deleted "beginning March 1, 1994"; in (1)(d), after "tag", deleted "$11 beginning March 1, 1992, and" and after "$15" deleted "beginning March 1, 1994"; in (1)(e), after "tag", deleted "$13 beginning March 1, 1992, and" and after "$16" deleted "beginning March 1, 1994"; in (2)(a), after "entitled to", substituted "hunt" for "take"; and made minor changes in style. Amendment effective July 1, 1995.

*Severability:* Section 37, Ch. 417, L. 1995, was a severability clause.

*1991 Amendments:* Chapter 418 in (3), near beginning after "who", substituted "owns or is contracting to purchase" for "holds fee title to".

Chapter 592 in (1)(a) increased deer A tag fee from $9 to $11 beginning March 1, 1992, and to $13 beginning March 1, 1994; in (1)(b) increased deer B tag fee from $6 to $7 beginning March 1, 1992, and to $8 beginning March 1, 1994; in (1)(c) increased elk tag fee from $10 to $13 beginning March 1, 1992, and to $16 beginning March 1, 1994; in (1)(d) increased bear tag fee from $8 to $11 beginning March 1, 1992, and to $15 beginning March 1, 1994; and in (1)(e) increased antlerless elk tag fee from $10 to $13 beginning March 1, 1992, and to $16 beginning March 1, 1994. Amendment effective March 1, 1992.

*Preamble:* The preamble attached to Ch. 592, L. 1991, provided: "WHEREAS, an increase in Montana hunting and fishing license fees is necessary to raise revenue in order for the Department of Fish, Wildlife, and Parks to meet an anticipated revenue shortfall."

*1989 Amendment:* Near beginning of (1), after "87-2-102", inserted "or a nonresident who wishes to purchase a Class A-7 elk license only"; near beginning of (2)(a), after "to take", deleted "surplus" and at end, after "commission", deleted "but may not simultaneously possess a Class A-5 and a Class A-7 license in the same year. The commission shall include in the terms of issuance of the Class A-7 license a requirement for surrender of a current Class A-5 license if held by a person at the time he purchases a Class A-7 license. If a current Class A-5 license is surrendered, as required by this section, the Class A-7 license must be issued without cost to the holder"; near end of first sentence of (2)(b), after "Class A-5", inserted "license or nonresident" and inserted second sentence relating to Department's use of special elk permits; and inserted (2)(c) that read: "(c) A nonresident shall hold a nonresident Class B-10 license as a prerequisite to application for a Class A-7 license." Amendment effective March 1, 1990.

*Delayed Effective Date:* Section 3, Ch. 296, L. 1989, provided: "[This act] is effective March 1, 1990."

*1987 Amendment:* Inserted (3) through (5) relating to the landowner set-aside of Class A-7 licenses.

*1985 Amendment:* Effective March 1, 1986, near middle of (1), after "licenses", inserted "at the prescribed cost"; in (1)(e) increased fee from $8 to $10; and in (2) near end of first sentence, substituted "and upon such terms as set forth by the commission but may not simultaneously possess a Class A-5 and a Class A-7 license in the same year" for "during the regular big game season as set forth by the commission", inserted second and third sentences requiring surrender of current Class A-5 license and issuance of Class A-7 license without cost if Class A-5 license is surrendered, at beginning of fourth sentence deleted "However", and in middle of fourth sentence, after "person", substituted "holding a Class A-7 antlerless elk tag may not take an elk" for "taking an antlerless elk as provided in this subsection may not take another elk".

*1983 Amendment:* Increased license fees as follows: Class A-3, deer A tag from $8 to $9; Class A-4, deer B tag from $5 to $6; Class A-5, elk tag from $9 to $10; and inserted (1)(e) and (2), creating Class A-7, antlerless elk tag.

*Statement of Intent:* The statement of intent attached to HB 335 (Ch. 680, L. 1983) provided: "A statement of intent is required for House Bill 335 because section 3 [87-2-501] provides that the Fish and Game Commission [now Fish, Wildlife, and Parks Commission] will designate the areas in which surplus antlerless elk may be taken with a Class A-7 antlerless elk license. In addition, the Commission may set times during the regular big game season for the taking of surplus antlerless elk in designated areas.

The intent of the Class A-7 antlerless elk license is to provide the Commission with the option to issue antlerless elk licenses. The Commission would, with appropriate public comment, authorize antlerless elk licenses to be used in problem areas where additional antlerless elk need to be harvested. Class A-7 antlerless elk license holders would not be allowed to harvest a bull elk in the designated areas for the time period authorized by the Commission for the antlerless elk license.

The Class A-7 antlerless elk license would not replace the need for or use of the antlerless or either sex elk permits now in place. The Class A-7 antlerless elk license would provide additional flexibility for the Commission to deal with problems of surplus antlerless elk, particularly on private land."

*1981 Amendment:* Increased license fees as follows: Class A-3, deer A tag from "$7" to "$8"; Class A-5, elk tag from "$8" to "$9"; and Class A-6, bear tag from "$6" to "$8".

**Attorney General's Opinions**

*Game Harvesting — Game Ranch:* The Fish and Game Commission (now Fish, Wildlife, and Parks Commission) does not have the authority to regulate the hunting and killing of privately owned game through the imposition of licensing requirements on individual hunters or open and closed seasons. 36 A.G. Op. 112 (1976).

**87-2-504. Class B-7 and B-8—nonresident deer licenses.**

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 2, Ch. 404, L. 2023. Amendment effective March 1, 2024.

*2019 Amendment:* Chapter 221 in (1)(a) after "for which the license is issued" deleted "and is a holder of a nonresident conservation license". Amendment effective March 1, 2020.

*Termination Provision Repealed:* Section 1, Ch. 50, L. 2005, repealed sec. 12, Ch. 598, L. 1987, sec. 3, Ch. 319, L. 1991, and secs. 1 and 2, Ch. 241, L. 1993, which terminated amendments to this section March 1, 2006. Effective March 24, 2005.

*2001 Amendment:* Chapter 528 in (1)(a) near end substituted "fish, wildlife, and parks" for "fish and game"; in (1)(a)(i) increased license fee to $250; and made minor changes in style. Amendment effective March 1, 2002.

*Termination Provision Repealed:* Section 1, Ch. 21, L. 2001, repealed sec. 6, Ch. 355, L. 1997, which terminated the 1997 amendments to this section October 1, 2001. Effective February 19, 2001.

*1999 Amendment:* (Version effective October 1, 2000) Chapter 533 in (1)(a) after second "who" substituted "is" for "will be" and after "older" substituted "or who will turn 12 years old before or during" for "prior to September 15 of"; in (1)(b) after "holder" inserted "who is 12 years of age or older"; and made minor changes in style. (Corresponding changes were made in later versions.) Amendment effective October 1, 2000.

*1997 Amendment:* (Temporary version) Chapter 355 in (1)(a)(i) increased cost of Class B-7 deer tag from $150 to $175; in (1)(a)(ii) increased cost of Class B-8 deer tag from $50 to $75; in (1)(b), at end before "rules", substituted "commission" for "department"; in (2), in first sentence after "license", substituted "may" for "must", after "region or" inserted "regions or a", and after "administrative region" inserted "or regions or in a specific hunting district or districts or a portion of a specific hunting district or districts", in second sentence, after "state", inserted "except as provided in 87-2-512(1)(d)", and deleted third sentence that read: "Money received from the sale of Class B-7 licenses in excess of 1,700 must be used as provided in 87-1-242(1)"; inserted (3) allowing the Commission to set certain conditions on Class B-8 licenses; and made minor changes in style. Amendment effective April 22, 1997, and terminates October 1, 2001.

*1997 Statement of Intent:* The statement of intent attached to Ch. 355, L. 1997, provided: "This bill establishes the authority of the fish, wildlife, and parks commission to modify, by rule, the structure of nonresident elk and deer licenses within the general framework established by law as needed for the effective management of big game animals. It is the intent of the legislature that in its initial rulemaking process, the commission utilize an advisory committee, including representatives of hunting and fishing organizations, outfitters, and landowners, to make recommendations regarding the structure of nonresident hunting licenses as authorized by this bill. It is also the intent of the legislature that commission rules not authorize more nonresident elk and deer hunters than are prescribed by current law."

*Termination:* Section 6, Ch. 355, L. 1997, provided: "[This act] terminates October 1, 2001."

*1995 Amendment:* Chapter 417 near end of first sentence, in clause following first list of licenses after "holder to", deleted "pursue" and after "hunt" deleted "shoot, and kill"; and made minor changes in style. Amendment effective July 1, 1995.

*Severability:* Section 37, Ch. 417, L. 1995, was a severability clause.

*Extension of Termination Date:* Section 1, Ch. 241, L. 1993, amended sec. 12, Ch. 598, L. 1987, to provide that the wildlife habitat acquisition program terminates March 1, 2006. Section 2, Ch. 241, L. 1993, amended sec. 3, Ch. 319, L. 1991, to provide that the wildlife habitat acquisition program terminates March 1, 2006.

*Extension of Termination Date:* Section 3, Ch. 319, L. 1991, amended sec. 12, Ch. 598, L. 1987, to provide that the wildlife habitat acquisition program terminates March 1, 1996. Amendment effective April 2, 1991.

*1987 Amendments:* Chapter 458 near beginning of second sentence inserted "or B-11" and inserted sentence allowing B-7 license purchased as part of B-11 license to be used statewide. Amendment effective March 1, 1988.

Chapter 598 increased B-7 tag from $100 to $150 and inserted last two sentences limiting number of licenses sold and providing for use of money from sale. (Chapter 598 amendments terminate March 1, 1994.)

### 87-2-505. Class B-10—nonresident big game combination license.

**Compiler's Comments**

*2019 Amendment:* Chapter 221 in (1) at end deleted "This license includes the nonresident conservation license as prescribed in 87-2-202." Amendment effective March 1, 2020.

*2015 Amendment:* Chapter 449 in (1) substituted "$981" for "$897 plus the nonresident hunting access enhancement fee in 87-2-202(3)(d)"; in (3) substituted "28.5%" for "25%"; in (4) inserted last sentence concerning rounding adjusted cost; deleted former (2) that read: "(2) A person who is not a resident, as defined in 87-2-102, who is unsuccessful in the Class B-10 big game combination license drawing may pay a fee of $25 to participate in a preference system for deer and elk permits established by the commission"; and made minor changes in style. Amendment effective March 1, 2016.

*2010 Amendment by Initiative:* Initiative Measure No. 161, proposed by initiative petition and approved at the general election held November 2, 2010, in (1)(a) in first sentence near middle substituted $897 for $628 and after "87-2-202(3)(d)" deleted "or upon payment of the fee established as provided in 87-1-268 if the license is one of the licenses reserved pursuant to 87-2-511 for applicants indicating their intent to use the services of a licensed outfitter"; in (1)(b) substituted "17,000" for "11,500 unreserved"; inserted (1)(c) relating to deposit of certain fees; inserted (1)(d) relating to annual cost adjustment of nonresident Class B-10 licenses; and made minor changes in style. Amendment effective March 1, 2011.

*2007 Amendment:* Chapter 25 deleted former (3) that read: "(3) A holder of a Class B-10 nonresident big game combination license may apply for a Class B-12 nonresident antlerless elk B tag license when authorized by the commission pursuant to 87-2-104. The fee for a Class B-12 license is $273. The license entitles the holder to hunt in the hunting district or portion of a hunting district and under the terms and conditions specified by the commission." Amendment effective March 22, 2007.

*2005 Amendment:* (Version effective March 1, 2006) Chapter 585 in (1) near middle increased fee from $625 to $628; and in (3) at end of second sentence increased fee from $270 to $273. Amendment effective March 1, 2006.

*Termination Provision Repealed:* Section 1, Ch. 50, L. 2005, repealed sec. 12, Ch. 598, L. 1987, sec. 3, Ch. 319, L. 1991, and secs. 1 and 2, Ch. 241, L. 1993, which terminated amendments to this section March 1, 2006. Effective March 24, 2005.

Sections 2 and 3, Ch. 235, L. 2005, amended sec. 6, Ch. 544, L. 1999, and sec. 18, Ch. 459, L. 1995, and sec. 4, Ch. 235, L. 2005, repealed sec. 9, Ch. 216, L. 2001, removing the provision that terminated amendments to this section March 1, 2006. Effective April 15, 2005.

*2003 Amendment:* Chapter 201 inserted (3) concerning nonresident antlerless elk B tag license and setting fee for the license; and made minor changes in style. Amendment effective April 1, 2003.

*2001 Amendments — Composite Section:* (Version effective March 1, 2002) Chapter 216 in (1) near middle of first sentence after "$475" inserted "plus the nonresident hunting access enhancement fee in 87-2-202(3)(d)". Amendment effective March 1, 2002, and terminates March 1, 2006.

(Version effective March 1, 2002) Chapter 528 in (1) in first sentence increased fee from $475 to $625.

(Version effective March 1, 2006) In (1) substituted "fee of $550" for "fee of $398 or upon payment of the fee of $408 if the license is one of the 5,600 licenses reserved pursuant to 87-2-511 for applicants indicating their intent to use the services of a licensed outfitter"; and made minor changes in style.

(Versions effective March 1, 2002, and March 1, 2006) In (1) in first sentence substituted "fish, wildlife, and parks office" for "fish and game office".

*Preamble:* The preamble attached to Ch. 216, L. 2001, provided: "WHEREAS, the Private Land/Public Wildlife Advisory Council is charged with the responsibility to make suggestions for funding, modification, or improvement of the hunting access enhancement program; and

WHEREAS, although the hunting access enhancement program has enjoyed considerable success to date in providing greater opportunities for Montana hunters, the Private Land/Public Wildlife Advisory Council recognizes the potential to increase hunting access through expansion of the program; and

WHEREAS, increasing the size of the current program through a once-a-season hunting access enhancement fee on resident and most nonresident hunters would provide revenue to allow greater landowner incentives, improve hunting access to private and public lands, improve program management and services, increase upland bird hunting opportunities, and provide for future increased program costs because of inflation."

*1999 Amendment:* Chapter 533 in (1) after second "who" substituted "is" for "will be", after "older" substituted "or who will turn 12 years old before or during" for "prior to September 15 of", and after "holder" inserted "who is 12 years of age or older"; inserted (2) concerning unsuccessful nonresident in B-10 drawing; and made minor changes in style. Amendment effective October 1, 2000.

*Extension of Termination Date:* Section 6, Ch. 544, L. 1999, amended sec. 18, Ch. 459, L. 1995, by extending the termination date imposed by Ch. 459 to March 1, 2006.

*1995 Amendment:* Chapter 459 in version effective March 1, 1996, in first sentence, after "payment of the fee of", deleted "$462 beginning March 1, 1992, and", after "$475" deleted "beginning March 1, 1994", substituted "established as provided in 87-1-268" for "of $472 beginning March 1, 1992, and $485 beginning March 1, 1994", and before "licenses" deleted "5,600" and in second sentence substituted "11,500 unreserved" for "17,000"; and made minor changes in style. Amendment effective March 1, 1996, and terminates October 1, 2001.

*Amendment Not Codified:* The Code Commissioner has not codified the amendments to the version effective March 1, 2006. Section 18(1), Ch. 459, L. 1995, terminated the amendments on October 1, 2001, before the section became effective on March 1, 2006.

*Preamble:* The preamble attached to Ch. 459, L. 1995, provided: "WHEREAS, Montana has a cherished hunting heritage based on a deep knowledge of and respect for wildlife and the land; and

WHEREAS, private landowners provide wildlife habitat and hunting opportunities, the hunting public provides financial and political support for sound wildlife management, and the combined efforts of landowners and the hunting public have sustained Montana's hunting and wildlife heritage; and

WHEREAS, landowner/outfitter/sportsperson relations have become increasingly strained over the past several years, leading to increased polarization between the groups; and

WHEREAS, the 1993 Legislature addressed this problem through the passage of House Joint Resolution No. 24, which requested the Governor, through the Department of Fish, Wildlife, and Parks, to coordinate a sustained, ongoing, cooperative effort to address these issues by establishing statewide, regional, and local groups to develop mutually satisfactory solutions that would preserve Montana's hunting and wildlife heritage and encourage the continuance of a viable outfitting industry; and

WHEREAS, in response to that request, the Governor appointed the Advisory Council on Private Land/Public Wildlife, consisting of representatives of the affected groups, to study the issues in anticipation of legislation that reflects the mutual interests of landowners, outfitters, and the sporting community; and

WHEREAS, after considering extensive input and advice from individual private citizens, local working groups, agencies, and nonprofit organizations involved in conservation, the Advisory Council by consensus developed recommendations for improving hunting access to private lands and for providing tangible benefits for landowners who allow access to their lands for hunting; and

WHEREAS, the Advisory Council has made efforts to break new ground philosophically in designing its recommendations, requiring that all interested parties be willing to accept change in order to benefit everyone who has an interest in Montana's hunting and wildlife heritage; and

WHEREAS, the Advisory Council finds it appropriate to present the following recommendations to the Legislature in the spirit of a cooperative and positive effort to enhance relations between landowners, outfitters, and sportspersons."

*1995 Statement of Intent:* "A statement of intent is required for this bill because [sections 1 through 3] [87-1-265 through 87-1-267 (87-1-267 now repealed)] grant rulemaking authority to the department of fish, wildlife, and parks and the fish, wildlife, and parks commission to implement programs for hunter management and hunting access enhancement. It is intended that in addition to the statutory guidelines set out in those sections, any rules be adopted with the purpose of optimizing hunting opportunity and access while minimizing administrative costs in providing benefits to landowners who voluntarily participate in the programs. In addition, [section 6] [87-1-268, now repealed] grants rulemaking authority to the fish, wildlife, and parks commission to implement the provisions of variable pricing for Class B-10 and Class B-11 outfitter-sponsored licenses. It is intended that the fish, wildlife, and parks commission use its licensing authority to adjust the price of those licenses as necessary and that any additional revenue generated by variable pricing be used to fund the hunting access enhancement program."

*Severability:* Section 13, Ch. 459, L. 1995, was a severability clause.

*Saving Clause:* Section 14, Ch. 459, L. 1995, was a saving clause.

*Extension of Termination Date:* Section 1, Ch. 241, L. 1993, amended sec. 12, Ch. 598, L. 1987, to provide that the wildlife habitat acquisition program terminates March 1, 2006. Section 2, Ch. 241, L. 1993, amended sec. 3, Ch. 319, L. 1991, to provide that the wildlife habitat acquisition program terminates March 1, 2006.

*1991 Amendment:* (Version effective March 1, 1992) In first sentence increased nonresident big game combination license fee from $450 to $462 beginning March 1, 1992, and to $475 beginning March 1, 1994, or to $472 beginning March 1, 1992, and to $485 beginning March 1, 1994, for applicants indicating intent to use services of licensed outfitter and near end, after "Class B-7", deleted "and black bear"; and made minor change in style.

(Version effective March 1, 1996) In first sentence increased nonresident big game combination license fee from $373 to $398 or to $408 for applicants indicating intent to use services of licensed outfitter and near end, after "Class B-7", deleted "and black bear"; and made minor change in style. Amendments effective March 1, 1992.

*Preamble:* The preamble attached to Ch. 592, L. 1991, provided: "WHEREAS, an increase in Montana hunting and fishing license fees is necessary to raise revenue in order for the Department of Fish, Wildlife, and Parks to meet an anticipated revenue shortfall."

*Extension of Termination Date:* Section 3, Ch. 319, L. 1991, amended sec. 12, Ch. 598, L. 1987, to provide that the wildlife habitat acquisition program terminates March 1, 1996. Amendment effective April 2, 1991.

*1987 Amendments:* Chapter 598 increased fee from $350 to $450 from March 1, 1988, to March 1, 1994.

Chapter 636 increased fee from $350 to $373.

*1985 Amendment:* Increased license fee from $300 to $350 effective March 1, 1986.

*1983 Amendment:* Increased license fee from $275 to $300 effective March 1, 1984.

*1981 Amendment:* Changed the fee from "$225" to "$275".

*2015 Amendment:* Chapter 449 in (1) substituted "$981" for "$897 plus the nonresident hunting access enhancement fee in 87-2-202(3)(d)"; in (3) substituted "28.5%" for "25%"; in (4) inserted last sentence concerning rounding adjusted cost; deleted former (2) that read: "(2) A person who is not a resident, as defined in 87-2-102, who is unsuccessful in the Class B-10 big game combination license drawing may pay a fee of $25 to participate in a preference system for deer and elk permits established by the commission"; and made minor changes in style. Amendment effective March 1, 2016.

*2010 Amendment by Initiative:* Initiative Measure No. 161, proposed by initiative petition and approved at the general election held November 2, 2010, in (1)(a) in first sentence near middle substituted $897 for $628 and after "87-2-202(3)(d)" deleted "or upon payment of the fee established as provided in 87-1-268 if the license is one of the licenses reserved pursuant to 87-2-511 for applicants indicating their intent to use the services of a licensed outfitter"; in (1)(b) substituted "17,000" for "11,500 unreserved"; inserted (1)(c) relating to deposit of certain fees; inserted (1)(d) relating to annual cost adjustment of nonresident Class B-10 licenses; and made minor changes in style. Amendment effective March 1, 2011.

*2007 Amendment:* Chapter 25 deleted former (3) that read: "(3) A holder of a Class B-10 nonresident big game combination license may apply for a Class B-12 nonresident antlerless elk B tag license when authorized by the commission pursuant to 87-2-104. The fee for a Class B-12 license is $273. The license entitles the holder to hunt in the hunting district or portion of a hunting district and under the terms and conditions specified by the commission." Amendment effective March 22, 2007.

*2005 Amendment:* (Version effective March 1, 2006) Chapter 585 in (1) near middle increased fee from $625 to $628; and in (3) at end of second sentence increased fee from $270 to $273. Amendment effective March 1, 2006.

*Termination Provision Repealed:* Section 1, Ch. 50, L. 2005, repealed sec. 12, Ch. 598, L. 1987, sec. 3, Ch. 319, L. 1991, and secs. 1 and 2, Ch. 241, L. 1993, which terminated amendments to this section March 1, 2006. Effective March 24, 2005.

Sections 2 and 3, Ch. 235, L. 2005, amended sec. 6, Ch. 544, L. 1999, and sec. 18, Ch. 459, L. 1995, and sec. 4, Ch. 235, L. 2005, repealed sec. 9, Ch. 216, L. 2001, removing the provision that terminated amendments to this section March 1, 2006. Effective April 15, 2005.

*2003 Amendment:* Chapter 201 inserted (3) concerning nonresident antlerless elk B tag license and setting fee for the license; and made minor changes in style. Amendment effective April 1, 2003.

*2001 Amendments — Composite Section:* (Version effective March 1, 2002) Chapter 216 in (1) near middle of first sentence after "$475" inserted "plus the nonresident hunting access enhancement fee in 87-2-202(3)(d)". Amendment effective March 1, 2002, and terminates March 1, 2006.

(Version effective March 1, 2002) Chapter 528 in (1) in first sentence increased fee from $475 to $625.

(Version effective March 1, 2006) In (1) substituted "fee of $550" for "fee of $398 or upon payment of the fee of $408 if the license is one of the 5,600 licenses reserved pursuant to 87-2-511 for applicants indicating their intent to use the services of a licensed outfitter"; and made minor changes in style.

(Versions effective March 1, 2002, and March 1, 2006) In (1) in first sentence substituted "fish, wildlife, and parks office" for "fish and game office".

*Preamble:* The preamble attached to Ch. 216, L. 2001, provided: "WHEREAS, the Private Land/Public Wildlife Advisory Council is charged with the responsibility to make suggestions for funding, modification, or improvement of the hunting access enhancement program; and

WHEREAS, although the hunting access enhancement program has enjoyed considerable success to date in providing greater opportunities for Montana hunters, the Private Land/Public Wildlife Advisory Council recognizes the potential to increase hunting access through expansion of the program; and

WHEREAS, increasing the size of the current program through a once-a-season hunting access enhancement fee on resident and most nonresident hunters would provide revenue to allow greater landowner incentives, improve hunting access to private and public lands, improve program management and services, increase upland bird hunting opportunities, and provide for future increased program costs because of inflation."

*1999 Amendment:* Chapter 533 in (1) after second "who" substituted "is" for "will be", after "older" substituted "or who will turn 12 years old before or during" for "prior to September 15 of", and after "holder" inserted "who is 12 years of age or older"; inserted (2) concerning unsuccessful nonresident in B-10 drawing; and made minor changes in style. Amendment effective October 1, 2000.

*Extension of Termination Date:* Section 6, Ch. 544, L. 1999, amended sec. 18, Ch. 459, L. 1995, by extending the termination date imposed by Ch. 459 to March 1, 2006.

*1995 Amendment:* Chapter 459 in version effective March 1, 1996, in first sentence, after "payment of the fee of", deleted "$462 beginning March 1, 1992, and", after "$475" deleted "beginning March 1, 1994", substituted "established as provided in 87-1-268" for "of $472 beginning March 1, 1992, and $485 beginning March 1, 1994", and before "licenses" deleted "5,600" and in second sentence substituted "11,500 unreserved" for "17,000"; and made minor changes in style. Amendment effective March 1, 1996, and terminates October 1, 2001.

*Amendment Not Codified:* The Code Commissioner has not codified the amendments to the version effective March 1, 2006. Section 18(1), Ch. 459, L. 1995, terminated the amendments on October 1, 2001, before the section became effective on March 1, 2006.

*Preamble:* The preamble attached to Ch. 459, L. 1995, provided: "WHEREAS, Montana has a cherished hunting heritage based on a deep knowledge of and respect for wildlife and the land; and

WHEREAS, private landowners provide wildlife habitat and hunting opportunities, the hunting public provides financial and political support for sound wildlife management, and the combined efforts of landowners and the hunting public have sustained Montana's hunting and wildlife heritage; and

WHEREAS, landowner/outfitter/sportsperson relations have become increasingly strained over the past several years, leading to increased polarization between the groups; and

WHEREAS, the 1993 Legislature addressed this problem through the passage of House Joint Resolution No. 24, which requested the Governor, through the Department of Fish, Wildlife, and Parks, to coordinate a sustained, ongoing, cooperative effort to address these issues by establishing statewide, regional, and local groups to develop mutually satisfactory solutions that would preserve Montana's hunting and wildlife heritage and encourage the continuance of a viable outfitting industry; and

WHEREAS, in response to that request, the Governor appointed the Advisory Council on Private Land/Public Wildlife, consisting of representatives of the affected groups, to study the issues in anticipation of legislation that reflects the mutual interests of landowners, outfitters, and the sporting community; and

WHEREAS, after considering extensive input and advice from individual private citizens, local working groups, agencies, and nonprofit organizations involved in conservation, the Advisory Council by consensus developed recommendations for improving hunting access to private lands and for providing tangible benefits for landowners who allow access to their lands for hunting; and

WHEREAS, the Advisory Council has made efforts to break new ground philosophically in designing its recommendations, requiring that all interested parties be willing to accept change in order to benefit everyone who has an interest in Montana's hunting and wildlife heritage; and

WHEREAS, the Advisory Council finds it appropriate to present the following recommendations to the Legislature in the spirit of a cooperative and positive effort to enhance relations between landowners, outfitters, and sportspersons."

*1995 Statement of Intent:* "A statement of intent is required for this bill because [sections 1 through 3] [87-1-265 through 87-1-267] grant rulemaking authority to the department of fish, wildlife, and parks and the fish, wildlife, and parks commission to implement programs for hunter management and hunting access enhancement. It is intended that in addition to the statutory guidelines set out in those sections, any rules be adopted with the purpose of optimizing hunting opportunity and access while minimizing administrative costs in providing benefits to landowners who voluntarily participate in the programs. In addition, [section 6] [87-1-268, now repealed] grants rulemaking authority to the fish, wildlife, and parks commission to implement the provisions of variable pricing for Class B-10 and Class B-11 outfitter-sponsored licenses. It is intended that the fish, wildlife, and parks commission use its licensing authority to adjust the price of those licenses as necessary and that any additional revenue generated by variable pricing be used to fund the hunting access enhancement program."

*Severability:* Section 13, Ch. 459, L. 1995, was a severability clause.

*Saving Clause:* Section 14, Ch. 459, L. 1995, was a saving clause.

*Extension of Termination Date:* Section 1, Ch. 241, L. 1993, amended sec. 12, Ch. 598, L. 1987, to provide that the wildlife habitat acquisition program terminates March 1, 2006. Section 2, Ch. 241, L. 1993, amended sec. 3, Ch. 319, L. 1991, to provide that the wildlife habitat acquisition program terminates March 1, 2006.

*1991 Amendment:* (Version effective March 1, 1992) In first sentence increased nonresident big game combination license fee from $450 to $462 beginning March 1, 1992, and to $475 beginning March 1, 1994, or to $472 beginning March 1, 1992, and to $485 beginning March 1, 1994, for applicants indicating intent to use services of licensed outfitter and near end, after "Class B-7", deleted "and black bear"; and made minor change in style.

(Version effective March 1, 1996) In first sentence increased nonresident big game combination license fee from $373 to $398 or to $408 for applicants indicating intent to use services of licensed outfitter and near end, after "Class B-7", deleted "and black bear"; and made minor change in style. Amendments effective March 1, 1992.

*Preamble:* The preamble attached to Ch. 592, L. 1991, provided: "WHEREAS, an increase in Montana hunting and fishing license fees is necessary to raise revenue in order for the Department of Fish, Wildlife, and Parks to meet an anticipated revenue shortfall."

*Extension of Termination Date:* Section 3, Ch. 319, L. 1991, amended sec. 12, Ch. 598, L. 1987, to provide that the wildlife habitat acquisition program terminates March 1, 1996. Amendment effective April 2, 1991.

*1987 Amendments:* Chapter 598 increased fee from $350 to $450 from March 1, 1988, to March 1, 1994.

Chapter 636 increased fee from $350 to $373.

*1985 Amendment:* Increased license fee from $300 to $350 effective March 1, 1986.

*1983 Amendment:* Increased license fee from $275 to $300 effective March 1, 1984.

*1981 Amendment:* Changed the fee from "$225" to "$275".

**Case Notes**

*Constitutionality:* The disparity in the treatment of residents and nonresidents under this section is not an unconstitutional discrimination because it infringes upon no fundamental rights and therefore does not violate the due process or equal protection clauses; nor is the right to hunt for sport a privilege or immunity of citizens of the several states that Montana is required to grant equally to residents and nonresidents under Art. IV, sec. 2, U.S. Const. (See 1999 amendment.) Mont. Outfitters Action Group v. Fish & Game Comm'n, 417 F. Supp. 1005 (D.C. Mont. 1976), affirmed in Baldwin v. Fish & Game Comm'n, 436 US 371, 56 L Ed 2d 354, 98 S Ct 1852 (1978).

## 87-2-506. Restrictions on hunting licenses.

**Compiler's Comments**

*2015 Amendment:* Chapter 449 in (3) near beginning substituted "87-2-817(1)" for "87-2-803(5)". Amendment effective March 1, 2016.

*2005 Amendment:* Chapter 556 inserted (3) providing 50 half-priced deer and antelope licenses to certain disabled combat veterans. Amendment effective October 1, 2005.

*1985 Amendment:* In two places in (2) inserted "big game" before "licenses".

**Administrative Rules**

ARM 12.3.620 Moose, sheep, and goat licenses.

## 87-2-507. Class D-1—nonresident mountain lion license.

**Compiler's Comments**

*2013 Amendment:* Chapter 129 deleted last two sentences that read: "If a holder of a valid mountain lion license under this section kills a mountain lion, the licensee shall purchase a trophy license for a fee of $50 within 10 days after the date of kill. The trophy license authorizes the holder to possess and transport the trophy"; and made minor changes in style. Amendment effective July 1, 2013.

*Termination Provision Repealed:* Section 1, Ch. 50, L. 2005, repealed sec. 12, Ch. 598, L. 1987, sec. 3, Ch. 319, L. 1991, and secs. 1 and 2, Ch. 241, L. 1993, which terminated amendments to this section March 1, 2006. Effective March 24, 2005.

*1999 Amendment:* Chapter 533 in first sentence after "older" inserted "or who will turn 12 years old before or during the season for which the license is issued" and after "holder" inserted "who is 12 years of age or older"; and made minor changes in style. Amendment effective October 1, 2000.

*1995 Amendment:* Chapter 417 near middle of first sentence, after "holder to", deleted "pursue" and after "hunt" deleted "shoot, and kill"; and made minor changes in style. Amendment effective July 1, 1995.

*Severability:* Section 37, Ch. 417, L. 1995, was a severability clause.

*Extension of Termination Date:* Section 1, Ch. 241, L. 1993, amended sec. 12, Ch. 598, L. 1987, to provide that the wildlife habitat acquisition program terminates March 1, 2006. Section 2, Ch. 241, L. 1993, amended sec. 3, Ch. 319, L. 1991, to provide that the wildlife habitat acquisition program terminates March 1, 2006.

*Extension of Termination Date:* Section 3, Ch. 319, L. 1991, amended sec. 12, Ch. 598, L. 1987, to provide that the wildlife habitat acquisition program terminates March 1, 1996. Amendment effective April 2, 1991.

*1987 Amendment:* Increased fee from $300 to $320.

*1983 Amendment:* Increased license fee from $100 to $300 and inserted last two sentences relating to trophy license requirements for mountain lion — effective March 1, 1984.

### 87-2-508. Class D-2—resident mountain lion license.

**Compiler's Comments**

*2013 Amendment:* Chapter 129 deleted last two sentences that read: "If a holder of a valid mountain lion license under this section kills a mountain lion, the licensee shall purchase a trophy license for a fee of $50 within 10 days after the date of kill. The trophy license authorizes the holder to possess and transport the trophy"; and made minor changes in style. Amendment effective July 1, 2013.

*2005 Amendment:* (Version effective March 1, 2006) Chapter 585 in first sentence increased fee from $15 to $19. Amendment effective March 1, 2006.

*1999 Amendment:* Chapter 533 in first sentence after "older" inserted "or who will turn 12 years old before or during the season for which the license is issued" and after "holder" inserted "who is 12 years of age or older"; and made minor changes in style. Amendment effective October 1, 2000.

*1995 Amendment:* Chapter 417 in first sentence, after "fee of", deleted "$13 beginning March 1, 1992, and", after "$15" deleted "beginning March 1, 1994", after "holder to" deleted "pursue", and after "hunt" deleted "shoot, and kill"; and made minor changes in style. Amendment effective July 1, 1995.

*Severability:* Section 37, Ch. 417, L. 1995, was a severability clause.

*1991 Amendment:* In first sentence increased mountain lion license fee from $10 to $13 beginning March 1, 1992, and to $15 beginning March 1, 1994. Amendment effective March 1, 1992.

*Preamble:* The preamble attached to Ch. 592, L. 1991, provided: "WHEREAS, an increase in Montana hunting and fishing license fees is necessary to raise revenue in order for the Department of Fish, Wildlife, and Parks to meet an anticipated revenue shortfall."

*1983 Amendment:* Increased license fee from $5 to $10 and inserted last two sentences relating to trophy license requirements for mountain lion — effective March 1, 1984.

### 87-2-510. Class B-11—nonresident deer combination license.

**Compiler's Comments**

*2019 Amendment:* Chapter 221 in (1)(a) at end deleted "This license includes the nonresident wildlife conservation license as prescribed in 87-2-202." Amendment effective March 1, 2020.

*2015 Amendment:* Chapter 449 in (1)(a) in middle substituted "$577" for "$527 plus the nonresident hunting access enhancement fee in 87-2-202(3)(d)"; in (1)(b) substituted "28.5%" for "25%"; in (1)(c) inserted last sentence concerning rounding adjusted cost; and deleted former (3) that read: "(3) A person who is not a resident, as defined in 87-2-102, who is unsuccessful in the Class B-11 deer combination license drawing may pay a fee of $25 to participate in a preference system for deer and elk permits established by the commission." Amendment effective March 1, 2016.

*2010 Amendment by Initiative:* Initiative Measure No. 161, proposed by initiative petition and approved at the general election held November 2, 2010, in (1)(a) near middle of first sentence substituted "$527" for "$328" and after "87-2-202(3)(d)" deleted "upon payment of the fee established as provided in 87-1-268 if the license is one of those reserved pursuant to 87-2-511 for applicants indicating their intent to use the services of a licensed outfitter or upon payment of the fee of $328 plus the nonresident hunting access enhancement fee in 87-2-202(3)(d), if the license is one of those reserved pursuant to 87-2-511 for applicants indicating their intent to hunt with a resident sponsor on land owned by that sponsor"; inserted (1)(b) relating to deposit of a portion of the fee; inserted (1)(c) relating to annual adjustment of the cost of the Class B-11 nonresident license; in (2) substituted "4,600" for "2,300"; and made minor changes in style. Amendment effective March 1, 2011.

*2005 Amendment:* (Version effective March 1, 2006) Chapter 585 in (1) in first sentence in two places increased fee from $325 to $328. Amendment effective March 1, 2006.

*Termination Provision Repealed:* Sections 2 and 3, Ch. 235, L. 2005, amended sec. 6, Ch. 544, L. 1999, and sec. 18, Ch. 459, L. 1995, and sec. 4, Ch. 235, L. 2005, repealed sec. 9, Ch. 216,

L. 2001, removing the provision that terminated amendments to this section March 1, 2006. Effective April 15, 2005.

*2001 Amendments — Composite Section:* (Version effective March 1, 2002) Chapter 216 in first sentence in (1) after "$245" and after "$250" inserted "plus the nonresident hunting access enhancement fee in 87-2-202(3)(d)". Amendment effective March 1, 2002, and terminates March 1, 2006.

(Version effective March 1, 2002) Chapter 528 in (1) increased fee for nonresident 12 years of age or older from $245 to $325, increased fee for nonresident using outfitter from $250 to $325, and substituted "fish, wildlife, and parks office" for "fish and game office".

(Version effective March 1, 2006) In (1) at end of first sentence substituted "$300, purchase a Class B-11 nonresident deer combination license that entitles a holder who is 12 years of age or older to all the privileges of the Class B, Class B-1, and Class B-7 licenses" for "$220 or upon payment of the fee of $225", at beginning of second sentence inserted "The fee for a Class B-11 license is $300", and in fourth sentence substituted "fish, wildlife, and parks office" for "fish and game office" and after "Montana" deleted "to purchase a Class B-11 nonresident deer combination license that entitles a holder who is 12 years of age or older to all the privileges of the Class B, Class B-1, and Class B-7 licenses"; and made minor changes in style.

*Preamble:* The preamble attached to Ch. 216, L. 2001, provided: "WHEREAS, the Private Land/Public Wildlife Advisory Council is charged with the responsibility to make suggestions for funding, modification, or improvement of the hunting access enhancement program; and

WHEREAS, although the hunting access enhancement program has enjoyed considerable success to date in providing greater opportunities for Montana hunters, the Private Land/Public Wildlife Advisory Council recognizes the potential to increase hunting access through expansion of the program; and

WHEREAS, increasing the size of the current program through a once-a-season hunting access enhancement fee on resident and most nonresident hunters would provide revenue to allow greater landowner incentives, improve hunting access to private and public lands, improve program management and services, increase upland bird hunting opportunities, and provide for future increased program costs because of inflation."

*1999 Amendment:* Chapter 533 in (1) after second "who" substituted "is" for "will be", after "older" substituted "or who will turn 12 years old before or during" for "prior to September 15 of", and after "holder" inserted "who is 12 years of age or older"; inserted (3) concerning unsuccessful nonresident in B-11 drawing; and made minor changes in style. Amendment effective October 1, 2000.

*Extension of Termination Date:* Section 6, Ch. 544, L. 1999, amended sec. 18, Ch. 459, L. 1995, by extending the termination date imposed by Ch. 459 to March 1, 2006.

*1995 Amendment:* Chapter 459 in version effective March 1, 1996, in (1), in first sentence, substituted "established as provided in 87-1-268" for "of $225", after "license is one of" substituted "those" for "the 4,000", and inserted requirement for payment of $225 fee for license reserved under 87-2-511; in (2) substituted "Not more than 2,300 unreserved" for "Six thousand"; and made minor changes in style. Amendment effective March 1, 1996, and terminates October 1, 2001.

*Preamble:* The preamble attached to Ch. 459, L. 1995, provided: "WHEREAS, Montana has a cherished hunting heritage based on a deep knowledge of and respect for wildlife and the land; and

WHEREAS, private landowners provide wildlife habitat and hunting opportunities, the hunting public provides financial and political support for sound wildlife management, and the combined efforts of landowners and the hunting public have sustained Montana's hunting and wildlife heritage; and

WHEREAS, landowner/outfitter/sportsperson relations have become increasingly strained over the past several years, leading to increased polarization between the groups; and

WHEREAS, the 1993 Legislature addressed this problem through the passage of House Joint Resolution No. 24, which requested the Governor, through the Department of Fish, Wildlife, and Parks, to coordinate a sustained, ongoing, cooperative effort to address these issues by establishing statewide, regional, and local groups to develop mutually satisfactory solutions that would preserve Montana's hunting and wildlife heritage and encourage the continuance of a viable outfitting industry; and

WHEREAS, in response to that request, the Governor appointed the Advisory Council on Private Land/Public Wildlife, consisting of representatives of the affected groups, to study the issues in anticipation of legislation that reflects the mutual interests of landowners, outfitters, and the sporting community; and

WHEREAS, after considering extensive input and advice from individual private citizens, local working groups, agencies, and nonprofit organizations involved in conservation, the Advisory Council by consensus developed recommendations for improving hunting access to private lands and for providing tangible benefits for landowners who allow access to their lands for hunting; and

WHEREAS, the Advisory Council has made efforts to break new ground philosophically in designing its recommendations, requiring that all interested parties be willing to accept change in order to benefit everyone who has an interest in Montana's hunting and wildlife heritage; and

WHEREAS, the Advisory Council finds it appropriate to present the following recommendations to the Legislature in the spirit of a cooperative and positive effort to enhance relations between landowners, outfitters, and sportspersons."

*1995 Statement of Intent:* "A statement of intent is required for this bill because [sections 1 through 3] [87-1-265 through 87-1-267 (87-1-267 now repealed)] grant rulemaking authority to the department of fish, wildlife, and parks and the fish, wildlife, and parks commission to implement programs for hunter management and hunting access enhancement. It is intended that in addition to the statutory guidelines set out in those sections, any rules be adopted with the purpose of optimizing hunting opportunity and access while minimizing administrative costs in providing benefits to landowners who voluntarily participate in the programs. In addition, [section 6] [87-1-268, now repealed] grants rulemaking authority to the fish, wildlife, and parks commission to implement the provisions of variable pricing for Class B-10 and Class B-11 outfitter-sponsored licenses. It is intended that the fish, wildlife, and parks commission use its licensing authority to adjust the price of those licenses as necessary and that any additional revenue generated by variable pricing be used to fund the hunting access enhancement program."

*Severability:* Section 13, Ch. 459, L. 1995, was a severability clause.

*Saving Clause:* Section 14, Ch. 459, L. 1995, was a saving clause.

*Code Commissioner Correction:* This section was amended in 1991 by Ch. 592, L. 1991, to increase the cost of a general Class B-11 license to $245 and the cost of a resident-sponsored and outfitter-sponsored license to $250, effective March 1, 1994. The 1995 Legislature amended this section to reflect pricing of the outfitter-sponsored license according to the variable pricing format of Ch. 459, L. 1995, without changing the price of the general or resident-sponsored license, but amended an earlier version of this section. The prices of the general license and the resident-sponsored license have been corrected by the Code Commissioner to reflect the actual license prices set by Ch. 592, L. 1991.

*1991 Amendment:* (Version effective March 1, 1992) In (1) increased nonresident combination deer license fee from $200 to $238 beginning March 1, 1992, and to $245 beginning March 1, 1994, or to $248 beginning March 1, 1992, and to $250 beginning March 1, 1994, for applicants indicating intent to use services of licensed outfitter or to hunt with resident sponsor on sponsor's land.

(Version effective March 1, 1994) In (1) increased nonresident deer combination license fee from $175 to $220 or to $225 for applicants indicating intent to use services of licensed outfitter or to hunt with resident sponsor on sponsor's land. Amendments effective March 1, 1992.

*Preamble:* The preamble attached to Ch. 592, L. 1991, provided: "WHEREAS, an increase in Montana hunting and fishing license fees is necessary to raise revenue in order for the Department of Fish, Wildlife, and Parks to meet an anticipated revenue shortfall."

*Coordination Instruction:* Section 11, Ch. 598, L. 1987, a coordination instruction, increased fee in (1) of temporary version from $175 to $200.

## 87-2-511. Sale and use of Class B-10 and Class B-11 licenses.

### Compiler's Comments

*2019 Amendment:* Chapter 114 in (1) substituted "April 1" for "March 15". Amendment effective March 1, 2020.

*2017 Amendment:* Chapter 287 deleted former (7) that read: "(7) Subject to 87-2-522(2), at the time of application, an applicant for a Class B-13 license shall provide the name and automated licensing system number of the adult immediate family member who will accompany the youth." Amendment effective March 1, 2018.

*2015 Amendment:* Chapter 449 in (6)(a) at end substituted "fee of $831" for "fee that is $150 less than that set for a Class B-10 license in 87-2-505"; inserted (6)(b) concerning adjustment of cost of elk-only combination license; and made minor changes in style. Amendment effective March 1, 2016.

*2013 Amendments — Composite Section:* Chapter 104 in (7) deleted former first sentence that read: "The department shall offer the Class B-13 nonresident youth big game combination license for sale on March 1", substituted "Subject to 87-2-522(2), at the time of application, an applicant for a Class B-13 license" for "An applicant", and deleted former last sentence that read: "The adult sponsor must possess either a valid Class B-10 or Class B-11 license or a valid resident deer or elk tag at the time of application." Amendment effective October 1, 2013.

Chapter 319 in (6)(b) substituted "retain 10% of the Class B-10 license fee" for "charge a $25 processing fee". Amendment effective March 1, 2014.

*2011 Amendment:* Chapter 336 inserted (6) regarding licensing of applicant not successful in drawing for special elk permit; and made minor changes in style. Amendment effective May 5, 2011.

*2010 Amendment by Initiative:* Initiative Measure No. 161, proposed by initiative petition and approved at the general election held November 2, 2010, in (1) near middle after "March 15" deleted "a number of authorized Class B-10 and Class B-11 licenses, as determined under 87-1-268, reserved for applicants using the services of a licensed outfitter and"; deleted former (4) and (5) that read: "(4) Each application for an outfitter-sponsored license under subsection (1) must contain a written affirmation by the applicant that the applicant will hunt with a licensed outfitter for all big game hunted by the applicant under the license and must indicate the name of the licensed outfitter with whom the applicant will hunt. In addition, the application must be accompanied by a certificate that is signed by a licensed outfitter and that affirms that the outfitter will:

(a) accompany the applicant;

(b) provide guiding services for the species hunted by the applicant;

(c) direct the applicant's hunting for all big game hunted by the applicant under the license and advise the applicant of game and trespass laws of the state;

(d) submit to the department, in a manner prescribed by the department, complete records of who hunted with the outfitter, where they hunted, and what game was taken; and

(e) accept no monetary consideration for enabling the nonresident applicant to obtain a license or for providing any services or assistance to the nonresident applicant, except as provided in Title 37, chapter 47, and this title.

(5) An outfitter-sponsored license under subsection (1) is valid only when used in compliance with the affirmations of the applicant and outfitter required under subsection (4). If the sponsoring outfitter is unavailable or if the applicant wishes to use the services of separate outfitters for hunting different species of game, an outfitter-sponsored license may be used with a substitute licensed outfitter, in compliance with the affirmations under subsection (4), upon advance written notification to the board by the sponsoring licensed outfitter or the substitute outfitter"; deleted former (7) and (8) that read: "(7) Any permits or tags secured as a result of obtaining a Class B-10 or Class B-11 license through an outfitter sponsor are valid only when hunting is conducted with a licensed outfitter.

(8) The department shall make the reserved outfitter-sponsored Class B-10 and Class B-11 licenses that remain unsold available as provided in 87-1-268"; and made minor changes in style. Amendment effective March 1, 2011.

*2005 Amendment:* (Version effective March 1, 2006) Chapter 470 inserted (10) regarding sale of Class B-13 licenses. Amendment effective March 1, 2006.

*Termination Provision Deleted:* Sections 2 and 3, Ch. 235, L. 2005, amended sec. 6, Ch. 544, L. 1999, and sec. 18, Ch. 459, L. 1995, removing the provision that terminated amendments to this section March 1, 2006. Effective April 15, 2005.

*1999 Amendment:* (Temporary version) Chapter 544 in (3) inserted second, third, fourth, and fifth sentences requiring department to issue licenses to applicant sponsored by resident owner of 640 or more acres if licenses sufficient, requiring issuance of licenses to second applicant for sponsor, requiring drawing for remaining resident-sponsored licenses, and requiring drawing when number of licenses insufficient and in sixth sentence decreased number of sponsorship certificates from 20 to 15 and after "year" deleted "prior to expiration of the moratorium established in 37-47-315, after which no more than 10 certificates of sponsorship may be submitted in any license year"; and made minor changes in style. Amendment effective April 29, 1999.

*Extension of Termination Date:* Section 6, Ch. 544, L. 1999, amended sec. 18, Ch. 459, L. 1995, by extending the termination date imposed by Ch. 459 to March 1, 2006.

*1995 Amendments:* Chapter 328 in (1), after "applicants", substituted "using" for "indicating their intent to use"; in (2), near beginning, substituted "resident-sponsored license" for "reserved license", after "affirmation" inserted "by the applicant", after "hunt with" deleted "a licensed outfitter or", after "name of the" deleted "licensed outfitter or", after "signed by a" deleted "licensed outfitter or", and at end substituted "the resident sponsor will" for "the outfitter or resident will"; in (2)(b) inserted reference to resident sponsor; in (2)(c), at end, inserted reference to Title 37, chapter 47; inserted (4) relating to outfitter-sponsored license; inserted (5) relating to substitute outfitter; adjusted subsection references; and made minor changes in style.

Chapter 459 in temporary version in (1) substituted "a number" for "5,600", after "Class B-10" inserted "and Class B-11", and substituted "as determined under 87-1-268" for "and 2,000 Class B-11 licenses"; in (2)(b), pursuant to sec. 15(2), Ch. 459, L. 1995, a coordination section, substituted "the resident sponsor" for "the outfitter or resident"; in (3) inserted second sentence regarding limitation of submission of certificates of sponsorship; inserted (6) regarding limitation on deer hunting; inserted (7) regarding validity of permits or tags; in (8) inserted "outfitter-sponsored", after "remain unsold" deleted "on April 15", and substituted reference to 87-1-268 for "to nonresident applicants without restriction as to hunting with a licensed outfitter or resident sponsor"; in (9), after "subsection (1)", deleted "and all unsold reserved licenses available under subsection (4)"; and made minor changes in style. Amendment terminates October 1, 2001.

*Preamble:* The preamble attached to Ch. 459, L. 1995, provided: "WHEREAS, Montana has a cherished hunting heritage based on a deep knowledge of and respect for wildlife and the land; and

WHEREAS, private landowners provide wildlife habitat and hunting opportunities, the hunting public provides financial and political support for sound wildlife management, and the combined efforts of landowners and the hunting public have sustained Montana's hunting and wildlife heritage; and

WHEREAS, landowner/outfitter/sportsperson relations have become increasingly strained over the past several years, leading to increased polarization between the groups; and

WHEREAS, the 1993 Legislature addressed this problem through the passage of House Joint Resolution No. 24, which requested the Governor, through the Department of Fish, Wildlife, and Parks, to coordinate a sustained, ongoing, cooperative effort to address these issues by establishing statewide, regional, and local groups to develop mutually satisfactory solutions that would preserve Montana's hunting and wildlife heritage and encourage the continuance of a viable outfitting industry; and

WHEREAS, in response to that request, the Governor appointed the Advisory Council on Private Land/Public Wildlife, consisting of representatives of the affected groups, to study the issues in anticipation of legislation that reflects the mutual interests of landowners, outfitters, and the sporting community; and

WHEREAS, after considering extensive input and advice from individual private citizens, local working groups, agencies, and nonprofit organizations involved in conservation, the Advisory Council by consensus developed recommendations for improving hunting access to private lands and for providing tangible benefits for landowners who allow access to their lands for hunting; and

WHEREAS, the Advisory Council has made efforts to break new ground philosophically in designing its recommendations, requiring that all interested parties be willing to accept change in order to benefit everyone who has an interest in Montana's hunting and wildlife heritage; and

WHEREAS, the Advisory Council finds it appropriate to present the following recommendations to the Legislature in the spirit of a cooperative and positive effort to enhance relations between landowners, outfitters, and sportspersons."

*1995 Statement of Intent:* "A statement of intent is required for this bill because [sections 1 through 3] [87-1-265 through 87-1-267 (87-1-267 now repealed)] grant rulemaking authority to the department of fish, wildlife, and parks and the fish, wildlife, and parks commission to implement programs for hunter management and hunting access enhancement. It is intended that in addition to the statutory guidelines set out in those sections, any rules be adopted with the purpose of optimizing hunting opportunity and access while minimizing administrative costs in providing benefits to landowners who voluntarily participate in the programs. In addition, [section 6] [87-1-268, now repealed] grants rulemaking authority to the fish, wildlife, and parks commission to implement the provisions of variable pricing for Class B-10 and Class B-11 outfitter-sponsored licenses. It is intended that the fish, wildlife, and parks commission use its licensing authority to adjust the price of those licenses as necessary and that any additional revenue generated by variable pricing be used to fund the hunting access enhancement program."

*Severability:* Section 13, Ch. 459, L. 1995, was a severability clause.

*Saving Clause:* Section 14, Ch. 459, L. 1995, was a saving clause.

*2017 Amendment:* Chapter 287 deleted former (7) that read: "(7) Subject to 87-2-522(2), at the time of application, an applicant for a Class B-13 license shall provide the name and automated licensing system number of the adult immediate family member who will accompany the youth." Amendment effective March 1, 2018.

*2015 Amendment:* Chapter 449 in (6)(a) at end substituted "fee of $831" for "fee that is $150 less than that set for a Class B-10 license in 87-2-505"; inserted (6)(b) concerning adjustment of cost of elk-only combination license; and made minor changes in style. Amendment effective March 1, 2016.

*2013 Amendments — Composite Section:* Chapter 104 in (7) deleted former first sentence that read: "The department shall offer the Class B-13 nonresident youth big game combination license for sale on March 1", substituted "Subject to 87-2-522(2), at the time of application, an applicant for a Class B-13 license" for "An applicant", and deleted former last sentence that read: "The adult sponsor must possess either a valid Class B-10 or Class B-11 license or a valid resident deer or elk tag at the time of application." Amendment effective October 1, 2013.

Chapter 319 in (6)(b) substituted "retain 10% of the Class B-10 license fee" for "charge a $25 processing fee". Amendment effective March 1, 2014.

*2011 Amendment:* Chapter 336 inserted (6) regarding licensing of applicant not successful in drawing for special elk permit; and made minor changes in style. Amendment effective May 5, 2011.

*2010 Amendment by Initiative:* Initiative Measure No. 161, proposed by initiative petition and approved at the general election held November 2, 2010, in (1) near middle after "March 15" deleted "a number of authorized Class B-10 and Class B-11 licenses, as determined under 87-1-268, reserved for applicants using the services of a licensed outfitter and"; deleted former (4) and (5) that read: "(4) Each application for an outfitter-sponsored license under subsection (1) must contain a written affirmation by the applicant that the applicant will hunt with a licensed outfitter for all big game hunted by the applicant under the license and must indicate the name of the licensed outfitter with whom the applicant will hunt. In addition, the application must be accompanied by a certificate that is signed by a licensed outfitter and that affirms that the outfitter will:

(a) accompany the applicant;

(b) provide guiding services for the species hunted by the applicant;

(c) direct the applicant's hunting for all big game hunted by the applicant under the license and advise the applicant of game and trespass laws of the state;

(d) submit to the department, in a manner prescribed by the department, complete records of who hunted with the outfitter, where they hunted, and what game was taken; and

(e) accept no monetary consideration for enabling the nonresident applicant to obtain a license or for providing any services or assistance to the nonresident applicant, except as provided in Title 37, chapter 47, and this title.

(5) An outfitter-sponsored license under subsection (1) is valid only when used in compliance with the affirmations of the applicant and outfitter required under subsection (4). If the sponsoring outfitter is unavailable or if the applicant wishes to use the services of separate outfitters for hunting different species of game, an outfitter-sponsored license may be used with a substitute licensed outfitter, in compliance with the affirmations under subsection (4), upon advance written notification to the board by the sponsoring licensed outfitter or the substitute outfitter"; deleted former (7) and (8) that read: "(7) Any permits or tags secured as a result of obtaining a Class B-10 or Class B-11 license through an outfitter sponsor are valid only when hunting is conducted with a licensed outfitter.

(8) The department shall make the reserved outfitter-sponsored Class B-10 and Class B-11 licenses that remain unsold available as provided in 87-1-268"; and made minor changes in style. Amendment effective March 1, 2011.

*2005 Amendment:* (Version effective March 1, 2006) Chapter 470 inserted (10) regarding sale of Class B-13 licenses. Amendment effective March 1, 2006.

*Termination Provision Deleted:* Sections 2 and 3, Ch. 235, L. 2005, amended sec. 6, Ch. 544, L. 1999, and sec. 18, Ch. 459, L. 1995, removing the provision that terminated amendments to this section March 1, 2006. Effective April 15, 2005.

*1999 Amendment:* (Temporary version) Chapter 544 in (3) inserted second, third, fourth, and fifth sentences requiring department to issue licenses to applicant sponsored by resident owner of 640 or more acres if licenses sufficient, requiring issuance of licenses to second applicant for sponsor, requiring drawing for remaining resident-sponsored licenses, and requiring drawing when number of licenses insufficient and in sixth sentence decreased number of sponsorship certificates from 20 to 15 and after "year" deleted "prior to expiration of the moratorium established in 37-47-315, after which no more than 10 certificates of sponsorship may be submitted in any license year"; and made minor changes in style. Amendment effective April 29, 1999.

*Extension of Termination Date:* Section 6, Ch. 544, L. 1999, amended sec. 18, Ch. 459, L. 1995, by extending the termination date imposed by Ch. 459 to March 1, 2006.

*1995 Amendments:* Chapter 328 in (1), after "applicants", substituted "using" for "indicating their intent to use"; in (2), near beginning, substituted "resident-sponsored license" for "reserved license", after "affirmation" inserted "by the applicant", after "hunt with" deleted "a licensed outfitter or", after "name of the" deleted "licensed outfitter or", after "signed by a" deleted "licensed outfitter or", and at end substituted "the resident sponsor will" for "the outfitter or resident will"; in (2)(b) inserted reference to resident sponsor; in (2)(c), at end, inserted reference to Title 37, chapter 47; inserted (4) relating to outfitter-sponsored license; inserted (5) relating to substitute outfitter; adjusted subsection references; and made minor changes in style.

Chapter 459 in temporary version in (1) substituted "a number" for "5,600", after "Class B-10" inserted "and Class B-11", and substituted "as determined under 87-1-268" for "and 2,000 Class B-11 licenses"; in (2)(b), pursuant to sec. 15(2), Ch. 459, L. 1995, a coordination section, substituted "the resident sponsor" for "the outfitter or resident"; in (3) inserted second sentence regarding limitation of submission of certificates of sponsorship; inserted (6) regarding limitation on deer hunting; inserted (7) regarding validity of permits or tags; in (8) inserted "outfitter-sponsored", after "remain unsold" deleted "on April 15", and substituted reference to 87-1-268 for "to nonresident applicants without restriction as to hunting with a licensed outfitter or resident sponsor"; in (9), after "subsection (1)", deleted "and all unsold reserved licenses available under subsection (4)"; and made minor changes in style. Amendment terminates October 1, 2001.

*Preamble:* The preamble attached to Ch. 459, L. 1995, provided: "WHEREAS, Montana has a cherished hunting heritage based on a deep knowledge of and respect for wildlife and the land; and

WHEREAS, private landowners provide wildlife habitat and hunting opportunities, the hunting public provides financial and political support for sound wildlife management, and the combined efforts of landowners and the hunting public have sustained Montana's hunting and wildlife heritage; and

WHEREAS, landowner/outfitter/sportsperson relations have become increasingly strained over the past several years, leading to increased polarization between the groups; and

WHEREAS, the 1993 Legislature addressed this problem through the passage of House Joint Resolution No. 24, which requested the Governor, through the Department of Fish, Wildlife, and Parks, to coordinate a sustained, ongoing, cooperative effort to address these issues by establishing statewide, regional, and local groups to develop mutually satisfactory solutions that would preserve Montana's hunting and wildlife heritage and encourage the continuance of a viable outfitting industry; and

WHEREAS, in response to that request, the Governor appointed the Advisory Council on Private Land/Public Wildlife, consisting of representatives of the affected groups, to study the issues in anticipation of legislation that reflects the mutual interests of landowners, outfitters, and the sporting community; and

WHEREAS, after considering extensive input and advice from individual private citizens, local working groups, agencies, and nonprofit organizations involved in conservation, the Advisory Council by consensus developed recommendations for improving hunting access to private lands and for providing tangible benefits for landowners who allow access to their lands for hunting; and

WHEREAS, the Advisory Council has made efforts to break new ground philosophically in designing its recommendations, requiring that all interested parties be willing to accept change in order to benefit everyone who has an interest in Montana's hunting and wildlife heritage; and

WHEREAS, the Advisory Council finds it appropriate to present the following recommendations to the Legislature in the spirit of a cooperative and positive effort to enhance relations between landowners, outfitters, and sportspersons."

*1995 Statement of Intent:* "A statement of intent is required for this bill because [sections 1 through 3] [87-1-265 through 87-1-267] grant rulemaking authority to the department of fish, wildlife, and parks and the fish, wildlife, and parks commission to implement programs for hunter management and hunting access enhancement. It is intended that in addition to the statutory guidelines set out in those sections, any rules be adopted with the purpose of optimizing hunting opportunity and access while minimizing administrative costs in providing benefits to landowners who voluntarily participate in the programs. In addition, [section 6] [87-1-268, now repealed] grants rulemaking authority to the fish, wildlife, and parks commission to implement the provisions of variable pricing for Class B-10 and Class B-11 outfitter-sponsored licenses. It is intended that the fish, wildlife, and parks commission use its licensing authority to adjust the price of those licenses as necessary and that any additional revenue generated by variable pricing be used to fund the hunting access enhancement program."

*Severability:* Section 13, Ch. 459, L. 1995, was a severability clause.

*Saving Clause:* Section 14, Ch. 459, L. 1995, was a saving clause.

**Administrative Rules**

ARM 12.3.616 Alternate list.

### 87-2-512. Separation of Class B-7 license from Class B-10 license for deer management purposes — disposition of license revenue.

**Compiler's Comments**

*2010 Amendment by Initiative:* Initiative Measure No. 161, proposed by initiative petition and approved at the general election held November 2, 2010, in (1)(c)(i) at end deleted "and may not be more than the fee set by the commission for licenses in the outfitter-sponsored category as specified in 87-1-268"; in (1)(c)(ii) at end deleted "and may not be more than the fee set by the commission for licenses in the outfitter-sponsored category as specified in 87-1-268"; deleted former (1)(f) that read: "(f) may allocate a portion of the separated Class B-7 or Class B-11 licenses to the outfitter-sponsored category subject to the requirements and procedures of 87-2-511, except that licenses in the outfitter-sponsored category may not comprise more than one-third of the licenses issued pursuant to this section and the number issued, when added to the number of Class B-11 licenses issued under 87-1-268, may not exceed 2,300 in any license year"; and made minor changes in style. Amendment effective March 1, 2011.

*Termination Provision Repealed:* Section 1, Ch. 21, L. 2001, repealed sec. 6, Ch. 355, L. 1997, which terminated the 1997 amendments to this section October 1, 2001. Effective February 19, 2001.

*1997 Statement of Intent:* The statement of intent attached to Ch. 355, L. 1997, provided: "This bill establishes the authority of the fish, wildlife, and parks commission to modify, by rule, the structure of nonresident elk and deer licenses within the general framework established by law as needed for the effective management of big game animals. It is the intent of the legislature that in its initial rulemaking process, the commission utilize an advisory committee, including representatives of hunting and fishing organizations, outfitters, and landowners, to make recommendations regarding the structure of nonresident hunting licenses as authorized by this bill. It is also the intent of the legislature that commission rules not authorize more nonresident elk and deer hunters than are prescribed by current law."

*Effective Date:* Section 5, Ch. 355, L. 1997, provided: "[This act] is effective on passage and approval." Approved April 22, 1997.

*Termination:* Section 6, Ch. 355, L. 1997, provided: "[This act] terminates October 1, 2001."

### 87-2-513. Either-sex or antlerless elk license or permit for landowner who offers free public elk hunting — terms, conditions, and issuance.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 1, Ch. 730, L. 2023. Amendment effective March 1, 2024.

*2021 Amendments — Composite Section:* Chapter 94 in (1) in first sentence near beginning inserted "and with approval of the commission pursuant to 87-1-301"; and made minor changes in style. Amendment effective March 26, 2021.

Chapter 486 deleted former (2)(b) that read: "(b) may not have been issued a Class A-7 landowner license pursuant to 87-2-501(3) during the license year"; and made minor changes in style. Amendment effective March 1, 2022.

Chapter 552 in (3) near beginning substituted "three members" for "four members"; in (7)(a) near beginning of second sentence inserted "include a process or methodology the landowner may use to select up to one-third of the public hunters required by subsection (3) and must"; in (7)(b) at beginning inserted exception clause; and made minor changes in style. Amendment effective May 15, 2021.

*2019 Amendments — Composite Section:* Chapter 37 in (1) substituted current text concerning issuance of an either-sex or antlerless elk license or permit to a landowner providing free public elk hunting or to the landowner's designee for former text that read: "In addition to any elk permits offered for sale, the department may, for wildlife management purposes, issue an either-sex or antlerless elk permit at no cost to a landowner who provides free public elk hunting on the landowner's property and who otherwise meets the conditions of this section. The department may issue elk permits to the public, at regular cost and in the number authorized in subsection (3), for hunting on the property of a landowner who opens property for public elk hunting for wildlife management purposes pursuant to this section"; in (2) in introductory clause substituted "license or permit" for "permit"; in (2)(c) after "department" inserted "in accordance with subsection (7)" and after "hunting season" deleted "and that includes public hunting by permitholders using permits that are valid for the hunting district"; deleted former (2)(d) that read: "(d) may not receive cash payments under 87-1-267"; in (3) substituted current text concerning number of licenses or permits issued per number of the members of the public allowed to hunt for former text that read: "(3) "Subject to the management provisions provided in 87-1-321 through 87-1-325, not more than 20% of permits issued pursuant to this section may be issued at no cost to a landowner, an immediate family member of a landowner, or an authorized full-time employee of a landowner. The remaining permits must be issued to the public on a first-come, first-served basis"; in (4) in introductory clause substituted "license or permit" for "permit"; in (4)(a) after "sold" inserted "or bartered"; in (5) substituted "distribution of licenses or permits under subsection (1)" for "distribution of the permits"; in (6) in two places substituted "license or permit" for "permit"; in (7) (a) substituted current text concerning the terms of a contractual public elk hunting access agreement for former text that read: "The department, through the commission, may authorize the issuance of permits under this section to a landowner who enters into a contractual public elk hunting access agreement with the department that defines the areas that will be open to public elk hunting, the number of public elk hunting days that will be allowed on the property, and other factors that the department and the landowner consider necessary for the proper management of elk on the landowner's property"; inserted (7)(b) concerning selecting public hunters through a random drawing; and made minor changes in style. Amendment effective March 7, 2019.

Chapter 63 in (2)(d) substituted reference to 87-1-265 for reference to 87-1-267. Amendment effective March 19, 2019. Amendment rendered void by Ch. 37 amendment.

*Termination Provision Repealed:* Section 1, Ch. 52, L. 2005, repealed sec. 4, Ch. 519, L. 2001, which terminated this section March 1, 2006. Effective March 24, 2005.

*2003 Amendment:* Chapter 553 in (3) at beginning inserted provision relating to 87-1-321 through 87-1-325; and made minor changes in style. Amendment effective May 5, 2003.

*Preamble:* The preamble attached to Ch. 519, L. 2001, provided:

"WHEREAS, landowner stewards provide important habitat that beneficially contributes to elk herd numbers and health; and

WHEREAS, certain landowners close their land to public hunting, preventing any harvest of big game, while other landowners allow limited hunting access and harvest, creating a problem of uneven distribution of big game; and

WHEREAS, restricted access to private property for public hunting prevents the department from managing big game population numbers and distribution."

*Effective Date:* Section 3, Ch. 519, L. 2001, provided: "[This act] is effective on passage and approval." Approved May 1, 2001.

*Termination:* Section 4, Ch. 519, L. 2001, provided: "[This act] terminates March 1, 2006."

**Administrative Rules**

Title 12, chapter 9, subchapter 9, ARM Contractual public elk hunting access agreements.

## 87-2-514. Nonresident relative of resident allowed to purchase nonresident licenses at reduced cost — definitions.

**Compiler's Comments**

*2021 Amendment:* Chapter 170 in (4)(b) before "course" inserted "and education". Amendment effective March 1, 2022.

*2019 Amendment:* Chapter 221 deleted former (3) concerning purchase of a nonresident wildlife conservation license by the nonresident relative of a resident (see 2019 Session Law for former text ); and made minor changes in style. Amendment effective March 1, 2020.

*Termination Provision Removed:* Section 14, Ch. 356, L. 2019, amended sec. 21, 387, L. 2017, to remove the termination of amendments made to this section by sec. 13, Ch. 387, L. 2017. Effective May 7, 2019.

*2017 Amendments — Composite Section:* Chapter 287 in (2)(c) inserted "one of the following"; inserted (2)(c)(iii) concerning nonresident elk licenses; inserted (2)(d) concerning deer and elk B tags; in (4) inserted last sentence concerning nonresident elk-only combination licenses; and made minor changes in style. Amendment effective March 1, 2018.

Chapter 387 in (3) after "if the nonresident" deleted "relative of a resident" and at end after "hunting license" inserted reference to purchase of nonresident aquatic invasive species prevention pass; and made minor changes in style. Amendment effective May 15, 2017, and terminates February 29, 2020.

*Code Commissioner Note:* Chapter 387, L. 2017, was not signed and approved until May 18, 2017.

*2015 Amendment:* Chapter 449 in (2) at end inserted "the following at one-half the cost"; inserted (2)(c) concerning Class B-10 license; in (2)(d) substituted "B-11 nonresident deer combination license" for "B-7 nonresident deer A tag"; deleted former (2)(d) and (3) that read: "(d) a Class B-15 nonresident elk license as provided in 87-2-515.

(3) This section does not allow a nonresident relative of a resident to purchase nonresident combination licenses at a reduced price"; in (3) deleted former first sentence that read: "The fee for a nonresident license purchased pursuant to subsection (2) is four times the amount charged for an equivalent resident license" and in second sentence substituted "a nonresident base hunting license as prescribed in 87-2-116" for "pay the nonresident hunting access enhancement fee in 87-2-202(3)(d)"; inserted (4) concerning applicability of certain license sales toward B-10 and B-11 license limit; inserted (6) concerning portion of hunting license fees deposited into hunting access account; and made minor changes in style. Amendment effective March 1, 2016.

*2011 Amendment:* Chapter 415 inserted (1) defining terms; in (2) after "chapter" substituted "a nonresident relative of a resident" for "a person who is not a resident, as defined in 87-2-102, but who is the natural or adopted child of a resident, as defined in 87-2-102, and"; in (2)(d) at beginning deleted "at the reduced cost specified in subsection (2) and may purchase" and after "nonresident" deleted "child's"; in (3) substituted "relative" for "child"; in (4) in first sentence substituted "four times" for "twice", and in second sentence in two places substituted "relative of a resident" for "child"; in (5) at beginning substituted "relative" for "child"; in (5)(a) after "Montana" inserted language concerning documentation; substituted (5)(b) concerning previous license or hunter safety course for "a high school diploma from a Montana public, private, or home school or certified verification that the applicant has passed the general educational development test in Montana"; in (5)(c) substituted "is a nonresident relative of a resident" for "has a natural or adoptive parent who is a current Montana resident, as defined in 87-2-102"; deleted former (4) through (6) that read: "(4) A qualified nonresident child of a resident may purchase licenses pursuant to subsection (1) for up to 6 license years after receiving a diploma or passing the general educational development test as provided in subsection (3)(b).

(5) A nonresident child of a resident who has been issued a hunting license pursuant to this section is not eligible to apply for or be issued any nonresident special permit.

(6) A nonresident child of a resident who has been issued a hunting license pursuant to this section must be accompanied by a licensed resident family member while hunting in the field"; and made minor changes in style. Amendment effective March 1, 2012.

*2009 Amendment:* Chapter 2 in (3)(b) and in (4) after "general" substituted "educational" for "education". Amendment effective October 1, 2009.

*Effective Date:* Section 5, Ch. 484, L. 2005, provided that this section is effective March 1, 2006.

## 87-2-516. Drawing for Class A-9 and Class B-12 antlerless elk B tag licenses — landowner preference.

**Compiler's Comments**

*Effective Date:* Section 6, Ch. 486, L. 2021, provided: "[This act] is effective March 1, 2022."

## 87-2-519. Class D-4—nonresident hound license.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 17, Ch. 507, L. 2023. Amendment effective July 1, 2023.

*2021 Amendment:* Chapter 552 in (1) substituted current first sentence for former first sentence that read: "Except as provided in subsections (5) and (6), in order for a nonresident hound handler to use a dog or dogs to aid in the pursuit of mountain lions, the nonresident hound handler must first purchase, for a fee of $500, a Class D-4 nonresident hound handler license"; in (1)(b) at end inserted "or a special nonresident black bear license"; in (2) substituted

"80 Class D-4 licenses" for "35 Class D-4 licenses"; in (4) near beginning after "mountain lions" inserted "or black bears", near middle after "personally harvesting" substituted "an animal" for "a mountain lion", and near end after "a lion" inserted "or bear"; in (5) near end of introductory clause inserted "or black bears"; inserted (5)(b) relating to nonresident landowners who own 640 or more contiguous acres and to nonresident guests of those landowners; in (7) at end after "mountain lions" inserted "and black bears"; deleted former (8) (see 2021 Session Law for former text); and made minor changes in style. Amendment effective May 15, 2021.

*Effective Date:* Section 5, Ch. 378, L. 2019, provided: "[This act] is effective March 1, 2020."

## 87-2-520. Supplemental game damage license — terms and conditions.

**Compiler's Comments**

*2015 Amendment:* Chapter 449 in (4)(a) at end inserted "including a recipient who has obtained an apprentice hunting certificate pursuant to 87-2-810". Amendment effective May 8, 2015.

*Termination Provision Repealed:* Section 1, Ch. 51, L. 2005, repealed sec. 4, Ch. 590, L. 2001, which terminated this section March 1, 2006. Effective March 24, 2005.

*Effective Date:* Section 3, Ch. 590, L. 2001, provided that this section is effective on passage and approval. Approved May 5, 2001.

*Termination:* Section 4, Ch. 590, L. 2001, provided that this section terminates March 1, 2006.

**Administrative Rules**

ARM 12.9.805 Supplemental game damage licenses.

## 87-2-521. Class D-3—resident hound training license.

**Compiler's Comments**

*2021 Amendment:* Chapter 359 near end substituted "mountain lions, bobcats, or black bears" for "mountain lions or bobcats"; and made minor changes in style. Amendment effective October 1, 2021.

*2011 Amendment:* Chapter 258 at end substituted "87-6-404(4)" for "87-3-124(3)(c)". Amendment effective October 1, 2011.

*Preamble:* The preamble attached to Ch. 258, L. 2011, provided: "WHEREAS, the 2007 Legislature passed House Joint Resolution No. 16, urging that revision of the criminal codes within Title 87 of the Montana Code Annotated be given priority; and

WHEREAS, House Joint Resolution No. 16 noted that practitioners, judges, and citizens find that the criminal codes intertwined within the fish and game laws in Title 87 are difficult to read, understand, and prosecute; and

WHEREAS, House Joint Resolution No. 16 directed that revision of the Title 87 criminal code should not include policy changes to current laws and should adhere to the intent of the legislatures that crafted the laws; and

WHEREAS, in 2008, the Director of Fish, Wildlife, and Parks appointed a Title 87 criminal code revision working group, consisting of Justices of the Peace, County Attorneys, an Assistant Attorney General, legal counsel and the enforcement administrator of the Department of Fish, Wildlife, and Parks, and legislative staff; and

WHEREAS, the working group met numerous times and spent countless hours crafting a revision that makes the Title 87 criminal code more understandable without making substantive or policy changes to present law; and

WHEREAS, revision of the fish and game criminal statutes will benefit the hunting and fishing public, magistrates, and prosecutors by codifying crimes and penalties in a separate chapter of Montana law, rather than being intertwined throughout Title 87."

*Saving Clause:* Section 131, Ch. 258, L. 2011, was a saving clause.

*Severability:* Section 132, Ch. 258, L. 2011, was a severability clause.

*Effective Date:* Section 4, Ch. 126, L. 2003, provided: "[This act] is effective on passage and approval." Approved March 26, 2003.

## 87-2-522. Nonresident youth combination licenses.

**Compiler's Comments**

*2021 Amendment:* Chapter 30 in (2)(a) in last sentence after "sister" inserted "stepparent, or legal guardian"; and made minor changes in style. Amendment effective February 26, 2021.

*2017 Amendment:* Chapter 287 in (1) near middle after "regularly priced" deleted "Class B-10 nonresident big game combination" and at end deleted "a Class B-13 nonresident youth big game combination license"; inserted (1)(a) concerning nonresident combination licenses; inserted (1)(b) concerning deer and elk B tags; in (2)(a) deleted former first sentence that read: "The holder of a Class B-13 license is entitled to all the privileges of a Class B license, a Class B-1 license, a

Class B-7 license, an elk tag, and a nonresident wildlife conservation license", in first sentence near beginning substituted "a license issued pursuant to this section" for "a Class B-13 license", after "Class B-7" inserted "Class B-8", and after "Class B-11" inserted "Class B-12, or nonresident elk-only combination"; inserted (2)(b) concerning requirements for youth applying for licenses; in (3) near beginning substituted "Class B-10 and Class B-11 licenses issued pursuant to this section" for "Class B-13 licenses", near middle of first sentence substituted "Class B-10 and Class B-11 licenses" for "Class B-10 nonresident big game combination licenses", at end of first sentence inserted "and 87-2-510", and inserted second sentence concerning nonresident elk-only combination licenses; deleted former (4) that read: "(4) The holder of a valid Class B-13 license may apply for a Class B-12 nonresident elk B tag license when authorized by the commission pursuant to 87-2-104. The fee for a Class B-12 license is $270. The license entitles the holder to hunt in the hunting district or portion of a hunting district and under the terms and conditions specified by the commission"; and made minor changes in style. Amendment effective March 1, 2018.

*2015 Amendment:* Chapter 449 in (1) in middle after "Class B-10 nonresident big game combination license" deleted "plus the nonresident hunting access enhancement fee in 87-2-202(3)(d)"; in (2) in middle after "Class B-11" deleted "or Class B-15"; and made minor changes in style. Amendment effective March 1, 2016.

*2013 Amendment:* Chapter 104 in (2) near middle substituted "Class B-7, Class B-10, Class B-11, or Class B-15 license" for "nonresident Class B-10 or Class B-11 combination license". Amendment effective October 1, 2013.

*2011 Amendment:* Chapter 183 in (3) deleted former first sentence that read: "Not more than 300 Class B-13 licenses are authorized for sale each license year." Amendment effective March 1, 2012.

*Effective Date:* Section 6, Ch. 470, L. 2005, provided: "[This act] is effective March 1, 2006."

**87-2-523. Class E-1—resident wolf license.**

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 1, Ch. 90, L. 2023. Amendment effective April 18, 2023.

*2019 Amendments — Composite Section:* Chapter 377 in (1) near beginning inserted "and in subsection (2) of this section"; inserted (2) regarding purchase of the first Class E-1 license by a resident holder of a Class AAA combination sports license; and made minor changes in style. Amendment effective March 1, 2020.

Chapter 405 in (1) after "fee of" substituted "$12" for "$19". Amendment effective March 1, 2020.

*2013 Amendments — Composite Section:* Chapter 13 inserted (2) regarding 24-hour waiting period; and made minor changes in style. Amendment effective February 13, 2013.

Chapter 297 inserted (2) regarding 24-hour waiting period; and made minor changes in style. Amendment effective April 25, 2013.

*Severability:* Section 8, Ch. 297, L. 2013, was a severability clause.

*2011 Amendment:* Chapter 390 inserted (2) regarding deposit of fees; and made minor changes in style. Amendment effective July 1, 2011.

*Severability:* Section 8, Ch. 390, L. 2011, was a severability clause.

*Contingent Effective Date:* Section 8(2), Ch. 415, L. 2007, provided that this section is effective upon notification by the U.S. fish and wildlife service to the department of fish, wildlife, and parks that the wolf has been formally removed from the federal threatened or endangered species list and upon removal of the wolf from the state endangered species list by the department of fish, wildlife, and parks. The contingency occurred when the Northern Rocky Mountain gray wolf was removed from the federal list of threatened and endangered species by the United States Fish and Wildlife Service through the adoption of a rule effective May 4, 2009. The wolf was removed from the state endangered species list on the effective date of that rule.

*District Court Ruling — Effect on Delisting of Northern Rocky Mountain Gray Wolf:* On August 5, 2010, District Judge Donald Molloy reversed the delisting of the Northern Rocky Mountain gray wolf by issuing a ruling ordering that the April 2, 2009, Final Rule to Identify the Northern Rocky Mountain Population of Gray Wolf as a Distinct Population Segment, 74 Fed. Reg. 15123, which removed the Endangered Species Act's protection of wolves except in Wyoming, is vacated and set aside. Judge Molloy's ruling stated that the whole Northern Rocky Mountain gray wolf population must be protected, not just those in Wyoming, and that the federal Fish and Wildlife Service's delisting of the wolf in only Montana and Idaho as a solution to the legal problem raised by the inadequacy of Wyoming's regulatory mechanisms does not comply with the federal Endangered Species Act. (See consolidated causes CV 09-77-M-DWM and CV 09-82-M-DWM.)

### 87-2-524. Class E-2—nonresident wolf license.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 2, Ch. 90, L. 2023. Amendment effective April 18, 2023.

*2019 Amendment:* Chapter 351 in (1) near beginning inserted "and in subsection (2) of this section"; inserted (2) providing that certain nonresident license holders may purchase their first Class E-2 license for one-half the cost; and made minor changes in style. Amendment effective March 1, 2020.

*2013 Amendments — Composite Section:* Chapter 13 in (1) reduced fee from $350 to $50; inserted (2) regarding 24-hour waiting period; and made minor changes in style. Amendment effective February 13, 2013.

Chapter 297 in (1) reduced fee from $350 to $50; inserted (2) regarding 24-hour waiting period; and made minor changes in style. Amendment effective April 25, 2013.

*Severability:* Section 8, Ch. 297, L. 2013, was a severability clause.

*2011 Amendment:* Chapter 390 inserted (2) regarding deposit of fees; and made minor changes in style. Amendment effective July 1, 2011.

*Severability:* Section 8, Ch. 390, L. 2011, was a severability clause.

*Contingent Effective Date:* Section 8(2), Ch. 415, L. 2007, provided that this section is effective upon notification by the U.S. fish and wildlife service to the department of fish, wildlife, and parks that the wolf has been formally removed from the federal threatened or endangered species list and upon removal of the wolf from the state endangered species list by the department of fish, wildlife, and parks. The contingency occurred when the Northern Rocky Mountain gray wolf was removed from the federal list of threatened and endangered species by the United States Fish and Wildlife Service through the adoption of a rule effective May 4, 2009. The wolf was removed from the state endangered species list on the effective date of that rule.

*District Court Ruling — Effect on Delisting of Northern Rocky Mountain Gray Wolf:* On August 5, 2010, District Judge Donald Molloy reversed the delisting of the Northern Rocky Mountain gray wolf by issuing a ruling ordering that the April 2, 2009, Final Rule to Identify the Northern Rocky Mountain Population of Gray Wolf as a Distinct Population Segment, 74 Fed. Reg. 15123, which removed the Endangered Species Act's protection of wolves except in Wyoming, is vacated and set aside. Judge Molloy's ruling stated that the whole Northern Rocky Mountain gray wolf population must be protected, not just those in Wyoming, and that the federal Fish and Wildlife Service's delisting of the wolf in only Montana and Idaho as a solution to the legal problem raised by the inadequacy of Wyoming's regulatory mechanisms does not comply with the federal Endangered Species Act. (See consolidated causes CV 09-77-M-DWM and CV 09-82-M-DWM.)

### 87-2-525. Nonresident college student licenses.

**Compiler's Comments**

*2023 Amendments — Composite Section:* Section 1, Ch. 69, L. 2023, in (4) in first sentence after "September" deleted "at any department regional office or at the department headquarters in Helena" and in second sentence after "the applicant shall" substituted "supply a copy of a" for "present a". Amendment effective March 16, 2023.

Section 18, Ch. 507, L. 2023, in (1)(b)(i)(B) after "and a nonresident" deleted "wildlife". Amendment effective July 1, 2023.

*2021 Amendment:* Chapter 368 in (1) in introductory clause at beginning inserted "Subject to the provisions of subsection (2)", near middle substituted "subsection (3)" for "subsection (2)", and at end inserted "discounted hunting and fishing licenses as follows"; in (1)(a) at beginning inserted "If the student's state of residence does not offer resident-rate licenses to Montanans who are full-time college students in that state, the student may purchase"; inserted (1)(b) regarding reciprocity for resident-rate licenses for a nonresident student when offered by the student's state of residence; inserted (2)(a) concerning privileges allowed by a license; inserted (2)(b) limiting purchase of a license to 4 license years; in (3)(a) after "To qualify for a license" substituted "issued pursuant to this section" for "pursuant to subsection (1)" and after "a student" inserted "may not possess or apply for any resident hunting, fishing, or trapping licenses from another state or country or exercise resident hunting, fishing, or trapping privileges in another state or country and"; in (3)(a)(i) after "enrolled as a full-time" inserted "undergraduate"; inserted (3)(a)(ii) regarding enrollment as a full-time graduate student; inserted (3)(b) excluding a student who is enrolled in a program exclusively delivered online; and made minor changes in style. Amendment effective March 1, 2022.

*2017 Amendment:* Chapter 287 in (1) inserted "and who meets the qualifications of subsection (2)" and after "may purchase" substituted "the following for one-half of the cost" for "a Class B-14 nonresident college student big game combination license for one-half of the cost of a Class B-10 nonresident big game combination license if that student"; inserted (1)(a) concerning nonresident combination licenses; inserted (1)(b) concerning nonresident B tags; in (2) inserted introductory language concerning qualification for student licenses; deleted former (2) that read: "(2) The holder of a Class B-14 license is entitled to all the privileges of a Class B license, a Class B-1 license, a Class B-7 license, an elk tag, and a nonresident wildlife conservation license"; in (3) after "Application for a" substituted "license issued pursuant to this section" for "Class B-14 nonresident college student big game combination license"; inserted (4) concerning Class B-10 and Class B-11 licenses; and made minor changes in style. Amendment effective March 1, 2018.

*2015 Amendments — Composite Section:* Chapter 55 in (1)(b)(ii) substituted "a high school equivalency diploma issued in Montana" for "passed the general educational development test in Montana". Amendment effective October 1, 2015.

Chapter 449 in (1) near end substituted "one-half of the cost of a Class B-10 nonresident big game combination license" for "the same price as a Class AAA combination sports license". Amendment effective March 1, 2016.

*Effective Date:* Section 3, Ch. 174, L. 2009, provided: "[This act] is effective on passage and approval." Approved April 6, 2009.

**87-2-526. License for nonresident to hunt with resident sponsor or family member — use of license revenue.**

**Compiler's Comments**

*2021 Amendment:* Chapter 24 in (2) in second sentence after "course" substituted "and" for "or". Amendment effective March 1, 2022.

*2017 Amendment:* Chapter 287 in (1) in first sentence after "deer combination licenses" inserted "and 500 nonresident elk-only combination licenses", in second sentence after "established" inserted "for Class B-10 and Class B-11 licenses" and after "87-2-510" inserted "or the number of nonresident elk-only combination licenses available pursuant to 87-2-511", and at end inserted "or 87-2-511"; and made minor changes in style. Amendment effective March 1, 2018.

*2015 Amendment:* Chapter 449 in (1) at beginning deleted "In addition to the nonresident licenses provided for in 87-2-505 and 87-2-510" and near end substituted "is one-half of the fee set for the equivalent licenses in" for "must be the same as nonresident big game combination licenses and nonresident deer combination licenses offered by general drawing pursuant to"; and made minor changes in style. Amendment effective March 1, 2016.

*2013 Amendment:* Chapter 107 in (2) after "education course" deleted "prior to March 1, 2010"; and made minor changes in style. Amendment effective March 28, 2013.

*Termination Provision Repealed:* Section 2, Ch. 107, L. 2013, repealed sec. 4, Ch. 345, L. 2009, which terminated this section March 1, 2014. Effective March 28, 2013.

*Preamble:* The preamble attached to Ch. 345, L. 2009, provided: "WHEREAS, Montana's hunting heritage is promoted when families can continue to hunt together; and

WHEREAS, members of many Montana families have been required to move out of state to pursue expanded employment opportunities; and

WHEREAS, it can be difficult for these adult nonresident family members to draw a nonresident license in order to come back to Montana to hunt with their families; and

WHEREAS, there is a need for new revenue to address public land access concerns because access to public land for hunting is becoming increasingly difficult to obtain as traditional routes across private land are closed to public hunters; and

WHEREAS, creating a temporary new pool of nonresident licenses dedicated to former residents who desire to return to Montana to hunt with their families and directing the revenue from those licenses to fund public access to inaccessible public land would assist in strengthening both aspects of Montana's hunting heritage; and

WHEREAS, statistics compiled by the Department of Fish, Wildlife, and Parks will provide a measurement of the success of the pilot program to provide more opportunities for former residents to come back home to hunt and to determine whether the license and the associated public land access efforts have resulted in a net increase or decrease in hunting opportunities for resident hunters."

*Effective Date:* Section 3, Ch. 345, L. 2009, provided that this section is effective March 1, 2010.

*Termination:* Section 4, Ch. 345, L. 2009, provided: "[This act] terminates March 1, 2014."

## Part 6
## Furbearer Licenses

**Part Administrative Rules**

Title 12, chapter 6, subchapter 10, ARM Trapping.

**Part Case Notes**

*Constitutionality:* The disparity in the treatment of residents and nonresidents under 87-2-505 is not an unconstitutional discrimination because it infringes upon no fundamental rights and therefore does not violate the due process or equal protection clauses; nor is the right to hunt for sport a privilege or immunity of citizens of the several states that Montana is required to grant equally to residents and nonresidents under Art. IV, sec. 2, U.S. Const. Mont. Outfitters Action Group v. Fish & Game Comm'n, 417 F. Supp. 1005 (D.C. Mont. 1976), affirmed in Baldwin v. Fish & Game Comm'n, 436 US 371, 56 L Ed 2d 354, 98 S Ct 1852 (1978).

**Part Attorney General's Opinions**

*Right to Trap on Streams Not Governed by Stream Access Law:* The right to trap fur-bearing animals between the ordinary high-water marks of a stream is not governed by Title 23, ch. 2, part 3, but rather is dependent upon whether the trapper has license, invitation, or privilege to enter or remain upon land and whether the trapper has secured a license to trap. 41 A.G. Op. 36 (1985).

**Part Law Review Articles**

Montana Outfitters v. Fish and Game Commission: Of Elk and Equal Protection, Ramlow, 38 Mont. L. Rev. 387 (1977).

### 87-2-601. Class C—trapper's license.

**Compiler's Comments**

*2021 Amendment:* Chapter 170 in first sentence near middle after "fur-bearing animals" deleted "and hunt bobcat, wolverine, and Canada lynx" and inserted last sentence concerning the Class C-4 license. Amendment effective March 1, 2022.

*2003 Amendment:* Chapter 321 near beginning substituted "12 years of age or older" for "13 years of age or older"; near end substituted "the commission" for "the department"; and made minor changes in style. Amendment effective July 1, 2003.

*1985 Amendment:* Near beginning, after "87-2-102", inserted "who is 13 years of age or older".

*1983 Amendment:* Increased license fee from $10 to $20.

### 87-2-602. Class C-1—landowner's trapping license.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 87-2-603. Class C-2—nonresident trapper's license — reciprocity.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 1, Ch. 466, L. 2023. Amendment effective May 8, 2023.

*2003 Amendment:* Chapter 321 in (1) in first sentence near beginning substituted "12 years of age or older" for "13 years of age or older"; and made minor changes in style. Amendment effective July 1, 2003.

*1985 Amendment:* Near beginning of (1) after "87-2-102", inserted "who is 13 years of age or older".

### 87-2-605. Class C-3—youth trapping license.

**Compiler's Comments**

*2003 Amendment:* Chapter 321 near beginning substituted "12 years of age" for "13 years of age"; after "upon making application" deleted "and payment of a fee of $3"; near end substituted "the commission" for "the department"; and made minor changes in style. Amendment effective July 1, 2003.

**87-2-606. Class C-4—resident license to hunt bobcat, wolverine, and Canada lynx.**

**Compiler's Comments**

*Effective Date:* Section 8, Ch. 170, L. 2021, provided: "[This act] is effective March 1, 2022."

## Part 7

## Special and Combination Licenses and Nongame Certificate

**Part Case Notes**

*Constitutionality:* The disparity in the treatment of residents and nonresidents under 87-2-505 is not an unconstitutional discrimination because it infringes upon no fundamental rights and therefore does not violate the due process or equal protection clauses; nor is the right to hunt for sport a privilege or immunity of citizens of the several states that Montana is required to grant equally to residents and nonresidents under Art. IV, sec. 2, U.S. Const. Mont. Outfitters Action Group v. Fish & Game Comm'n, 417 F. Supp. 1005 (D.C. Mont. 1976), affirmed in Baldwin v. Fish & Game Comm'n, 436 US 371, 56 L Ed 2d 354, 98 S Ct 1852 (1978).

**Part Law Review Articles**

Montana Outfitters v. Fish and Game Commission: Of Elk and Equal Protection, Ramlow, 38 Mont. L. Rev. 387 (1977).

**87-2-701. Special licenses.**

**Compiler's Comments**

*2019 Amendment:* Chapter 221 in (1) after "for which the license is issued" deleted "and is the holder of a resident wildlife conservation license or a nonresident wildlife conservation license". Amendment effective March 1, 2020.

*2015 Amendment:* Chapter 449 in (1)(a), (1)(b), (1)(c), and (1)(g) substituted "$1,250" for "$750". Amendment effective March 1, 2016.

*2011 Amendment:* Chapter 292 in (1)(e) substituted "$150" for "$50" and "$1,000" for "$300"; in (2) substituted "$50" for "$25"; in (3) at beginning inserted exception clause; and made minor changes in style. Amendment effective March 1, 2012.

*2005 Amendment:* (Version effective March 1, 2006) Chapter 585 in (1)(a), (1)(b), and (1)(c) increased resident fee from $75 to $125; in (1)(d) increased resident fee from $11 to $14; and in (1)(g) increased resident fee from $75 to $125. Amendment effective March 1, 2006.

*Termination Provision Repealed:* Section 1, Ch. 50, L. 2005, repealed sec. 12, Ch. 598, L. 1987, sec. 3, Ch. 319, L. 1991, and secs. 1 and 2, Ch. 241, L. 1993, which terminated amendments to this section March 1, 2006. Effective March 24, 2005.

*2003 Amendment:* Chapter 604 inserted (1)(g) establishing fees for wild buffalo or bison licenses; and made minor changes in style. Amendment effective May 9, 2003.

*2001 Amendment:* (Version effective March 1, 2002) Chapter 528 in (1)(a), (1)(b), and (1)(c) increased nonresident fees for moose, mountain goat, and mountain sheep licenses from $475 to $750; in (1)(d) increased antelope nonresident fee from $150 to $200; in (1)(f) increased nonresident black bear fee from $120 to $350; and made minor changes in style.

(Version effective March 1, 2006) In (1)(a), (1)(b), and (1)(c) increased nonresident fees for moose, mountain goat, and mountain sheep licenses from $455 to $980; in (1)(d) increased antelope nonresident fee from $130 to $180; in (1)(f) increased nonresident black bear fee from $100 to $330; and made minor changes in style.

*1999 Amendment:* Chapter 533 in (1) after "who" substituted "is" for "will be" and after "older" substituted "or who will turn 12 years old before or during" for "prior to September 15 of"; and in (2) after "license" inserted "who is 12 years of age or older". Amendment effective October 1, 2000.

*1995 Amendment:* Chapter 263 in (1)(a) through (1)(d) of March 1, 1996, version deleted former license fees and dates upon which fees became effective (see 1995 Session Law for text); in versions effective March 1, 1996, and March 1, 2006, in (1)(f), after "black", deleted "or brown"; and made minor changes in style. Amendment effective March 1, 1996.

*Extension of Termination Date:* Section 1, Ch. 241, L. 1993, amended sec. 12, Ch. 598, L. 1987, to provide that the wildlife habitat acquisition program terminates March 1, 2006. Section 2, Ch. 241, L. 1993, amended sec. 3, Ch. 319, L. 1991, to provide that the wildlife habitat acquisition program terminates March 1, 2006.

*1991 Amendments:* Chapter 401 deleted (1)(g) establishing wild buffalo license with resident fee of $200 and nonresidential fee of $1,000; and made minor changes in style. Amendment effective April 9, 1991.

(Version effective March 1, 1992) Chapter 592 in (1)(a) increased resident moose license fee from $50 to $60 beginning March 1, 1992, and to $75 beginning March 1, 1994, and nonresident fee from $320 to $450 beginning March 1, 1992, and to $475 beginning March 1, 1994; in (1)(b) increased resident mountain goat license fee from $50 to $60 beginning March 1, 1992, and to $75 beginning March 1, 1994, and nonresident fee from $320 to $450 beginning March 1, 1992, and to $475 beginning March 1, 1994; in (1)(c) increased resident mountain sheep license fee from $50 to $60 beginning March 1, 1992, and to $75 beginning March 1, 1994, and nonresident fee from $320 to $450 beginning March 1, 1992, and to $475 beginning March 1, 1994; and in (1)(d) increased resident antelope license fee from $6 to $9 beginning March 1, 1992, and to $11 beginning March 1, 1994, and nonresident fee from $120 to $145 beginning March 1, 1992, and to $150 beginning March 1, 1994.

(Version effective March 1, 1996) Chapter 592 in (1)(a) increased resident moose license fee from $50 to $75 and nonresident fee from $300 to $455; in (1)(b) increased resident mountain goat license fee from $50 to $75 and nonresident fee from $300 to $455; in (1)(c) increased resident mountain sheep license fee from $50 to $75 and nonresident fee from $300 to $455; and in (1)(d) increased resident antelope license fee from $6 to $11 and nonresident fee from $100 to $130. Amendments effective March 1, 1992.

*Preamble:* The preamble attached to Ch. 592, L. 1991, provided: "WHEREAS, an increase in Montana hunting and fishing license fees is necessary to raise revenue in order for the Department of Fish, Wildlife, and Parks to meet an anticipated revenue shortfall."

*Extension of Termination Date:* Section 3, Ch. 319, L. 1991, amended sec. 12, Ch. 598, L. 1987, to provide that the wildlife habitat acquisition program terminates March 1, 1996. Amendment effective April 2, 1991.

*1987 Amendment:* Increased all nonresident fees except on grizzly bear and wild buffalo by $20.

*1985 Amendment:* Inserted (1)(g) establishing license fee for wild buffalo.

*1983 Amendment:* Effective March 1, 1984, increased license fees for residents and nonresidents respectively as follows: in (1)(a) for moose from $25 to $50 and from $175 to $300; in (1)(b) for mountain goat from $15 to $50 and from $175 to $300; in (1)(c) for mountain sheep from $25 to $50 and from $175 to $300; in (1)(e) for grizzly bear from $25 to $50 and $175 to $300; and in (1)(d) increased the resident fee for antelope from $5 to $6.

*1981 Amendment:* Changed the nonresident fee in (1)(a), (b), (c), and (e) from "$150" to "$175".

*Composite Section:* This section was amended by Ch. 100 and Ch. 478, L. 1979, and a composite section was prepared by the Code Commissioner, 1979. Although Ch. 100 and Ch. 478 differ in language usage, they do not conflict conceptually. Changes were made to incorporate the concepts of both chapters.

**Administrative Rules**

ARM 12.3.503 Limitation on number of hunting licenses.

ARM 12.3.620 Moose, sheep, and goat licenses.

**Case Notes**

*Bear Killed Unlawfully — State Prosecution Barred:* Defendant was charged in state District Court for subscribing to a materially false statement on an application for a grizzly bear trophy license and was charged and convicted in federal District Court for violating the Endangered Species Act for taking the same trophy. The federal court and the state court have concurrent jurisdiction, and the state prosecution is barred as it is based on an offense arising out of the same transaction as the federal charge. St. v. Sword, 229 M 370, 747 P2d 206, 44 St. Rep. 2053 (1987), distinguishing St. v. Pierce, 199 M 57, 647 P2d 847 (1982), and Blockburger v. U.S., 284 US 299, 76 L Ed 306, 52 S Ct 180 (1932).

## **87-2-702. Restrictions on special licenses — availability of bear and mountain lion licenses.**

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 2, Ch. 267, L. 2023. Amendment effective March 1, 2024.

*2021 Amendments — Composite Section:* Chapter 261 in (4)(b)(ii) in introductory clause substituted current text for former text that read: "Before September 1 of each even-numbered year, the department shall report to the environmental quality council information on". Amendment effective April 20, 2021.

Chapter 552 deleted former (6) and (7) (see 2021 Session Law for former text). Amendment effective May 15, 2021.

*2017 Amendment:* Chapter 186 in (4)(b) in first sentence after "a person who takes a" substituted "legal ram mountain sheep with at least one horn that is equal to or greater than a three-fourths curl" for "mountain sheep" and substituted "or a population management license issued pursuant to 87-2-701" for "with the exception of a mountain sheep taken pursuant to an adult ewe license, as authorized by 87-2-701"; inserted (4)(b)(ii) concerning department report requirements to the environmental quality council; and made minor changes in style. Amendment effective July 1, 2017, and amendment to (4)(b)(ii) terminates July 1, 2027.

*2013 Amendments — Composite Section:* Chapter 54 in (3) inserted exception clause; in (4)(a) and (4)(b) inserted reference to 87-2-815; and made minor changes in style. Amendment effective February 27, 2013.

Chapter 151 in (6)(a) and (6)(b) substituted "24 hours" for "5 days". Amendment effective April 5, 2013.

*2009 Amendment:* Chapter 136 inserted (5) regarding applications for wild buffalo or bison licenses; inserted (6) regarding the purchase of bear licenses; inserted (7) regarding the purchase of mountain lion licenses; and made minor changes in style. Amendment effective April 1, 2009.

*2007 Amendment:* Chapter 25 in (4)(a) in first sentence after "sheep license" deleted "with the exception of an adult ewe license" and after "87-2-701" inserted "with the exception of an antlerless moose or an adult ewe game management license issued under 87-2-104"; and made minor changes in style. Amendment effective March 22, 2007.

*2005 Amendment:* Chapter 471 in (4)(a) and (4)(b) at beginning inserted exception clause. Amendment effective April 28, 2005.

*2003 Amendment:* Chapter 201 in (1) after "deer" inserted "elk"; and made minor changes in style. Amendment effective April 1, 2003.

*1995 Amendment:* Chapter 115 in (3), after "may", deleted "during his lifetime"; in (4)(a) inserted definition of limited mountain sheep license; inserted (4)(b) relating to unlimited mountain sheep license; and made minor changes in style.

*1991 Amendment:* Inserted (4) prohibiting a person who receives a certain special license from eligibility for receiving another license for that species for 7 years. Amendment effective February 27, 1991.

*1989 Amendment:* Deleted former (1) that read: "(1) A person who has received a special permit for elk is not eligible to receive a second special permit for elk during any license year. However, in the event the number of applications received is not equal to the number of elk desired to be killed by the department, reapplication may be made by those valid license holders of the current year who may fall within these limitations." Amendment effective April 4, 1989.

*1987 Amendment:* In (1) substituted "elk" for "this species of game animal" and for "game animals"; inserted (3) requiring applicants for a special license to first hold a current license for that species; and inserted (4) restricting to one the number of grizzly bears any person may take in his lifetime.

*1981 Amendment:* Deleted former subsection (1) dealing with restrictions on eligibility to apply for another special license for the next succeeding 7 years if special game for which license was issued was killed.

## 87-2-704. Regulation of special elk permits.

### Compiler's Comments

*2009 Amendment:* Chapter 175 in (2)(a) inserted exception clause allowing the holder of a general elk license to hunt any elk during the time permitted for hunting antlerless elk; and made minor changes in style. Amendment effective April 6, 2009.

*2005 Amendment:* (Version effective March 1, 2006) Chapter 585 in (4) increased fee from $3 to $4. Amendment effective March 1, 2006.

*2003 Amendment:* Chapter 201 inserted (3) concerning waiting period for special elk permit; and made minor changes in style. Amendment effective April 1, 2003.

*1991 Amendments:* Chapter 358 inserted (2) limiting hunting by special elk permit to taking of only antlerless elk in the district where the permit is valid, while allowing general elk hunting privileges in other districts; and made minor change in style. Amendment effective April 6, 1991.

Chapter 592 inserted (3) concerning fees for special elk permit. Amendment effective March 1, 1992.

*Preamble:* The preamble attached to Ch. 592, L. 1991, provided: "WHEREAS, an increase in Montana hunting and fishing license fees is necessary to raise revenue in order for the Department of Fish, Wildlife, and Parks to meet an anticipated revenue shortfall."

*1991 Statement of Intent:* The statement of intent attached to Ch. 358, L. 1991, provided: "A statement of intent is provided for this bill because the legislature is aware that increasing elk populations are of concern to private landowners who are impacted by increased numbers of elk on their property. This legislation is not intended to replace the Class A-7 antlerless elk license but is intended to provide flexibility to solve problems that might arise for both landowners and sportsmen regarding surplus antlerless elk. The legislature encourages the fish and game commission [now fish, wildlife, and parks commission] and the department of fish, wildlife, and parks to utilize the Class A-7 antlerless elk license whenever practical."

## 87-2-705. Drawing for special elk permits.

**Compiler's Comments**

*1991 Amendment:* In (2), near beginning after "who", substituted "owns or is contracting to purchase" for "holds fee title to".

*1989 Amendment:* In (2), at end, substituted "in the hunting district under the terms and conditions of the permit" for "on land owned by him". Amendment effective March 24, 1989.

*1987 Amendment:* Inserted (2) through (4) relating to the landowner set-aside of special elk permits.

*1981 Amendment:* Deleted preference granted persons who applied but did not receive a special elk permit during the season immediately preceding; and inserted second sentence relating to choice of hunting districts.

**Administrative Rules**

ARM 12.3.619 Elk permits.

## 87-2-706. Drawing for special antelope licenses — licenses for those with life-threatening illness.

**Compiler's Comments**

*2015 Amendment:* Chapter 449 in (2) substituted "87-2-817(1)" for "87-2-803(5)". Amendment effective March 1, 2016.

*2011 Amendment:* Chapter 68 inserted (3) authorizing department to issue special antelope license to person with a life-threatening illness; and made minor changes in style. Amendment effective March 25, 2011.

*2005 Amendment:* Chapter 556 in (2) in first sentence near middle inserted exception clause. Amendment effective October 1, 2005.

*1997 Amendment:* Chapter 472 in (2), in first sentence, substituted "nonambulatory and have a permanent physical disability" for "permanently physically handicapped and nonambulatory"; and made minor changes in style.

*1987 Amendment:* Inserted (2) relating to handicapped preference for special antelope licenses; and in (3), after "department", substituted "may" for "shall have the authority to". Amendment effective March 1, 1988.

*1981 Amendment:* Deleted preference granted persons who applied but did not receive a special antelope license during the season immediately preceding; and inserted second sentence relating to choice of hunting districts.

**Administrative Rules**

ARM 12.3.617 Antelope licenses.

## 87-2-708. Class A-2—special bow and arrow license.

**Compiler's Comments**

*2005 Amendment:* (Version effective March 1, 2006) Chapter 585 near middle increased fee from $8 to $10. Amendment effective March 1, 2006.

*1995 Amendment:* Chapter 417 near middle, after "holder to", deleted "pursue" and after "hunt" deleted "shoot, and kill"; and made minor changes in style. Amendment effective July 1, 1995.

*Severability:* Section 37, Ch. 417, L. 1995, was a severability clause.

*1991 Amendment:* Increased Class A-2 license fee from $7 to $8. Amendment effective March 1, 1992.

*Preamble:* The preamble attached to Ch. 592, L. 1991, provided: "WHEREAS, an increase in Montana hunting and fishing license fees is necessary to raise revenue in order for the Department of Fish, Wildlife, and Parks to meet an anticipated revenue shortfall."

*1987 Amendment:* Near middle of section increased fee from $6 to $7. Amendment effective March 1, 1988.

*Composite Unnecessary:* This section was amended by Ch. 220 and Ch. 478, L. 1979, but the Code Commissioner chose the language of Ch. 478 over that of Ch. 220 because the language "or any special license" added to the specific listing of licenses by Ch. 220 was obviated by the deletion of references to specific licenses in favor of a general, all-inclusive reference to "a valid hunting license for which a special archery season is set by the department" by Ch. 478.

**87-2-711. Class AAA—combination sports license.**

**Compiler's Comments**

*2019 Amendment:* Chapter 221 in (1)(a) after "A-5 licenses" deleted "and resident conservation licenses as prescribed in 87-2-202" and after "upon payment of the sum of" substituted "$62" for "$70 or, if the resident is a service member eligible for a combination sports license pursuant to 87-2-817(2), upon payment of the resident base hunting license fee provided for in 87-2-116 and purchase of the resident aquatic invasive species prevention pass pursuant to 87-2-130"; and in (1)(b) decreased fee from $85 to $77. Amendment effective March 1, 2020.

*Termination Provision Removed:* Sec. 14, Ch. 356, L. 2019, amended sec. 21, Ch. 387, L. 2017, to remove the termination of the amendment made to this section by sec. 14, Ch. 387, L. 2017. Effective May 7, 2019.

*2017 Amendment:* Chapter 387 in (1)(a) at end after "87-2-116" inserted reference to purchase of resident aquatic invasive species prevention pass. Amendment effective May 15, 2017, and terminates February 29, 2020.

*Code Commissioner Note:* Chapter 387, L. 2017, was not signed and approved until May 18, 2017.

*2015 Amendment:* (Both versions) Chapter 449 in (1) at beginning inserted exception clause; and made minor changes in style. Amendment effective May 8, 2015.

(Version effective March 1, 2016) In (1)(a) near middle after "$70" deleted "plus the resident hunting access enhancement fee provided for in 87-2-202(3)(c)" and near end substituted "87-2-817(2), upon payment of the resident base hunting license fee provided for in 87-2-116" for "87-2-803(12), upon payment of the resident hunting access enhancement fee provided for in 87-2-202(3)(c)"; and in (1)(b) after "Class A-6" substituted "tag" for "license" and at end after "$85" deleted "plus the resident hunting access enhancement fee provided for in 87-2-202(3)(c)". Amendment effective March 1, 2016.

*2007 Amendment:* Chapter 406 in (1)(a) near end substituted "payment of the resident hunting access enhancement fee" for "payment of $29, plus the resident hunting access enhancement fee". Amendment effective May 3, 2007.

*2005 Amendments — Composite Section:* Chapter 573 in (1)(a) at end inserted provision allowing an eligible service member to obtain a combination license upon payment of a $29 fee and the hunting access enhancement fee; and made minor changes in style. Amendment effective May 2, 2005.

(Version effective March 1, 2006) Chapter 585 in (1)(a) near beginning increased fee from $54 to $70; and in (1)(b) near beginning increased fee from $64 to $85. Amendment effective March 1, 2006.

*Termination Provision Repealed:* Section 4, Ch. 235, L. 2005, repealed sec. 9, Ch. 216, L. 2001, that terminated amendments to this section March 1, 2006. Effective April 15, 2005.

*2001 Amendment:* Chapter 216 in (1)(a) after "$54" and in (1)(b) after "$64" inserted "plus the resident hunting access enhancement fee in 87-2-202(3)(c)". Amendment effective March 1, 2002, and terminates March 1, 2006.

*Preamble:* The preamble attached to Ch. 216, L. 2001, provided: "WHEREAS, the Private Land/Public Wildlife Advisory Council is charged with the responsibility to make suggestions for funding, modification, or improvement of the hunting access enhancement program; and

WHEREAS, although the hunting access enhancement program has enjoyed considerable success to date in providing greater opportunities for Montana hunters, the Private Land/Public Wildlife Advisory Council recognizes the potential to increase hunting access through expansion of the program; and

WHEREAS, increasing the size of the current program through a once-a-season hunting access enhancement fee on resident and most nonresident hunters would provide revenue to allow greater landowner incentives, improve hunting access to private and public lands, improve program management and services, increase upland bird hunting opportunities, and provide for future increased program costs because of inflation."

*1999 Amendment:* Chapter 533 in (1) after "who" substituted "is" for "will be" and after "older" substituted "or who will turn 12 years old before or during" for "before September 15 of"; in (1)(a) and (1)(b) after "holder" inserted "who is 12 years of age or older"; and made minor changes in style. Amendment effective October 1, 2000.

*1997 Amendment:* Chapter 187 in (2), after "department", substituted "may" for "shall"; and made minor changes in style. Amendment effective March 1, 1998.

*1995 Amendment:* Chapter 263 in (1)(a) of March 1, 1996, version, after "$54", deleted "beginning March 1, 1992, and $64 beginning March 1, 1994, shall be entitled to"; in version effective March 1, 2006, substituted "$54" for "$64"; in both versions: in (1)(a) and (2) substituted "combination sports license" for "sportsman's license"; in (1)(a), after "A-5", deleted "A-6"; inserted (1)(b) regarding combination sports license; and made minor changes in style. Amendment effective March 1, 1996.

The effect of the amendment was to render the March 1, 1996, version and the March 1, 2006, version identical. Accordingly, the Code Commissioner has not separately published the version effective March 1, 2006.

*Extension of Termination Date:* Section 1, Ch. 241, L. 1993, amended sec. 12, Ch. 598, L. 1987, to provide that the wildlife habitat acquisition program terminates March 1, 2006. Section 2, Ch. 241, L. 1993, amended sec. 3, Ch. 319, L. 1991, to provide that the wildlife habitat acquisition program terminates March 1, 2006. The extension of the termination date made by Ch. 241, L. 1993, was rendered meaningless by the amendments made by Ch. 263, L. 1995.

*1991 Amendment:* (Version effective March 1, 1992) Increased sportsman's license fee from $45.50 to $54 beginning March 1, 1992, and to $64 beginning March 1, 1994.

(Version effective March 1, 1996) Increased sportsman's license fee from $38.50 to $64. Amendments effective March 1, 1992.

*Preamble:* The preamble attached to Ch. 592, L. 1991, provided: "WHEREAS, an increase in Montana hunting and fishing license fees is necessary to raise revenue in order for the Department of Fish, Wildlife, and Parks to meet an anticipated revenue shortfall."

*Extension of Termination Date:* Section 3, Ch. 319, L. 1991, amended sec. 12, Ch. 598, L. 1987, to provide that the wildlife habitat acquisition program terminates March 1, 1996. Amendment effective April 2, 1991.

*1989 Amendment:* Changed "$45" to "$45.50". Amendment effective July 1, 1989. Section 9, Ch. 601, L. 1989, amended sec. 8, Ch. 636, L. 1987, to increase the fee from "$38" to "$38.50" after March 1, 1994.

*Applicability:* Section 11, Ch. 601, L. 1989, provided that this section applies to licenses for fishing seasons that begin on or after March 1, 1990.

*1987 Amendments:* Chapter 598 increased fee from $36 to $45 from March 1, 1988, to March 1, 1994.

Chapter 636 increased fee from $36 to $38.

*1985 Amendment:* Increased license fee from $35 to $36 effective March 1, 1986.

## 87-2-714. Landowner preference for Class B-10 nonresident big game combination license.

**Compiler's Comments**

*Effective Date:* Section 4, Ch. 487, L. 2023, provided: "[This act] is effective March 1, 2024."

## 87-2-722. Auction of mountain sheep license.

**Compiler's Comments**

*1993 Amendment:* Chapter 349 in last sentence of (2), after "report", deleted "to each legislature concerning" and after "proceeds" inserted "to the office of budget and program planning as a part of the information required by 17-7-111".

*Statement of Intent:* The statement of intent attached to HB 282 (Ch. 414, L. 1985) provided: "House Bill No. 282 requires a statement of intent because section 1 [87-2-722] authorizes the fish and game commission [now fish, wildlife, and parks commission] to establish rules for the use of the license to be auctioned and for the conduct of the auction.

It is the intent of the legislature that the commission, in drafting rules, shall consult with other states such as Wyoming, Utah, and Nevada which have similar legislation. The commission shall strive to maximize the revenue generated by the auction, and to that end shall select the method of auction which it perceives will best attain that objective.

Because revenue from the auction of the license is not predictable, it is the intent of the legislature that the department shall use such money only for special projects related to mountain sheep research, management, and habitat improvement, and such funds may not be budgeted or used in place of funds regularly appropriated by the legislature for mountain sheep related purposes."

**Administrative Rules**

ARM 12.3.801 Proposals for licenses sold by auction or lottery.

ARM 12.3.802 Procedure for submitting proposals and awarding an auction or lottery license.

## 87-2-724. Auction of Shiras moose license.

**Compiler's Comments**

*1993 Amendment:* Chapter 349 deleted third sentence of (2) that read: "The department shall, as provided in 5-11-210, report to each legislature concerning the use or investment of auction proceeds."

*1991 Amendment:* In last sentence inserted reference to 5-11-210. Amendment effective March 20, 1991.

*1987 Statement of Intent:* The statement of intent attached to Ch. 174, L. 1987, provided: "This bill requires a statement of intent because section 1 [87-2-724] authorizes the fish and game commission [now fish, wildlife, and parks commission] to establish rules for the use of the license to be auctioned and for the conduct of the auction.

It is the intent of the legislature that the commission, in drafting rules, shall consult with any other states which have similar legislation. The commission shall strive to maximize revenue generated by the auction and for that purpose shall select the method of auction which it determines will best attain that objective.

Because revenue from the auction of the license is not predictable, it is the intent of the legislature that the department shall use such money only for special projects related to moose research, management, and habitat improvement, and such funds may not be budgeted or used in place of funds regularly appropriated by the legislature for moose-related purposes."

**Administrative Rules**

ARM 12.3.801 Proposals for licenses sold by auction or lottery.

ARM 12.3.802 Procedure for submitting proposals and awarding an auction or lottery license.

## 87-2-725. Auction or lottery of mountain goat license — rules.

**Compiler's Comments**

*Effective Date:* Section 3, Ch. 40, L. 2005, provided: "[This act] is effective on passage and approval." Approved March 24, 2005.

**Administrative Rules**

ARM 12.3.801 Proposals for licenses sold by auction or lottery.

ARM 12.3.802 Procedure for submitting proposals and awarding an auction or lottery license.

## 87-2-730. Special wild buffalo license — regulation.

**Compiler's Comments**

*2013 Amendments — Composite Section:* Chapter 181 in (3)(c) after "hunt" deleted "but notification may not include information regarding the actual physical location of a wild buffalo or bison other than the prescribed hunting district where the animal may be taken". Amendment effective October 1, 2013.

Chapter 298 in (3)(b) at beginning deleted "drawing and". Amendment effective March 1, 2014.

*2011 Amendment:* Chapter 221 inserted (3)(f) regarding use of bows and arrows; and made minor changes in style. Amendment effective October 1, 2011.

*Preamble:* The preamble attached to Ch. 604, L. 2003, provided: "WHEREAS, the Legislature intends that the provisions of the special wild buffalo or bison license be administered and implemented by the Department of Fish, Wildlife, and Parks, after consultation with the Department of Livestock, regarding the management of wild buffalo or bison that have been designated as a species in need of disease control."

*Effective Date:* Section 6, Ch. 604, L. 2003, provided: "[This act] is effective on passage and approval." Approved May 9, 2003.

## 87-2-732. Allocation of wild buffalo licenses to tribes for traditional purposes.

**Compiler's Comments**

*Effective Date:* Section 4, Ch. 196, L. 2017, provided: "[This act] is effective on passage and approval." Approved April 13, 2017.

**87-2-735. Landowner preference licenses and permits for deer and antelope.**

**Compiler's Comments**

*Effective Date:* Section 3, Ch. 94, L. 2023, provided: "[This act] is effective on passage and approval." Approved April 18, 2023.

## Part 8
## Exceptions to License Requirements

**Part Case Notes**

*Constitutionality:* The disparity in the treatment of residents and nonresidents under 87-2-505 is not an unconstitutional discrimination because it infringes upon no fundamental rights and therefore does not violate the due process or equal protection clauses; nor is the right to hunt for sport a privilege or immunity of citizens of the several states that Montana is required to grant equally to residents and nonresidents under Art. IV, sec. 2, U.S. Const. Mont. Outfitters Action Group v. Fish & Game Comm'n, 417 F. Supp. 1005 (D.C. Mont. 1976), affirmed in Baldwin v. Fish & Game Comm'n, 436 US 371, 56 L Ed 2d 354, 98 S Ct 1852 (1978).

**Part Law Review Articles**

Montana Outfitters v. Fish and Game Commission: Of Elk and Equal Protection, Ramlow, 38 Mont. L. Rev. 387 (1977).

The Right to Kill Wild Animals in Defense of Person or Property, Bender, 31 Mont. L. Rev. 235 (1970).

**87-2-801. Licenses for residents over 62 years of age.**

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 19, Ch. 507, L. 2023. Amendment effective July 1, 2023.

*2019 Amendment:* Chapter 221 inserted (1) regarding wildlife conservation licenses; and made minor changes in style. Amendment effective March 1, 2020.

*2015 Amendment:* Chapter 449 substituted current text concerning residents over age 62 for former section that read: "(1) A resident, as defined in 87-2-102, who is 62 years of age or older is entitled to fish and hunt game birds, not including wild turkeys, with a conservation license issued by the department. The form of the license must be prescribed by the department.

(2) A resident who is 62 years of age or older is also entitled to purchase a Class A-3 deer A tag for $10 and a Class A-5 elk tag for $12.

(3) Regardless of age, a resident, as defined in 87-2-102, or a nonresident who is a legion of valor member is entitled to fish with a conservation license issued by the department.

(4) Regardless of age, a resident, as defined in 87-2-102, who has been awarded a purple heart for service in the armed forces of the United States is entitled to fish and hunt game birds, not including wild turkeys, with a conservation license issued by the department.

(5) Regardless of age, a nonresident who has been awarded a purple heart for service in the armed forces of the United States is entitled to fish and hunt game birds, not including wild turkeys, with a conservation license issued by the department during expeditions arranged for the nonresident by a nonprofit organization that uses fishing and hunting as part of the rehabilitation of disabled veterans.

(6) The department's general license account must be reimbursed by a quarterly transfer of funds from the general fund to the general license account for license costs associated with the fishing and game bird hunting privileges granted pursuant to subsections (4) and (5) during the preceding calendar quarter. Reimbursement costs must be designated as license revenue." Amendment effective March 1, 2016.

*Annotator's Note:* Section 87-2-816 is a recodification of text formerly contained in 87-2-801.

*2007 Amendment:* Chapter 452 inserted (4) and (5) granting fishing and game bird license privileges to certain purple heart recipients; and inserted (6) providing reimbursement to the department for the costs associated with the purple heart license privileges. Amendment effective May 8, 2007.

*2005 Amendment:* (Version effective March 1, 2006) Chapter 585 in (1) in first sentence after "birds" inserted "not including wild turkeys"; in (2) after "purchase" substituted "a Class A-3 deer A tag for $10 and a Class A-5 elk tag for $12" for "regular resident deer and elk tags at a price that is one-half of the fee paid by a resident who is 15 years old or older and who is under 62 years of age"; and made minor changes in style. Amendment effective March 1, 2006.

*1999 Amendment:* Chapter 35 inserted (3) allowing a legion of valor member to fish with a conservation license; and made minor changes in style. Amendment effective October 1, 1999.

*Preamble:* The preamble attached to Ch. 35, L. 1999, provided: "WHEREAS, the Legion of Valor is composed of recipients of the Congressional Medal of Honor, the Army Distinguished Service Cross, the Navy Cross, and the Air Force Cross; and

WHEREAS, members of the Legion of Valor have bravely served their country above and beyond the call of duty; and

WHEREAS, there are approximately 800 members of the Legion of Valor, 5 of whom reside in Montana; and

WHEREAS, pursuant to Article II, section 35, of the Montana Constitution, special considerations that the Legislature may give the five Montana Legion of Valor members should be extended to their distinguished out-of-state colleagues; and

WHEREAS, the people of Montana can show their appreciation to these medal recipients by allowing resident and nonresident Legion of Valor members to fish with a conservation license issued by the Department of Fish, Wildlife, and Parks."

*1983 Amendment:* In (2), changed "65" to "62" in two places and before "one-half" deleted "no more than".

*1981 Amendment:* Deleted "for a fee of $1" after "by the department" at the end of the first sentence of (1); added (2) providing discounted fee for persons over 65.

**87-2-802. Veterans in VA hospitals and residents of state institutions and long-term care facilities, nursing care facilities, assisted living facilities, and community homes for persons with disabilities.**

**Compiler's Comments**

*2003 Amendment:* Chapter 54 in (2) near beginning after "facilities and" substituted "assisted living" for "personal-care"; and made minor changes in style. Amendment effective October 1, 2003.

*1999 Amendment:* Chapter 491 in (1) in first sentence near middle after "residents of all" deleted "correctional facilities and", after "under the jurisdiction of" deleted "the department of corrections and", and after "health and human services" deleted "except the Montana state prison at Deer Lodge or the Montana women's prison". Amendment effective April 27, 1999.

*Saving Clause:* Section 24, Ch. 491, L. 1999, was a saving clause.

*1997 Amendments — Composite Section:* Chapter 77 inserted (2) requiring the Department to allow supervised residents of licensed long-term care facilities, nursing care facilities, personal care facilities, and community homes for persons with disabilities to fish without a license upon annual application by facility managers or directors; and made minor changes in style.

Chapter 189 near middle of first sentence of (1), after "all", inserted "correctional facilities and" and near end substituted "Montana women's prison, may" for "women's correctional system, will be entitled to".

Style changes in the chapters were slightly different. In each case, the codifier chose the more appropriate.

*Applicability:* Section 2, Ch. 77, L. 1997, provided: "[Section 1] [87-2-802] applies to license years beginning March 1, 1998."

*1995 Amendment:* Chapter 546 near middle of first sentence substituted "department of corrections and the department of public health and human services" for "department of corrections and human services" and after "Deer Lodge" inserted "or the women's correctional system"; and made minor changes in style. Amendment effective July 1, 1995.

*Saving Clause:* Section 571, Ch. 546, L. 1995, was a saving clause.

*1991 Amendment — Instructions to Code Commissioner:* The Code Commissioner changed "department of institutions" to "department of corrections and human services", pursuant to sec. 1, Ch. 262, L. 1991, directing the Code Commissioner to make the change wherever necessary in the Montana Code Annotated. Amendment effective July 1, 1991.

**87-2-803. Licenses for persons with disabilities — definitions.**

**Compiler's Comments**

*2023 Amendments — Composite Section:* Section 2, Ch. 318, L. 2023, in (6)(a) in last sentence after "conservation license" included aquatic invasive species prevention pass as a prerequisite; and made minor changes in style. Amendment effective May 1, 2023.

Section 20, Ch. 507, L. 2023, in (2) and (6)(a) substituted "conservation license" for "wildlife conservation license". Amendment effective July 1, 2023.

*2019 Amendment:* Chapter 221 in (2) near beginning substituted "wildlife conservation license" for "conservation license". Amendment effective March 1, 2020.

*2015 Amendment:* Chapter 449 in (1) near beginning after "Persons with disabilities" substituted "who" for "are entitled to fish and to hunt game birds, not including turkeys, with only a conservation license if they", after "departmental rule" inserted "may purchase the following for one-half the cost", and inserted (1)(a), (1)(b), (1)(c), and (1)(d) concerning licenses and tags that can be purchased for one-half cost; in (2) in two places after "game bird license" inserted "deer tag, or elk tag" and in middle after "to a refund for" inserted "one-half of the cost of"; deleted former (2) that read: "(2) A resident of Montana who is certified as disabled by the department and who is not residing in an institution may purchase a Class A-3 deer A tag for $6.50 and a Class A-5 elk tag for $8. A person who has purchased a conservation license and a resident deer license or resident elk license for a particular license year and who is subsequently certified as disabled is entitled to a refund for the deer license or elk license previously purchased and reissuance of the license for that license year at the rate established in this subsection"; deleted former (5) that read: "(5) A veteran or a disabled member of the armed forces who meets the qualifications in subsection (9) as a result of a combat-connected injury may apply at a fish, wildlife, and parks office for a regular Class A-3 deer A tag, a Class A-4 deer B tag, a Class B-7 deer A tag, a Class B-8 deer B tag, and a special antelope license at one-half the license fee. Fifty licenses of each license type must be made available annually. Licenses issued to veterans or disabled members of the armed forces under this part do not count against the number of special antelope licenses reserved for people with permanent disabilities, as provided in 87-2-706"; in (6)(a) substituted current last sentence for "An applicant for a license under this subsection need not obtain a wildlife conservation license as a prerequisite to licensure"; deleted former (12) and (13) that read: "(12) (a) A Montana resident who is a member of the Montana national guard or the federal reserve as provided in 10 U.S.C. 10101 or who was otherwise engaged in active duty and who participated in a contingency operation as provided in 10 U.S.C. 101(a)(13) that required the member to serve at least 2 months outside of the state, upon request and upon presentation of the documentation described in subsection (12)(b), must be issued a free resident wildlife conservation license or a Class AAA resident combination sports license, which may not include a bear license, upon payment of the resident hunting access enhancement fee provided for in 87-2-202(3)(c), in the license year that the member returns from military service or in the year following the member's return, based on the member's election, and in any of the 4 years after the member's election. A member who participated in a contingency operation after September 11, 2001, that required the member to serve at least 2 months outside of the state may make an election in 2007 or in the year following the member's return, based on the member's election, and in any of the 4 years after the member's election and be entitled to a free resident wildlife conservation license or a free Class AAA resident combination sports license in the year of election and in any of the 4 years after the member's election.

(b) To be eligible for the free resident wildlife conservation license or free Class AAA resident combination sports license provided for in subsection (12)(a), an applicant shall, in addition to the written application and proof of residency required in 87-2-202(1), provide to any regional department office or to the department headquarters in Helena, by mail or in person, the member's DD form 214 verifying the member's release or discharge from active duty. The applicant is responsible for providing documentation showing that the applicant participated in a contingency operation as provided in 10 U.S.C. 101(a)(13).

(c) A Montana resident who meets the service qualifications of subsection (12)(a) and the documentation required in subsection (12)(b) is entitled to a free Class A resident fishing license in the license year that the member returns from military service or in the year following the member's return, based on the member's election, and in any of the 4 years after the member's election.

(d) The department's general license account must be reimbursed by a quarterly transfer of funds from the general fund to the general license account for costs associated with the free licenses granted pursuant to this subsection (12) during the preceding calendar quarter. Reimbursement costs must be designated as license revenue.

(13) A member of the armed forces who forfeited a license or permit issued through a drawing as a result of deployment outside of the continental United States in support of a contingency operation as provided in 10 U.S.C. 101(a)(13) is guaranteed the same license or permit, without additional fee, upon application in the year of the member's return from deployment or in the first year that the license or permit is made available after the member's return"; and made minor changes in style. Amendment effective March 1, 2016.

*Annotator's Note:* Section 87-2-817 is a recodification of text formerly contained in 87-2-803.

*2013 Amendments — Composite Section:* Chapter 70 in (5) in two places after references to veteran inserted references to disabled member of the armed forces. Amendment effective October 1, 2013.

Chapter 397 in (1) in last sentence substituted "2014" for "2000"; in (3) substituted "meets the requirements of" for "establishes one or more of the disabilities pursuant to"; inserted (9) concerning certification to hunt from a vehicle; deleted former (9) that read: "(9) A person is entitled to a permit to hunt from a vehicle if the person:

(a) is certified by a licensed physician, a licensed chiropractor, an advanced practice registered nurse, or a licensed physician assistant to be dependent on an oxygen device or dependent on a wheelchair, crutch, or cane for mobility;

(b) is an amputee above the wrist or ankle; or

(c) is certified by a licensed physician, a licensed chiropractor, an advanced practice registered nurse, or a licensed physician assistant to be unable to walk, unassisted, 600 yards over rough and broken ground while carrying 15 pounds within 1 hour and to be unable to handle and maneuver up to 25 pounds"; and in (10) after "Certification" deleted "by a licensed physician, a licensed chiropractor, an advanced practice registered nurse, or a licensed physician assistant". Amendment effective March 1, 2014.

*2009 Amendments — Composite Section:* Chapter 193 inserted (13) guaranteeing a member of the armed forces who forfeited a special hunting license or permit as a result of deployment outside the U.S. the same special license after the member's return. Amendment effective October 1, 2009.

Chapter 352 in (9)(a), (9)(c), and (10) after "physician" inserted "a licensed chiropractor"; and made minor changes in style. Amendment effective April 24, 2009.

*2007 Amendments — Composite Section:* Chapter 102 inserted (4)(a)(iii) allowing disabled to hunt from properly marked off-highway vehicle or snowmobile; and made minor changes in style. Amendment effective March 1, 2008.

Chapter 136 in (9)(a), (9)(c), and (10) near beginning after "licensed physician" inserted "an advanced practice registered nurse, or a licensed physician assistant"; and made minor changes in style. Amendment effective April 5, 2007.

Chapter 137 in (3) deleted former second and third sentences that read: "The department shall adopt rules to establish a voluntary board or boards of review to resolve any disputes over whether a person meets the criteria established in subsection (9). Each board must have at least one Montana-licensed physician as a member"; in (11) at beginning inserted "The department or", after "determination of" inserted "disability or", and at end after "review by" substituted "the board of medical examiners pursuant to 37-3-203" for "a voluntary board of review pursuant to subsection (3)"; and made minor changes in style. Amendment effective April 5, 2007.

Chapter 406 in (12)(a) in first sentence decreased member's service time from 6 months to 2 months, after "bear license" substituted "upon payment of the resident hunting access enhancement fee" for "for $29, plus the resident hunting access enhancement fee", and at end substituted "in any of the 4 years after the member's election" for "in the license year after the member's election" and in second sentence after "operation" substituted "after September 11, 2001" for "between September 11, 2001, and February 28, 2006", decreased member's service time from 6 months to 2 months, after "election in" deleted "2006 or", after "2007" inserted "or in the year following the member's return, based on the member's election, and in any of the 4 years after the member's election", after "license" substituted "or a free Class AAA" for "or a $25 Class AAA", and near end after "election and" substituted "in any of the 4 years" for "the license year"; in (12)(b) in first sentence after "license" substituted "or free Class AAA" for "or reduced-rate Class AAA"; inserted (12)(c) providing that Montana resident who meets service qualifications and documentation is entitled to free Class AAA resident fishing license in license year member returns from military service or year following member's return and in any of 4 years after member's election; and inserted (12)(d) requiring reimbursement of general license account by quarterly transfer of funds from general fund for costs associated with free licenses granted and requiring reimbursement costs to be designated as license revenue. Amendment effective May 3, 2007.

*2005 Amendments — Composite Section:* Chapter 542 in (4) in first sentence after "defined in" substituted "61-1-101" for "61-1-202". Amendment effective January 1, 2006.

Chapter 556 inserted (5) excepting class A-3, A-4, B-7, and B-8 and special antelope licenses issued to certain disabled combat veterans from numerical license limits; and made minor changes in style. Amendment effective October 1, 2005.

Chapter 573 inserted (12) entitling certain military members to a free resident conservation license or a reduced fee combination license for a year and providing eligibility requirements; and made minor changes in style. Amendment effective May 2, 2005.

(Version effective March 1, 2006) Chapter 585 in (2) in first sentence after "purchase" substituted "a Class A-3 deer A tag for $6.50 and a Class A-5 elk tag for $8" for "regular resident deer and elk licenses at one-half the fee paid by a resident who is 15 years of age or older and who is under 62 years of age"; and made minor changes in style. Amendment effective March 1, 2006.

*2001 Amendment:* Chapter 248 throughout section substituted "permitholder" for "person with a disability"; in (1) in first sentence after "game birds" inserted "not including turkeys" and inserted third sentence concerning certified disabled hunter hunting from vehicle in subsequent years; in (3) substituted first sentence concerning hunter being certified as disabled for "A resident or nonresident person with a disability who is certified as disabled by the department and who is not residing in an institution may carry a permit on a form prescribed by the department. A person with a disability who is issued a permit under this subsection is entitled to have the department stamp the permit with "Permission to Hunt From a Vehicle" if the person establishes to the satisfaction of the department that the person has substantially impaired mobility" and at end of second sentence substituted "subsection (8)" for "this subsection"; in (4) in first sentence after "permit" substituted "to hunt from a vehicle, referred to in this subsection as a permitholder" for "as required in subsection (3), upon which is stamped "Permission to Hunt From a Vehicle"", at beginning of third sentence substituted "permitholder" for "person with a disability who hunts as authorized in this subsection", and at end of last sentence inserted "or as prescribed by the department"; in (7) deleted definitions of permanently physically handicapped person and substantially impaired mobility that read: "(b) "permanently physically handicapped person" means a disabled person as defined in subsection (7)(a) except for a person with a disability that is due to mental retardation or mental illness;

(c) "substantially impaired mobility" means, with respect to a disabled person, that the person is nonambulatory or virtually unable to move on foot. The board or boards of review established pursuant to subsection (3) shall resolve any disputes regarding whether a person meets the criteria for having substantially impaired mobility"; inserted (8) establishing conditions for receiving a permit to hunt from a vehicle; inserted (9) concerning certification by physician; inserted (10) concerning review of eligibility by voluntary board; and made minor changes in style. Amendment effective April 16, 2001.

*1999 Amendment:* Chapter 382 in (1) inserted last sentence allowing refund for fishing license or game bird license for person disabled during license year; in (2) inserted last sentence allowing refund for deer license or elk license for person disabled during license year; in (3) at end of second sentence substituted "that the person has substantially impaired mobility" for "that the person is nonambulatory and has a permanent physical disability or that the person's mobility is substantially impaired" and inserted last two sentences granting rulemaking authority for establishment of review boards to resolve disputes; in (4) in three places substituted "person with a disability" for "hunter with a disability"; in (5)(a) substituted "experiencing blindness" for "suffering from blindness"; inserted (5)(b) allowing issuance of deer and elk licenses to persons experiencing blindness and requiring blind hunter to be accompanied by companion; inserted (6) requiring adoption of rules regarding companions and companions as designated shooters; in (7) inserted (a) defining disabled person or person with disability, inserted (b) defining permanently physically handicapped person, and inserted (c) defining substantially impaired mobility; and made minor changes in style. Amendment effective October 1, 1999.

*1997 Amendments:* Chapter 42 in (5) substituted "certified by the department as suffering from blindness, as defined in 53-7-301" for "certified by the department as a blind individual, as defined in 53-7-301"; and made minor changes in style. Amendment effective March 12, 1997.

Chapter 472 throughout section substituted references to persons with disabilities for references to disabled persons; near end of (3) substituted "nonambulatory and has a permanent physical disability" for "permanently physically handicapped and nonambulatory"; in (4), in last sentence, substituted "persons with disabilities" for "the handicapped"; and made minor changes in style.

*1995 Amendment:* Chapter 417 in (4), near end of first sentence after "motorists or", deleted "may hunt by shooting a firearm from within a self-propelled or drawn vehicle" and in fourth sentence, after "hunter by", deleted "pursuing" and after "hunting" deleted "taking, shooting, or killing"; in (5), in second sentence after "fish", deleted "with hook and line or rod"; and made minor changes in style. Amendment effective July 1, 1995.

*Severability:* Section 37, Ch. 417, L. 1995, was a severability clause.

*1993 Amendment:* Chapter 49 at beginning of (3) substituted "A resident or nonresident disabled person who is certified as disabled by the department and who is not residing in an institution may" for "Such disabled persons shall"; in (4) inserted fourth sentence allowing assistance in taking a game animal by a hunting companion of disabled hunter; and made minor changes in style. Amendment effective February 18, 1993.

*1989 Amendment:* Inserted (5) providing for a lifetime fishing license for the blind. Amendment effective February 24, 1989.

*1985 Amendment:* In (3) inserted second sentence allowing nonambulatory persons to hunt from a vehicle; and inserted (4) relating to hunting by nonambulatory persons from a vehicle.

*1983 Amendment:* In (1), after "entitled to" substituted "fish and to hunt game birds with only a conservation license" for "fish without a license" and after "certified as disabled", substituted "as prescribed by departmental rule" for "by a medical doctor licensed to practice medicine in Montana"; substituted (2) (see 1983 Session Law) for former (2), which read: "Disability is defined as a physical or mental condition that prevents a person from doing any substantial gainful work that is expected to last for the rest of his life."

*Statement of Intent:* The statement of intent attached to HB 402 (Ch. 169, L. 1983), first adopted by the House Fish and Game Committee, read: "A statement of intent is required for this bill because it delegates rulemaking authority to the Department of Fish, Wildlife, and Parks. Section 2 of the bill [amending 87-2-803] authorizes the department to make rules concerning disabled persons and exemptions to fishing and game bird license requirements.

The legislature contemplates that the rules should address the following subjects as well as others:

(1) A definition of "disabled" as it applies to persons meeting license requirements for fishing and hunting game birds and qualifying for the one-half fee deer and elk licenses;

(2) Documents that would, of themselves, be adequate certification of disability."

## 87-2-805. Licenses for persons under 18 years of age.

### Compiler's Comments

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 21, Ch. 507, L. 2023. Amendment effective July 1, 2023.

*2019 Amendment:* Chapter 221 inserted (2)(a) regarding wildlife conservation licenses; and made minor changes in style. Amendment effective March 1, 2020.

*2015 Amendment:* Chapter 449 substituted current subsections (1), (2), and (3) concerning resident and nonresident minors for former subsections (1), (2), and (3) concerning resident minors (see 2015 Session Law for former text); in (4)(b) substituted "accompanied by" for "in the company of"; and made minor changes in style. Amendment effective March 1, 2016.

*Annotator's Note:* Section 87-6-307 is an amended recodification of text formerly contained in 87-2-805.

*2009 Amendments — Composite Section:* Chapter 131 in (4)(a) in first sentence near middle inserted "or a free resident or nonresident antelope license and wildlife conservation license, as applicable", increased age from 17 to 18, and at end substituted "life-threatening illness" for "terminal illness", in second sentence substituted "documentation that the youth has been diagnosed with a life-threatening illness from a licensed physician" for "documentation from a licensed physician verifying that the youth is terminally ill" and inserted last sentence defining life-threatening illness; inserted (4)(d) allowing the department to limit the number of licenses issued to 25 annually; and made minor changes in style. Amendment effective April 1, 2009.

Chapter 189 inserted (5) allowing minors who reach age 12 by January 16 to hunt after August 15 upon obtaining the necessary license. Amendment effective March 1, 2010.

Chapter 304 in introductory language of (1)(b) at end substituted "minor" for "person"; in (1)(b)(i) near middle of first sentence following "nonresident" substituted "minor" for "person under 15 years of age" and near middle of second sentence following "nonresident" substituted "minor" for "person"; inserted (1)(b)(ii) authorizing nonresident minors ages 12 to 16 to hunt certain birds and allocating the license fee; and made minor changes in style. Amendment effective April 18, 2009.

*2007 Amendment:* Chapter 452 inserted (5) providing that upon application and production of documentation, certain resident minors and residents 62 years of age or older be issued a free resident wildlife conservation license. Amendment effective May 8, 2007, and terminates February 28, 2009.

*2005 Amendments — Composite Section:* Chapter 80 inserted (4) concerning free license for terminally ill youth under 17 years of age. Amendment effective March 24, 2005.

(Version effective March 1, 2006) Chapter 585 in (2) near beginning after "87-2-102" inserted "who is 12 years of age or older and", after "A-3" inserted "deer A tag for $6.50", and after "A-5" substituted "elk tag for $8" for "licenses at a price equal to one-half the fee paid by a resident who is 15 years of age or older and under 62 years of age"; in (3)(a) at end of first sentence after "license" substituted "for $25" for "at a price that, rounded to the nearest dollar, is 46% of the fee paid for the Class AAA combination sports license by a resident who is 18 years of age or older and under 62 years of age"; in (3)(c) at end after "license" substituted "for $8" for "at a price that is 50% of the fee paid by a resident who is 18 years of age or older and under 62 years of age"; in (3)(d) at end after "license" substituted "for $3" for "at 50% of the fee paid by a resident who is 18 years of age or older and under 62 years of age"; and made minor changes in style. Amendment effective March 1, 2006.

*2003 Amendments — Composite Section:* Chapter 50 in (3)(a) inserted last sentence concerning free first-time youth combination sports license; in (3)(e) in first and second sentences inserted reference to granting free youth combination sports license; and made minor changes in style. Amendment effective May 1, 2003.

Chapter 228 in fourth sentence in (1) after "B-4" inserted "or B-5"; and made minor changes in style. Amendment effective April 3, 2003.

*2001 Amendment:* Chapter 49 in (3)(e) inserted first sentence authorizing certain youth to use youth combination sports license and near beginning of second sentence after "A person who" deleted "is 18 years of age or older who" and after "combination sports license" inserted "purchased after the person reaches 18 years of age"; and made minor changes in style. Amendment effective March 16, 2001.

*Termination Provision Repealed:* Section 2, Ch. 49, L. 2001, repealed sec. 4, Ch. 568, L. 1999, which terminated the amendments to this section February 28, 2002. Effective March 16, 2001.

*1999 Amendment:* Chapter 568 in (1) inserted second sentence allowing resident minors 15 years of age to hunt migratory game birds with only a conservation license; inserted (3) establishing provisions of the youth combination sports license; and made minor changes in style. Amendment effective March 1, 2000, and terminates February 28, 2002.

*Preamble:* The preamble attached to Ch. 568, L. 1999, provided: "WHEREAS, Montana's youth should be encouraged to take advantage of Montana's abundant outdoor recreational opportunities; and

WHEREAS, a person who learns early in life to fish and hunt responsibly and ethically is likely to continue that behavior throughout the person's life; and

WHEREAS, Montana's fishing and hunting heritage will be preserved for future generations as more youth are introduced to those sports; and

WHEREAS, providing an affordable combination license that allows a young person to fish and hunt upland game birds, deer, and elk will be an effective way to cultivate an appreciation for the state's wildlife resources among Montana's youth."

*1985 Amendment:* At beginning of (1) inserted "Resident"; and in (2) after "Class", deleted "A-1".

*1983 Amendments:* Chapter 169, in first sentence, substituted present language allowing minors 12 through 14 years old to fish and hunt birds with a conservation license for "Minors under 15 years of age may fish for and take fish during the open season without a license."; inserted second sentence of (1) allowing residents under 12 years of age to fish without a license; and in (2), substituted final clause after "A-5 licenses at" for "$2 per license".

Chapter 239, in (1), deleted "B-3" after "Class B".

**87-2-806. Taking fish or game for scientific purposes.**

**Compiler's Comments**

*2003 Amendment:* Chapter 84 near end of first sentence in (1) substituted "department or commission rule" for "state fish and game rule"; and made minor changes in style. Amendment effective March 20, 2003.

*1995 Amendment:* Chapter 154 in (1), in first sentence after "agency", inserted "or for an individual" and at end inserted "provided that a permit to collect is authorized by the department", at beginning of second sentence inserted "Under the provisions of this section" and near middle, after "way", inserted "that is approved by the department", at beginning of third sentence inserted "A permittee may not take, kill, or capture", and inserted last sentence concerning when permits may not be issued; in (2), in three places, substituted "department" for "director" and inserted second sentence concerning plan of operations; inserted (3) concerning grounds for denying a permit; inserted (4) concerning annual report; in (5) increased fee from $5 to $50 and inserted exception clause concerning educational institutions and governmental agencies; in (6), near end, substituted "allowed" for "mentioned"; in (7), throughout subsection, inserted references to students, in first sentence, after "learning", inserted "or an individual permittee", inserted second sentence concerning qualifications and supervision, in third and fourth sentences substituted "primary" for "original", at end of fourth sentence substituted "conducts a collection under the permit" for "is issued a copy", and at end of last sentence deleted "including their reports of species and numbers of animals collected"; and made minor changes in style. Amendment effective March 16, 1995.

**Administrative Rules**

ARM 12.7.1301 Application process and criteria for a scientific collectors permit.

**87-2-807. Taking migratory game birds for propagation — avicultural permit.**

**Compiler's Comments**

*2011 Amendment:* Chapter 258 in (1) in first sentence near end substituted "87-2-101" for "87-2-101(9)". Amendment effective October 1, 2011.

The amendment to this section made by sec. 4, Ch. 134, L. 2011, was rendered void by sec. 122, Ch. 258, L. 2011, a coordination section.

*Preamble:* The preamble attached to Ch. 258, L. 2011, provided: "WHEREAS, the 2007 Legislature passed House Joint Resolution No. 16, urging that revision of the criminal codes within Title 87 of the Montana Code Annotated be given priority; and

WHEREAS, House Joint Resolution No. 16 noted that practitioners, judges, and citizens find that the criminal codes intertwined within the fish and game laws in Title 87 are difficult to read, understand, and prosecute; and

WHEREAS, House Joint Resolution No. 16 directed that revision of the Title 87 criminal code should not include policy changes to current laws and should adhere to the intent of the legislatures that crafted the laws; and

WHEREAS, in 2008, the Director of Fish, Wildlife, and Parks appointed a Title 87 criminal code revision working group, consisting of Justices of the Peace, County Attorneys, an Assistant Attorney General, legal counsel and the enforcement administrator of the Department of Fish, Wildlife, and Parks, and legislative staff; and

WHEREAS, the working group met numerous times and spent countless hours crafting a revision that makes the Title 87 criminal code more understandable without making substantive or policy changes to present law; and

WHEREAS, revision of the fish and game criminal statutes will benefit the hunting and fishing public, magistrates, and prosecutors by codifying crimes and penalties in a separate chapter of Montana law, rather than being intertwined throughout Title 87."

*Saving Clause:* Section 5, Ch. 134, L. 2011, was a saving clause.

Section 131, Ch. 258, L. 2011, was a saving clause.

*Severability:* Section 132, Ch. 258, L. 2011, was a severability clause.

*1995 Amendment:* Chapter 417 in (1) substituted "87-2-101(9)" for "87-2-101(7)"; and made minor changes in style. Amendment effective July 1, 1995.

*Severability:* Section 37, Ch. 417, L. 1995, was a severability clause.

*Sunset Repealed:* Section 1, Ch. 227, L. 1989, repealed sec. 4, Ch. 262, L. 1985, which provided that this section was to terminate September 30, 1989. Repealed effective March 22, 1989.

*Statement of Intent:* The statement of intent attached to HB 581 (Ch. 262, L. 1985) provided: "A statement of intent is necessary for this bill because section 1 [87-2-807] grants rulemaking authority to the department of fish, wildlife, and parks. It is the intent of the legislature that the department adopt rules providing for coordination with federal agencies in the issuance of avicultural permits and enforcement of conditions and restrictions imposed by the federal migratory game bird regulations.

The legislature intends that the department adopt rules addressing disposition of migratory game birds that remain the property of the state under the provisions of this bill. It is the further intent of the legislature that the department provide necessary guidelines for the issuance and exercise of avicultural permits not stated in the bill."

**Administrative Rules**

Title 12, chapter 6, subchapter 18, ARM Migratory game bird avicultural permits.

## 87-2-808. Fishing license exception for angler educational events and activities.

**Compiler's Comments**

*1997 Statement of Intent:* The statement of intent attached to Ch. 452, L. 1997, provided: "A statement of intent is required for this bill because it grants rulemaking powers to the department of fish, wildlife, and parks to implement fishing license exceptions for approved angler educational events and activities. In approving angler educational events, the department shall give consideration to activities that promote family togetherness. The legislature intends that the rules adopted by the department include:

(1) procedural requirements for applications;

(2) criteria for qualification of the instructors;

(3) a procedure for training volunteers from the private sector to conduct the angler educational events and activities; and

(4) any other procedures and criteria reasonably necessary or desirable to administratively review and approve angler educational events and activities."

*Effective Date:* Section 3, Ch. 275, L. 1997, provided that this section was effective on passage and approval. Approved April 16, 1997.

**Administrative Rules**

ARM 12.3.126 Criteria and procedure for approval of angler education events and activities.
ARM 12.3.127 Procedure for angler applications and events.
ARM 12.3.128 Training and certification of volunteers.

## 87-2-810. Apprentice hunting certificate.

**Compiler's Comments**

*2021 Amendment:* Chapter 552 in (1) near middle substituted "eligible to use" for "eligible to apply for"; and made minor changes in style. Amendment effective May 15, 2021.

*2017 Amendment:* Chapter 427 in (1) after "years of age or older and" deleted "under 18 years of age"; in (2) inserted second and third sentences concerning completing a Montana hunter safety and education course; in (4)(b) at the beginning inserted "if the apprentice hunter is under 18 years of age"; inserted (8)(a)(ii) concerning turning 12; inserted (8)(b), (8)(c), and (8)(e) concerning black bear, mountain lion, and wolf licenses; and made minor changes in style. Amendment effective July 1, 2017.

*Effective Date:* Section 42, Ch. 449, L. 2015, provided that this section is effective March 1, 2016.

**Administrative Rules**

ARM 12.3.510 Apprentice hunter certificate.

## 87-2-811. Auction or lottery of mule deer license.

**Compiler's Comments**

*Effective Date:* This section is effective October 1, 2003.

**Administrative Rules**

ARM 12.3.801 Proposals for licenses sold by auction or lottery.
ARM 12.3.802 Procedure for submitting proposals and awarding an auction or lottery license.

## 87-2-812. Auction or lottery of elk license.

**Compiler's Comments**

*Effective Date:* This section is effective October 1, 2003.

**Administrative Rules**

ARM 12.3.801 Proposals for licenses sold by auction or lottery.
ARM 12.3.802 Procedure for submitting proposals and awarding an auction or lottery license.

## 87-2-813. Auction or lottery of wolf license.

**Compiler's Comments**

*Contingent Effective Date:* Section 8(2), Ch. 415, L. 2007, provided that this section is effective upon notification by the U.S. fish and wildlife service to the department of fish, wildlife, and parks that the wolf has been formally removed from the federal threatened or endangered species list and upon removal of the wolf from the state endangered species list by the department of fish, wildlife, and parks. The contingency occurred when the Northern Rocky Mountain gray wolf was removed from the federal list of threatened and endangered species by the United States Fish and Wildlife Service through the adoption of a rule effective May 4, 2009. The wolf was removed from the state endangered species list on the effective date of that rule.

*District Court Ruling — Effect on Delisting of Northern Rocky Mountain Gray Wolf:* On August 5, 2010, District Judge Donald Molloy reversed the delisting of the Northern Rocky Mountain gray wolf by issuing a ruling ordering that the April 2, 2009, Final Rule to Identify the Northern Rocky Mountain Population of Gray Wolf as a Distinct Population Segment, 74 Fed. Reg. 15123, which removed the Endangered Species Act's protection of wolves except in Wyoming, is vacated and set aside. Judge Molloy's ruling stated that the whole Northern Rocky Mountain gray wolf population must be protected, not just those in Wyoming, and that the federal Fish and Wildlife Service's delisting of the wolf in only Montana and Idaho as a solution to the legal problem raised by the inadequacy of Wyoming's regulatory mechanisms does not comply with the federal Endangered Species Act. (See consolidated causes CV 09-77-M-DWM and CV 09-82-M-DWM.)

## 87-2-815. Donation of hunting licenses to disabled veterans or disabled members of the armed forces.

### Compiler's Comments

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 22, Ch. 507, L. 2023. Amendment effective July 1, 2023.

*2019 Amendment:* Chapter 126 in (2)(b) at end deleted "while receiving medical treatment at a medical facility". Amendment effective March 1, 2020.

*Effective Date:* Section 4, Ch. 54, L. 2013, provided: "[This act] is effective on passage and approval." Approved February 27, 2013.

### Administrative Rules

ARM 12.3.512 Donated licenses.

## 87-2-816. Licenses for legion of valor members — purple heart awardees.

### Compiler's Comments

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 23, Ch. 507, L. 2023. Amendment effective July 1, 2023.

*Termination Provision Removed:* Section 14, Ch. 356, L. 2019, amended sec. 21, Ch. 387, L. 2017, to remove the termination of the amendments made to this section by sec. 15, Ch. 387, L. 2019. Effective May 7, 2019.

*2017 Amendment:* Chapter 387 in (2) substituted "the purchase of a wildlife conservation license pursuant to 87-2-202 and a resident aquatic invasive species prevention pass pursuant to 87-2-130" for "a wildlife conservation license issued by the department"; in (3) substituted "the purchase of a wildlife conservation license pursuant to 87-2-202 and a nonresident aquatic invasive species prevention pass pursuant to 87-2-130" for "a wildlife conservation license issued by the department". Amendment effective May 15, 2017, and terminates February 29, 2020.

*Code Commissioner Note:* Chapter 387, L. 2017, was not signed and approved until May 18, 2017.

*Annotator's Note:* Section 87-2-816 is a recodification of text formerly contained in 87-2-801.

*Effective Date:* Section 42, Ch. 449, L. 2015, provided that this section is effective March 1, 2016.

## 87-2-817. Licenses for service members.

### Compiler's Comments

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 24, Ch. 507, L. 2023. Amendment effective July 1, 2023.

*2019 Amendment — Coordination:* Chapter 231 in (2)(a) near middle after "free resident wildlife conservation license" inserted "and a Class A resident fishing license"; inserted (2)(b) concerning resetting the entitlement period; in (2)(c) near beginning substituted "free licenses" for "free resident wildlife conservation license or free Class AAA resident combination sports license"; deleted former (2)(c) that read: "(c) A Montana resident who meets the service qualifications of subsection (2)(a) and provides the documentation required in subsection (2)(b) is entitled to a free Class A resident fishing license in the license year that the member returns from military service or in the year following the member's return, based on the member's election, and in any of the 4 years after the member's election"; and made minor changes in style. Amendment effective May 1, 2019.

The amendments to this section made by sec. 18, Ch. 221, L. 2019, were rendered void by sec. 20, Ch. 221, L. 2019, a coordination section.

*Termination Provision Removed:* Section 14, Ch. 356, L. 2019, amended sec. 21, Ch. 387, L. 2017, to remove the termination of the amendments made to this section by sec. 16, Ch. 387, L. 2017. Effective May 7, 2019.

*2017 Amendment:* Chapter 387 in (2)(a) inserted "and the purchase of the resident aquatic invasive species prevention pass pursuant to 87-2-130". Amendment effective May 15, 2017, and terminates February 29, 2020.

*Code Commissioner Note:* Chapter 387, L. 2017, was not signed and approved until May 18, 2017.

*Annotator's Note:* Section 87-2-817 is a recodification of text formerly contained in 87-2-803.

*Effective Date:* Section 42, Ch. 449, L. 2015, provided that this section is effective March 1, 2016.

### 87-2-818. Law enforcement officers and firefighters critically injured in line of duty.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 25, Ch. 507, L. 2023. Amendment effective July 1, 2023.

*Effective Date:* Section 3, Ch. 115, L. 2015, provided that this section is effective on passage and approval. Approved March 24, 2015.

## Part 9
## License Agents

### 87-2-901. Appointment of license agents.

**Administrative Rules**

Title 12, chapter 3, subchapter 2, ARM License agents.

ARM 12.3.210 Discount sale of hunting and fishing licenses prohibited.

### 87-2-903. Compensation, fees, and duties of agents — penalty for late submission of license money.

**Compiler's Comments**

*2019 Amendments — Composite Section:* Chapter 356 in (7) near end after "species prevention passes pursuant to" inserted reference to 23-2-541. Amendment effective May 7, 2019.

Chapter 434 in (3), (7), and (8) inserted reference to 81-7-123; and made minor changes in style. Amendment effective July 1, 2019.

*Termination Provision Removed:* Section 14, Ch. 356, L. 2019, amended sec. 21, Ch. 387, L. 2017, to remove the termination of the amendments made to this section by sec. 17, Ch. 387, L. 2017. Effective May 7, 2019.

*2017 Amendment — Composite Section:* Chapter 374 in (3), (7), and (8) inserted reference to 76-17-102; and made minor changes in style. Amendment effective July 1, 2017, and terminates June 30, 2027.

Chapter 387 in (3) and (8) after "sale of licenses" inserted "and aquatic invasive species prevention passes"; in (7) at end inserted "or the sale of aquatic invasive species prevention passes pursuant to 87-2-130"; and made minor changes in style. Amendment effective May 15, 2017, and terminates February 29, 2020.

*Code Commissioner Note:* Chapter 387, L. 2017, was not signed and approved until May 18, 2017.

*Termination Provision Repealed:* Section 1, Ch. 292, L. 2017, repealed sec. 7, Ch. 83, L. 2013, which terminated the 2013 amendments to this section June 30, 2019. Effective October 1, 2017.

*2013 Amendment:* Chapter 83 in (3) inserted "and donations received pursuant to 87-1-293"; in (7) inserted second sentence excluding donations collected pursuant to 87-1-293; in (8) inserted "and from donations received pursuant to 87-1-293"; and made minor changes in style. Amendment effective July 1, 2013, and terminates June 30, 2019.

*2011 Amendment:* Chapter 298 in (1) inserted "under subsection (9) and"; inserted (9) relating to a commission paid for processing hunting license lotteries; and made minor changes in style. Amendment effective March 1, 2012.

*2007 Amendment:* Chapter 452 in (4) at end after "sold" inserted "or issued pursuant to 87-2-805(5)"; and in (7) after "sale" inserted "or issuance". Amendment effective May 8, 2007, and terminates February 28, 2009.

*2005 Amendment:* Chapter 515 in (1) at end inserted "plus any additional amount as determined by rules adopted pursuant to subsection (9)"; inserted (2) authorizing credit card convenience fees; in (3) at end inserted "and convenience fee"; in (4) before "license" inserted "paper"; in (5) after "system" deleted "installation"; in (6) in first sentence substituted "protocol for" for "deadline for submission of license money by"; in (7) inserted "collection of any data or fee" and "issuance of any"; in (8) in first sentence after "appropriate" inserted "commission and convenience" and near end after "15-1-216" substituted "may" for "must"; and made minor changes in style. Amendment effective July 1, 2005.

*1999 Amendment:* Chapter 427 in (7) substituted "charged under 15-1-216" for "charged on late corporation license tax payments under 15-31-510". Amendment effective January 1, 2000.

*Applicability:* Section 57, Ch. 427, L. 1999, provided that this section applies to all tax periods beginning after December 31, 1999.

*1997 Amendment:* Chapter 187 in (1), after "services rendered", substituted "a commission of 50 cents for each transaction" for "the sum of 50 cents for each license, permit, or certificate issued" and deleted second sentence that read: "Each license agent shall submit to the department all duplicates of each class of licenses sold and shall accompany the duplicate licenses with all money received for the sale of the licenses, less the appropriate fee"; inserted (2) through (4) setting out additional conditions applicable to license agents; in (6), after "term", substituted "transaction" for "license", after "includes" inserted "the sale of", and before "certificate" substituted "or" for "and"; in (7), after "15-31-510", deleted "(2)"; and inserted (8) allowing the adoption of rules. Amendment effective March 1, 1998.

*1997 Statement of Intent:* The statement of intent attached to Ch. 187, L. 1997, provided: "A statement of intent is required for this bill because 87-2-105(7) and 87-2-903(8) grant rulemaking authority to the department of fish, wildlife, and parks regarding standards applicable to license agents.

It is intended that the rules adopted pursuant to 87-2-105(7) address the methods by which a license agent determines proof of competency in hunter safety, particularly the competency of nonresidents who apply for a Montana hunting license. It is intended that the rules recognize that a person who takes a hunter safety course from a department-authorized instructor will be considered competent for licensing purposes.

It is intended that rules adopted pursuant to 87-2-903(8) address compensation, system installation fees, and duties of license agents."

*1993 Amendment:* Chapter 92 in (1), in first sentence after "sum of", deleted "40 cents for the 1992 license year"; in (3), near end of first sentence, substituted "15-31-510(2)" for "15-31-502"; and made minor changes in style.

*Applicability:* Section 4(1), Ch. 92, L. 1993, provided: "[This act] applies to tax years beginning after December 31, 1993."

*Rulemaking Authority:* Section 4(2), Ch. 92, L. 1993, provided: "The department of revenue may institute rulemaking under Title 2, chapter 4, to implement [this act] prior to October 1, 1993, but the rules may not be effective prior to October 1, 1993."

*1991 Amendment:* In first sentence of (1) increased sum for services from 30 cents to 40 cents for 1992 license year and to 50 cents thereafter and at end of second sentence, after "licenses less", substituted "the appropriate fee" for "a fee of 30 cents for each license sold". Amendment effective March 1, 1992.

*Preamble:* The preamble attached to Ch. 592, L. 1991, provided: "WHEREAS, an increase in Montana hunting and fishing license fees is necessary to raise revenue in order for the Department of Fish, Wildlife, and Parks to meet an anticipated revenue shortfall."

*1983 Amendment:* In (1), in second sentence deleted "On or before the 10th day of each month" at the beginning and "during the preceding month" following "licenses sold", and inserted third sentence relating to classification of license agents and submission of license money; and inserted (3) relating to late submission of license money.

*1983 Statement of Intent:* The statement of intent attached to HB 434 (Ch. 534, L. 1983) provided: "A statement of intent is required for this bill because it grants rulemaking authority to the Department of Fish, Wildlife, and Parks to adopt rules to set deadlines for license receipts according to different classes of license agents and setting guidelines for allowing alternative forms of security for small volume license agents.

Section 2 of this bill [amending 87-2-903] proposes to allow the director of the Department of Fish, Wildlife, and Parks to set deadlines for the license receipts according to different classes of license agents. The intent of this bill is to allow the director the flexibility to recognize that there are widely disparate kinds of license agents. In some sparsely populated areas, the license receipts for a given year are so few that the current monthly accounting requirement may be unrealistic. On the other hand, in heavily populated areas some license agents have extremely high monthly receipts, necessitating that the money be transferred promptly, on a monthly basis, to the Department. The Department contemplates rules that would have deadlines grounded in population base and historical demand in an area.

Section 1 of this bill [amending 87-2-902, now repealed] proposes to change the security requirements for license agents. Currently, the law requires a minimum bond of $1,000. In reality, no bonding company gives a bond for only $1,000. The current industry standard is a minimum of $5,000. Many of the small license agents may carry a total inventory of licenses far below $5,000. In those instances, where the license agent does not stand to make a great deal of money on the license agency, the $5,000 bonding requirement may be unduly burdensome. The proposed amendment would allow the director to adjust the bonding requirement to the particular circumstance of a given license agent. For instance, a license agent with a large inventory would be obliged to provide a bond. A license agent with an inventory of less than $1,000 may be obliged to provide some other kind of security to ensure performance under the law. The Department anticipates promulgating rules that would allow alternative forms of security other than a bond for the small volume license agent."

*1981 Amendment:* Changed sum and fee in (1) from "15 cents" to "30 cents".

### 87-2-904. Nontransferability of appointments — revocation and oaths.

**Administrative Rules**

ARM 12.3.210 Discount sale of hunting and fishing licenses prohibited.

## Part 10
## Interstate Fishing Privileges

### 87-2-1001. Reciprocal fishing privileges of licensees of bordering states.

**Compiler's Comments**

*2009 Amendment:* Chapter 130 in (1) near beginning after "pond" inserted "river, stream", after "privileges in any" deleted "body or bodies of water or in all", after "ponds" inserted "rivers, streams", and after "bodies of water" substituted "designated in a reciprocal agreement as authorized in subsection (2)" for "similarly defined"; and made minor changes in style. Amendment effective April 1, 2009.

*1997 Amendment:* Chapter 187 in (2), in second sentence after "only when", substituted "a valid reciprocal license is" for "there is affixed to such license a stamp" and near end substituted "the reciprocal license" for "such stamp"; and made minor changes in style. Amendment effective March 1, 1998.

### 87-2-1002. Regulation of devices and equipment used under reciprocal privilege.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 87-2-1003. Bodies of water subject to reciprocal privileges.

**Compiler's Comments**

*2009 Amendment:* Chapter 130 at end after "states" substituted "subject to the terms of a reciprocal agreement as authorized in 87-2-1001" for "and it is not intended to cover the waters of rivers or streams"; and made minor changes in style. Amendment effective April 1, 2009.

# CHAPTER 3
# RESTRICTIONS AND REGULATIONS

**Chapter Case Notes**

*No Expectation of Privacy in Radio Conversation Held Over Public Airways:* A game warden monitored Cotterell's two-way radio conversations held with his son while hunting. Cotterell asserted that, absent a warrant, the warden's surreptitious third-party electronic surveillance of the radio conversations was unlawful. The Supreme Court noted that it held in St. v. Goetz, 2008 MT 296, 345 M 421, 191 P3d 489 (2008), that warrantless electronic monitoring and recording of face-to-face conversations, even with the consent of one participant in the conversation, violates the other participant's right to privacy and the right to be free from unreasonable search and seizure. However, the initial inquiry under Goetz is to determine whether the electronic monitoring constitutes an unreasonable or unlawful search or seizure, and the factors in determining whether such a search or seizure occurred are whether the person challenging the state's action had an actual subjective expectation of privacy that society would recognize as objectively reasonable and the nature of the state's intrusion. In this case, Cotterell had no reasonable expectation of privacy. The electronic conversations were held using widely available hand-held radios over a public channel that could be monitored by anyone using the same equipment and thus could not be considered private. Absent a reasonable expectation of privacy, no search occurred and the warden did not need a warrant to monitor and record the conversations. St. v. Cotterell, 2008 MT 409, 347 M 231, 198 P3d 254 (2008).

*Media Coverage of Search Involving Alleged Wildlife Violation Outside Scope of Warrant — Open Fields Doctrine and Invited Informer Doctrine Inapplicable:* Federal agents who suspected a wildlife violation searched the Bergers' ranch pursuant to a search warrant and to a written contract with two national broadcasting networks authorizing the filming and recording of the search for broadcast on environmental television shows. After Berger was convicted of one misdemeanor count of improper use of a pesticide, he sued both the networks and the federal agents for violations of constitutional rights. On appeal, the Ninth Circuit Court held that activities conducted pursuant to the search were not authorized by the open fields doctrine, which allows law enforcement officers to obtain evidence while on privately owned open fields, because Berger had a reasonable expectation of privacy with regard to outbuildings that were photographed and because that doctrine does not authorize trespass by third parties. Further, the invited informer doctrine, which allows the use of informers with recording devices to obtain information as part of a good faith government investigation, did not apply in this instance because the recording of Berger's conversations was used to assist commercial television, not to further law enforcement objectives. Pursuant to the joint action test, the networks were considered to be acting under color of law and, as such, were liable for damages as government actors for contractually engaging in a search enterprise that only the government could lawfully institute for the mutual benefit of both private and governmental interests in publicity. The case was reversed for further consideration of Berger's state claims of trespass and intentional infliction of emotional distress. Berger v. Hanlon, 129 F3d 505 (9th Cir. 1997).

**Chapter Law Review Articles**

The Right to Kill Wild Animals in Defense of Person or Property, Bender, 31 Mont. L. Rev. 235 (1970).

## Part 1
## General Provisions

**Part Compiler's Comments**

*Preamble:* The preamble attached to Ch. 272, L. 1999, provided: "WHEREAS, Montana's rivers are drawing people to the state to fish, float, and camp at an accelerating rate; and

WHEREAS, although the increasing popularity of Montana is beneficial to the state's economy, steps must be taken to ensure that escalating recreational use of natural resources does not degrade the resource, taint the experience, or threaten private property rights; and

WHEREAS, with the unparalleled scenery and the abundance of fish, osprey, bald eagles, deer, and other wildlife sustained by its waters, the Blackfoot River in western Montana offers recreationists a unique, pristine outdoor experience; and

WHEREAS, the same attributes that bring floaters, campers, and anglers to the banks of the Blackfoot River to visit have attracted Montana families to live, work, and recreate for over a hundred years; and

WHEREAS, increased use of the river has led to an increase in the frequency and intensity of conflicts among the landowner, the commercial outfitter, and the private recreationist, each of whom has a legitimate and legal interest in the Blackfoot River; and

WHEREAS, cooperation between private property owners and recreationists to resolve conflict along the Blackfoot River is not unprecedented; and

WHEREAS, the Legislature finds it appropriate and timely to direct the Department of Fish, Wildlife, and Parks to lead a comprehensive study of the Blackfoot River and its capacity to sustain recreational use, while ensuring that private property and water rights are retained with minimal conflict."

*Blackfoot River Study:* Section 1, Ch. 272, L. 1999, provided: "Blackfoot River study. (1) The department of fish, wildlife, and parks shall undertake a comprehensive study of the Blackfoot River, which may include ongoing department studies as well as findings derived from the draft Blackfoot River Recreation Management Direction of 1999.

(2) The study must address:

(a) the growing popularity of the Blackfoot River and ways to mitigate conflict among landowners, outfitters, and private recreationists;

(b) ways to protect the integrity of the river's resources, while continuing to accommodate recreational use;

(c) the amount and scope of use by recreationists that the river is capable of sustaining;

(d) easement, right-of-way, access, and trespass concerns between private landowners and public users of the river;

(e) the impact that heavy recreational use has on the river's fish, wildlife, streambanks, and water quality; and

(f) any other issue that the department determines needs to be examined in order to complete the study.

(3) During the course of the study, the department may enlist the assistance of the governor's consensus council, created pursuant to executive order, to organize discussions among all interested parties.

(4) The department shall report its findings and conclusions to the 57th legislature. The report must include but is not limited to:

(a) a suggested appropriate role for the department and the fish, wildlife, and parks commission in mitigating and mediating conflicts between recreationists and private landowners;

(b) the amount and type of use that is taking place on the river and how that use is changing from the historical recreational use of the river;

(c) the amount of use that the river is capable of sustaining before significant resource degradation occurs;

(d) a description of the amount, nature, and location of conflicts occurring on the river that have warranted intervention;

(e) the steps taken to ensure that landowners, outfitters, and members of the public were afforded the opportunity to comment and participate in the study; and

(f) suggested legislation or department rules, if either are warranted, to alleviate conflict, preserve the integrity of the resource, protect private property rights, and ensure continued high-quality fishing, camping, and floating for commercial and private recreational users."

## 87-3-106. Hunting and fishing prohibited in fire-danger areas.

### Compiler's Comments

*1995 Amendment:* Chapter 418 in (1) substituted "department of natural resources and conservation" for "department of state lands"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1981 Amendment:* Changed "the department of natural resources and conservation" to "the department of state lands".

### Administrative Rules

Title 36, chapter 10, subchapter 2, ARM Closure of areas because of fire danger.

## 87-3-115. Violation by carriers.

### Compiler's Comments

*2019 Amendment:* Chapter 238 in two places inserted reference to 87-3-310; and made minor changes in style. Amendment effective October 1, 2019.

*2005 Amendment:* Chapter 59 near end of second sentence substituted "87-3-114 or this section" for "87-3-113 through 87-3-115"; and made minor changes in style. Amendment effective October 1, 2005.

## 87-3-121. Regulation of contests.

### Compiler's Comments

*2011 Amendment:* Chapter 258 deleted former (1) that read: "(1) It shall be unlawful for any person, firm, corporation, association, or club to offer or give any prize, gift, or anything of value in connection with or as a bag limit prize for the taking, capturing, killing, or in any manner acquiring any game, fowl, fur-bearing animals, or any bird or animal now or that shall be hereafter protected in any way by the fish and game laws of the state of Montana"; in first sentence inserted "in accordance with the provisions of 87-6-214" and after "firm" deleted "corporation, association"; deleted former (3) that read: "(3) This section shall not be construed to prohibit the award of prizes for any one game bird or fur-bearing animal on the basis of size, quality, or rarity"; and made minor changes in style. Amendment effective October 1, 2011.

*Preamble:* The preamble attached to Ch. 258, L. 2011, provided: "WHEREAS, the 2007 Legislature passed House Joint Resolution No. 16, urging that revision of the criminal codes within Title 87 of the Montana Code Annotated be given priority; and

WHEREAS, House Joint Resolution No. 16 noted that practitioners, judges, and citizens find that the criminal codes intertwined within the fish and game laws in Title 87 are difficult to read, understand, and prosecute; and

WHEREAS, House Joint Resolution No. 16 directed that revision of the Title 87 criminal code should not include policy changes to current laws and should adhere to the intent of the legislatures that crafted the laws; and

WHEREAS, in 2008, the Director of Fish, Wildlife, and Parks appointed a Title 87 criminal code revision working group, consisting of Justices of the Peace, County Attorneys, an Assistant Attorney General, legal counsel and the enforcement administrator of the Department of Fish, Wildlife, and Parks, and legislative staff; and

WHEREAS, the working group met numerous times and spent countless hours crafting a revision that makes the Title 87 criminal code more understandable without making substantive or policy changes to present law; and

WHEREAS, revision of the fish and game criminal statutes will benefit the hunting and fishing public, magistrates, and prosecutors by codifying crimes and penalties in a separate chapter of Montana law, rather than being intertwined throughout Title 87."

*Saving Clause:* Section 131, Ch. 258, L. 2011, was a saving clause.

*Severability:* Section 132, Ch. 258, L. 2011, was a severability clause.

*1987 Amendment:* In (1) deleted "fish" in two places from list of protected species; inserted (2) relating to adoption of rules by the Commission; and in (3) deleted "fish" after "game bird".

*1987 Statement of Intent:* The statement of intent attached to Ch. 346, L. 1987, provided: "A statement of intent is required for this bill because it grants rulemaking duties to the fish and game commission [now fish, wildlife, and parks commission] with regard to the awarding of prizes for the taking of protected fish in state waters. It is the intent of the legislature that the commission adopt rules that address an approval process for the conditions or operations of fishing tournaments, derbies, or contests in order to protect and preserve the fish resources in the state from potentially harmful practices or results of such events.

It is the intent of the legislature that the commission adopt rules that are designed to prevent adverse impacts on the fish resources. To accomplish the purpose, the commission may adopt rules that include but are not limited to:

(1) the duties of the department of fish, wildlife, and parks to recommend approval or disapproval of a tournament, derby, or contest or its conditions, based on sound wildlife conservation criteria;

(2) reporting requirements for the rules and conditions of a tournament, derby, or contest that awards a prize for the taking of fish;

(3) purse or participation limits for such events;

(4) time limits for reporting such events to obtain commission approval or disapproval; and

(5) details of the approval process, including any appeal process.

Notwithstanding the general rulemaking areas listed, it is the intent of the legislature to permit the commission to adopt rules that allow the commission enough flexibility to consider the merits of each tournament, derby, or contest on a case-by-case basis."

**Administrative Rules**

Title 12, chapter 7, subchapter 8, ARM Regulation of fishing contests.

**87-3-126. Use of aircraft or helicopter — authority to issue permits and adopt rules.**

**Compiler's Comments**

*2011 Amendment:* Chapter 258 deleted former (1), (2), and (3) that read: "(1) (a) A game bird or game or fur-bearing animal may not be killed, taken, or shot at from any aircraft, including helicopters.

(b) An aircraft or helicopter may not be used for the purpose of concentrating, pursuing, driving, rallying, or stirring up any game or migratory birds or game or fur-bearing animals.

(c) A powerboat, sailboat, or any boat under sail or any floating device towed by a powerboat, sailboat, or any boat under sail may not be used for the purpose of killing, capturing, taking, pursuing, concentrating, driving, or stirring up any upland game birds or game or fur-bearing animals.

(2) It is unlawful for any person airborne in any aircraft, including a helicopter, to spot or locate any game or fur-bearing animals and communicate the location of the game or fur-bearing

animals to any person on the ground by means of any air-to-ground communication signal or other device as an aid to hunting or pursuing wildlife.

(3) Within the boundaries of a national forest, except as permitted by the department, it is unlawful to use aircraft, including helicopters, for hunting purposes, except when persons or cargo are loaded and unloaded at federal aviation agency approved airports, aircraft landing fields, or heliports that have been established on private property or that have been established by any federal, state, county, or municipal governmental body. Hunting purposes include the transportation of hunters or wildlife and hunting equipment and supplies. The provisions of this subsection do not apply:

(a) during emergency situations;

(b) when search and rescue operations are being conducted; or

(c) for predator control as permitted by the department of livestock"; and made minor changes in style. Amendment effective October 1, 2011.

*Preamble:* The preamble attached to Ch. 258, L. 2011, provided: "WHEREAS, the 2007 Legislature passed House Joint Resolution No. 16, urging that revision of the criminal codes within Title 87 of the Montana Code Annotated be given priority; and

WHEREAS, House Joint Resolution No. 16 noted that practitioners, judges, and citizens find that the criminal codes intertwined within the fish and game laws in Title 87 are difficult to read, understand, and prosecute; and

WHEREAS, House Joint Resolution No. 16 directed that revision of the Title 87 criminal code should not include policy changes to current laws and should adhere to the intent of the legislatures that crafted the laws; and

WHEREAS, in 2008, the Director of Fish, Wildlife, and Parks appointed a Title 87 criminal code revision working group, consisting of Justices of the Peace, County Attorneys, an Assistant Attorney General, legal counsel and the enforcement administrator of the Department of Fish, Wildlife, and Parks, and legislative staff; and

WHEREAS, the working group met numerous times and spent countless hours crafting a revision that makes the Title 87 criminal code more understandable without making substantive or policy changes to present law; and

WHEREAS, revision of the fish and game criminal statutes will benefit the hunting and fishing public, magistrates, and prosecutors by codifying crimes and penalties in a separate chapter of Montana law, rather than being intertwined throughout Title 87."

*Saving Clause:* Section 131, Ch. 258, L. 2011, was a saving clause.

*Severability:* Section 132, Ch. 258, L. 2011, was a severability clause.

*2005 Amendment:* Chapter 211 inserted (4) allowing use of an aircraft or helicopter under certain conditions for herding, driving, or hazing wild animals that are damaging property or crops; and made minor changes in style. Amendment effective April 7, 2005.

### Administrative Rules

Title 12, chapter 6, subchapter 23, ARM Aerial herding permits.

### Case Notes

*Airborne Hunting — Non-Indian Hunters on Indian Reservations:* The Airborne Hunting Act, 16 U.S.C. § 742j-1, was declared unconstitutional in a challenge by non-Indian hunters caught hunting on an Indian reservation. The statute was found to be an unlawful preemption of reserve state regulatory authority. The federal government is not empowered to displace Montana's regulation in this area. U.S. v. Helsley, 463 F. Supp. 1111 (D.C. Mont. 1979), reversed in U.S. v. Helsley, 615 F2d 784 (9th Cir. 1979).

## 87-3-127. Taking of stock-killing animals.

### Compiler's Comments

*2001 Amendment:* Chapter 316 in (1) in first sentence near beginning inserted "their agents", substituted "a federal agency" for "the federal fish and wildlife service", and in two places before "bears" inserted "black"; and made minor changes in style. Amendment effective April 21, 2001.

## 87-3-131. Regulation of grizzly bear parts.

### Compiler's Comments

*2011 Enactment:* This section was enacted as 87-3-110(4) by Ch. 258, L. 2011. Section 87-3-110 was repealed by Ch. 113, L. 2011. The Code Commissioner has codified 87-3-110(4) from Ch. 258 as 87-3-131.

### 87-3-145. Permit to salvage game animals.

**Compiler's Comments**

*Effective Date:* This section is effective October 1, 2013.

**Administrative Rules**

ARM 12.3.511 Salvage permits.

## Part 2
## Fish

### 87-3-202. Supervision over fish hatcheries by director.

**Administrative Rules**

Title 12, chapter 7, subchapter 6, ARM Fish planting policies.

### 87-3-204. Designation of state waters for particular fishing methods.

**Compiler's Comments**

*2011 Amendment:* Chapter 258 deleted former (1) and (2) that read: "(1) A game fish may not be caught, captured, or taken or attempted to be caught, captured, or taken by the aid or with the use of any gun or trap, nor may any gun, trap, or other device to entrap game fish be used, made, or set.

(2) Except when specifically authorized by law or commission rule, a person may not:

(a) take or catch fish in any of the waters of this state, except with hook and line held in hand or line and hook attached to rod or pole held in hand or within immediate control;

(b) take or catch fish with hook baited with any poisonous substance or using any poisonous substance, including fish berries; or

(c) take or catch fish using fishtraps, grabhooks, seines, nets, spears, gigs, or other similar means for catching fish"; deleted former (5) that read: "(5) Game fish must be taken only by hook and single line or single rod in hand or within immediate control. This does not prevent, however:

(a) the snagging of paddlefish, chinook salmon, and kokanee (sockeye salmon) when the commission declares an open season when paddlefish, chinook salmon, and kokanee (sockeye salmon) may be taken by snagging;

(b) the taking of paddlefish, channel catfish, and nongame fish with longbow and arrow, under rules and regulations that the commission prescribes;

(c) the taking of game fish pursuant to subsection (3);

(d) the use of landing net or gaff to land a game fish after the game fish has been hooked as specified in this subsection (5);

(e) the taking of minnows other than game fish variety by the use or aid of a net not to exceed 12 feet in length and 4 feet in width in waters designated by the commission;

(f) the taking of whitefish by nets or traps in the Kootenai River and in its tributary streams within 1 mile of the Kootenai River, under the rules and regulations that the commission prescribes;

(g) the taking of any game fish through a hole in ice with an unattended line or rod as long as the angler is in the vicinity and within visual contact of the line or rod; or

(h) the taking of salmon and lake trout in Fort Peck reservoir by spear or gig from December through March, under rules and regulations prescribed by the commission"; and made minor changes in style. Amendment effective October 1, 2011.

*Preamble:* The preamble attached to Ch. 258, L. 2011, provided: "WHEREAS, the 2007 Legislature passed House Joint Resolution No. 16, urging that revision of the criminal codes within Title 87 of the Montana Code Annotated be given priority; and

WHEREAS, House Joint Resolution No. 16 noted that practitioners, judges, and citizens find that the criminal codes intertwined within the fish and game laws in Title 87 are difficult to read, understand, and prosecute; and

WHEREAS, House Joint Resolution No. 16 directed that revision of the Title 87 criminal code should not include policy changes to current laws and should adhere to the intent of the legislatures that crafted the laws; and

WHEREAS, in 2008, the Director of Fish, Wildlife, and Parks appointed a Title 87 criminal code revision working group, consisting of Justices of the Peace, County Attorneys, an Assistant Attorney General, legal counsel and the enforcement administrator of the Department of Fish, Wildlife, and Parks, and legislative staff; and

WHEREAS, the working group met numerous times and spent countless hours crafting a revision that makes the Title 87 criminal code more understandable without making substantive or policy changes to present law; and

WHEREAS, revision of the fish and game criminal statutes will benefit the hunting and fishing public, magistrates, and prosecutors by codifying crimes and penalties in a separate chapter of Montana law, rather than being intertwined throughout Title 87."

*Saving Clause:* Section 131, Ch. 258, L. 2011, was a saving clause.

*Severability:* Section 132, Ch. 258, L. 2011, was a severability clause.

*2003 Amendments — Composite Section:* Chapter 84 at beginning of (2) inserted exception clause; at end of (2)(a) inserted "or within immediate control"; in (2)(c) after "nets" inserted "spears, gigs"; in (3) substituted language authorizing commission to designate waters within the state where traps, seines, nets, spears, or gigs may be used for taking designated fish for former (3) that read: "(3) The department may designate such waters within the state of Montana wherein, in the judgment of the department, spears or gigs may be used for taking walleyed pike, sauger, northern pike, and nongame fish and traps, seines, nets, and rubber or spring-propelled spears, when employed by sportsmen swimming or submerged in the water, may be used for the taking of designated species of fish. The waters so designated may be closed at the discretion of the department. The taking of all fish by such means in the waters, when so designated, is to be done under such rules as the department may prescribe with reference thereto and under the supervision of the department. All such nongame fish so taken may be possessed and sold in such manner and under such restrictions as the department may direct. All fish, other than those herein designated, so taken under department rules, when prescribed by the department, shall be returned uninjured to the waters from which they were taken"; deleted former (4) that read: "(4) The taking of black bass in Flathead Lake may be permitted by the department"; in two places in (4) substituted "commission" for "department"; in (5) after "line" deleted "in hand"; in two places in (5)(a) substituted "chinook salmon" for "coho (silver salmon)" and near middle substituted "commission" for "department"; in (5)(c) substituted "taking of game fish pursuant to subsection (3)" for "taking of walleyed pike, sauger, northern pike, burbot (ling), and nongame fish with spear or gig when the department declares an open season for taking walleyed pike, sauger, northern pike, burbot (ling), and nongame fish with spear or gig"; in (5)(e) at end substituted "commission" for "department"; inserted (6) authorizing commission to designate waters where commercial fishing operators may use nets, seines, and traps to fish for designated nongame fish; and made minor changes in style. Amendment effective March 20, 2003.

Chapter 227 inserted (5)(h) allowing commission to adopt rules permitting the taking of salmon and lake trout in Fort Peck reservoir by spear or gig from December through March; and made minor changes in style. Amendment effective October 1, 2003.

*1991 Name Change:* Section 2, Ch. 28, L. 1991, directed the Code Commissioner to change the name of the Fish and Game Commission to the Fish, Wildlife, and Parks Commission wherever the name appears in the MCA. Accordingly, the name was changed in this section as directed.

*1989 Amendment:* Inserted (6)(g) permitting a person to ice fish with unattended line or rod if within visual contact with line or rod. Amendment effective March 21, 1989.

*1987 Amendment:* In (6)(b) substituted language that reads: "the taking of paddlefish, channel catfish, and nongame fish with longbow and arrow, under such rules and regulations as the fish and game commission (now fish, wildlife, and parks commission) may prescribe" for "the taking of paddlefish with longbow and arrow when the department declares an open season when paddlefish may be taken by longbow and arrow".

*1983 Amendment:* Inserted (6)(f) relating to the taking of whitefish by nets or traps.

*Statement of Intent:* The statement of intent attached to SB 387 (Ch. 267, L. 1983) provided: "A statement of intent is required for Senate Bill 387 because rulemaking authority is granted to the Montana Fish and Game Commission [now Fish, Wildlife, and Parks Commission] to prescribe rules and regulations for the taking of Whitefish by nets or traps in the Kootenai River and in its tributary systems within one mile of the Kootenai River. It is proposed that such rules will encompass the following:

1. method of taking the fish;
2. permit requirements for those taking the fish; and
3. the times of taking the fish."

**Administrative Rules**

Title 12, chapter 7, subchapter 1, ARM Commercial fishing permit.

Title 12, chapter 7, subchapter 2, ARM Commercial seining license.

**Case Notes**

*Complaint:* Complaint charging offense of unlawfully taking fish from stream was held sufficient. St. v. Russell, 52 M 583, 160 P 655 (1916).

### 87-3-210. Permit required for importation of nonsalmonid fish or eggs.

**Administrative Rules**

Title 12, chapter 7, subchapter 5, ARM Importation of fish.

### 87-3-221. Importation of salmonid fish or eggs unlawful — exception — certification — permit.

**Compiler's Comments**

*2011 Amendment:* Chapter 258 in (2) deleted former last sentence that read: "It is unlawful to import live salmonid fish or eggs into Montana without first obtaining the permit required by this subsection or to violate any conditions of the permit." Amendment effective October 1, 2011.

*Preamble:* The preamble attached to Ch. 258, L. 2011, provided: "WHEREAS, the 2007 Legislature passed House Joint Resolution No. 16, urging that revision of the criminal codes within Title 87 of the Montana Code Annotated be given priority; and

WHEREAS, House Joint Resolution No. 16 noted that practitioners, judges, and citizens find that the criminal codes intertwined within the fish and game laws in Title 87 are difficult to read, understand, and prosecute; and

WHEREAS, House Joint Resolution No. 16 directed that revision of the Title 87 criminal code should not include policy changes to current laws and should adhere to the intent of the legislatures that crafted the laws; and

WHEREAS, in 2008, the Director of Fish, Wildlife, and Parks appointed a Title 87 criminal code revision working group, consisting of Justices of the Peace, County Attorneys, an Assistant Attorney General, legal counsel and the enforcement administrator of the Department of Fish, Wildlife, and Parks, and legislative staff; and

WHEREAS, the working group met numerous times and spent countless hours crafting a revision that makes the Title 87 criminal code more understandable without making substantive or policy changes to present law; and

WHEREAS, revision of the fish and game criminal statutes will benefit the hunting and fishing public, magistrates, and prosecutors by codifying crimes and penalties in a separate chapter of Montana law, rather than being intertwined throughout Title 87."

*Saving Clause:* Section 131, Ch. 258, L. 2011, was a saving clause.

*Severability:* Section 132, Ch. 258, L. 2011, was a severability clause.

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

*1989 Amendment:* In (1) substituted "source" for "hatchery where reared", after "certification" deleted "is provided", after "that the" deleted "importation or", after "free of" substituted "all fish pathogens specified by" for "such infectious organisms as", after "department" deleted "may specify" and inserted "as posing a threat to existing fisheries accompanies the shipment", in second sentence, after "made", deleted "in the state of origin", after "pathologist" deleted reference to designation by Secretary of Interior or state Fish, Wildlife, and Parks Director, inserted "approved by the", in fourth sentence, after "inspection", deleted "of the hatchery of origin", after "as the" deleted "state fish, wildlife, and parks", and deleted last sentence requiring copy of certification to accompany shipment; inserted (2) requiring permits for importation of salmonid fish or eggs; and made minor changes in style.

**Administrative Rules**

ARM 12.7.503 Certification inspection procedures.
ARM 12.7.504 Approved pathologists.
ARM 12.7.505 Import permits.
ARM 12.7.506 Shipment inspections.
ARM 12.7.507 Hatchery or culture facility inspection, quarantine, and disinfection.

### 87-3-222. When certification unnecessary.

**Compiler's Comments**

*2011 Amendment:* Chapter 258 in (1) near beginning substituted "87-6-219(1)(b)" for "87-3-209". Amendment effective October 1, 2011.

*Preamble:* The preamble attached to Ch. 258, L. 2011, provided: "WHEREAS, the 2007 Legislature passed House Joint Resolution No. 16, urging that revision of the criminal codes within Title 87 of the Montana Code Annotated be given priority; and

WHEREAS, House Joint Resolution No. 16 noted that practitioners, judges, and citizens find that the criminal codes intertwined within the fish and game laws in Title 87 are difficult to read, understand, and prosecute; and

WHEREAS, House Joint Resolution No. 16 directed that revision of the Title 87 criminal code should not include policy changes to current laws and should adhere to the intent of the legislatures that crafted the laws; and

WHEREAS, in 2008, the Director of Fish, Wildlife, and Parks appointed a Title 87 criminal code revision working group, consisting of Justices of the Peace, County Attorneys, an Assistant Attorney General, legal counsel and the enforcement administrator of the Department of Fish, Wildlife, and Parks, and legislative staff; and

WHEREAS, the working group met numerous times and spent countless hours crafting a revision that makes the Title 87 criminal code more understandable without making substantive or policy changes to present law; and

WHEREAS, revision of the fish and game criminal statutes will benefit the hunting and fishing public, magistrates, and prosecutors by codifying crimes and penalties in a separate chapter of Montana law, rather than being intertwined throughout Title 87."

*Saving Clause:* Section 131, Ch. 258, L. 2011, was a saving clause.

*Severability:* Section 132, Ch. 258, L. 2011, was a severability clause.

*1989 Amendment:* In (1) inserted "or 87-3-209 may" and after "manner" substituted "that kills those fish pathogens specified by the department as posing a threat to fisheries" for "whereby such infectious organisms as the department may specify have been killed"; in (2) substituted "dead salmonid fish or eggs" for "salmon caught and brought directly into North America and", after "processing" deleted "or sale", after "wild" deleted "in North America shall be", and inserted second sentence prohibiting placement of uncertified salmonid fish, parts, or eggs into surface waters; and made minor changes in style and grammar.

**Administrative Rules**

ARM 12.7.505 Import permits.

## 87-3-223. Authorization for rules and personnel.

**Administrative Rules**

Title 12, chapter 7, subchapter 5, ARM Importation of fish.

## 87-3-224. Enforcement.

**Compiler's Comments**

*2011 Amendment:* Chapter 258 in first sentence near beginning substituted "87-6-219(1)(b)" for "87-3-209". Amendment effective October 1, 2011.

*Preamble:* The preamble attached to Ch. 258, L. 2011, provided: "WHEREAS, the 2007 Legislature passed House Joint Resolution No. 16, urging that revision of the criminal codes within Title 87 of the Montana Code Annotated be given priority; and

WHEREAS, House Joint Resolution No. 16 noted that practitioners, judges, and citizens find that the criminal codes intertwined within the fish and game laws in Title 87 are difficult to read, understand, and prosecute; and

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*Saving Clause:* Section 131, Ch. 258, L. 2011, was a saving clause.

*Severability:* Section 132, Ch. 258, L. 2011, was a severability clause.

*1991 Amendment:* Substituted references to Department of Transportation for references to Department of Highways. Amendment effective July 1, 1991.

*1989 Amendment:* Inserted "87-3-209 and 87-3-210 or", in second sentence, after "salmonid", inserted "and nonsalmonid", and made minor changes in style.

*Severability Clause:* Section 53, Ch. 9, L. 1977, read: "If a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications."

**Administrative Rules**

ARM 12.7.506 Shipment inspections.

ARM 12.7.507 Hatchery or culture facility inspection, quarantine, and disinfection.

## 87-3-225. Inspection, quarantine, and disinfection of fish hatcheries and culture facilities.

**Administrative Rules**

ARM 12.7.507 Hatchery or culture facility inspection, quarantine, and disinfection.

## 87-3-226. Duty to report fish pathogens.

**Administrative Rules**

ARM 12.7.502 Designated pathogens.

ARM 12.7.504 Approved pathologists.

## 87-3-235. Fort Peck multispecies fish hatchery established.

**Compiler's Comments**

*2017 Amendment:* Chapter 111 in (2) deleted former third sentence that read: "It is intended that the hatchery use free, high-quality water from the dredge cut adjacent to Fort Peck dam"; and in (3) deleted former last sentence that read: "The department may not produce more than 750,000 cold water fish at the hatchery each year." Amendment effective March 27, 2017.

*2009 Amendment:* Chapter 431 in both versions in (3) in first sentence after "walleye" substituted "(Sander vitreus)" for "(Stizostedion vitreum)", after "sauger" substituted "(Sander canadensis)" for "(Stizostedion canadense)", at end inserted "must be given priority over the propagation of any cold water species at the hatchery", inserted second through fourth sentences regarding production of cold water species, and deleted former second sentence that read: "The hatchery may also include raceways for salmon"; in (4) near beginning after "hatchery" deleted "construction", after "87-3-236" inserted "revenue in the general license account or any federal funding available to the department", and deleted former second sentence that read: "It is intended that the hatchery be constructed in stages as revenue becomes available in the warm water game fish accounts established in 87-3-236"; and made minor changes in style. Amendment effective May 4, 2009.

In version effective March 1, 2012, in (4) near beginning after "funded with" deleted "revenue in the warm water game fish accounts established in 87-3-236". Amendment effective March 1, 2012.

*2005 Amendment:* Chapter 245 in (3) after "(Esox lucius)" inserted references to pallid sturgeon and paddlefish and after "muskellunge" inserted "other warm water species classified as species of special concern, threatened, or endangered"; and made minor changes in style. Amendment effective April 15, 2005.

*Contingent Voidness:* Section 3, Ch. 559, L. 1999, provided: "If federal funds are not committed for the purposes of [this act] [87-3-235 and 87-3-236] by June 30, 2001, then [this act] is void." The federal government has committed funds for the Fort Peck fish hatchery project.

*Effective Date:* This section is effective October 1, 1999.

## 87-3-237. Warm water fishery enhancement account — source of funding — use of account.

**Compiler's Comments**

*Effective Date:* Section 3, Ch. 343, L. 2005, provided: "[This act] is effective on passage and approval." Approved April 21, 2005.

## Part 3
## Game Animals

### 87-3-303. Policy toward nonresident big game hunters.

**Compiler's Comments**

*2015 Amendment:* Chapter 282 substituted language welcoming nonresident hunters to enjoy the state's wildlife resources and acknowledging their financial contributions for "and to avoid the deliberate waste of wildlife and destruction of property by nonresidents licensed to hunt in this state"; and made minor changes in style. Amendment effective October 1, 2015.

### 87-3-308. Development of maps identifying land ownership boundaries.

**Compiler's Comments**

*Preamble:* The preamble attached to Ch. 48, L. 1999, provided: "WHEREAS, the act of hunting on private land is a privilege and not a right; and

WHEREAS, it is common courtesy to ask permission before entering private property; and

WHEREAS, increased communication normally leads to less confrontation; and

WHEREAS, with increased hunting pressure placed on private land, it is essential to maintain good rapport between landowners and hunters."

*Effective Date:* Section 4, Ch. 48, L. 1999, provided: "[This act] is effective July 1, 1999."

### 87-3-310. Transfer of possession of harvested game.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 1, Ch. 316, L. 2023. Amendment effective May 1, 2023.

*Effective Date:* This section is effective October 1, 2019.

### 87-3-315. Recovery and possession of horns and skulls from mountain sheep that died of natural causes.

**Compiler's Comments**

*Effective Date:* Section 4, Ch. 244, L. 2019, provided: "[This act] is effective on passage and approval." Approved May 2, 2019.

## Part 4
## Game Birds

### 87-3-403. Migratory game birds — closed season and bag limits.

**Compiler's Comments**

*2011 Amendment:* Chapter 258 in last sentence at end substituted "is subject to the provisions of 87-6-410" for "shall be guilty of a misdemeanor and on conviction thereof shall be punished as provided by law"; and made minor changes in style. Amendment effective October 1, 2011.

*Preamble:* The preamble attached to Ch. 258, L. 2011, provided: "WHEREAS, the 2007 Legislature passed House Joint Resolution No. 16, urging that revision of the criminal codes within Title 87 of the Montana Code Annotated be given priority; and

WHEREAS, House Joint Resolution No. 16 noted that practitioners, judges, and citizens find that the criminal codes intertwined within the fish and game laws in Title 87 are difficult to read, understand, and prosecute; and

WHEREAS, House Joint Resolution No. 16 directed that revision of the Title 87 criminal code should not include policy changes to current laws and should adhere to the intent of the legislatures that crafted the laws; and

WHEREAS, in 2008, the Director of Fish, Wildlife, and Parks appointed a Title 87 criminal code revision working group, consisting of Justices of the Peace, County Attorneys, an Assistant Attorney General, legal counsel and the enforcement administrator of the Department of Fish, Wildlife, and Parks, and legislative staff; and

WHEREAS, the working group met numerous times and spent countless hours crafting a revision that makes the Title 87 criminal code more understandable without making substantive or policy changes to present law; and

WHEREAS, revision of the fish and game criminal statutes will benefit the hunting and fishing public, magistrates, and prosecutors by codifying crimes and penalties in a separate chapter of Montana law, rather than being intertwined throughout Title 87."

## Part 6
## Bird Hunting Dogs

**Part Compiler's Comments**

*Codification Instruction:* Section 8, Ch. 103, L. 2019, provided that sections 1 through 4 were to be codified in Title 87, chapter 3, part 4. The code commissioner has instead codified these sections as a separate new part.

*Effective Date:* Section 9, Ch. 103, L. 2019, provided: "[This act] is effective on passage and approval." Approved April 1, 2019.

### 87-3-602. Training bird hunting dogs — Class D-5 license.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 1, Ch. 668, L. 2023. Amendment effective May 19, 2023.

### 87-3-604. Rulemaking authority.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 2, Ch. 668, L. 2023. Amendment effective May 19, 2023.

# CHAPTER 4
# COMMERCIAL ACTIVITIES

## Part 2
## Taxidermists

### 87-4-201. Regulation of taxidermists.

**Compiler's Comments**

*2011 Amendment:* Chapter 258 in (5) substituted current text for "Upon conviction for a violation of this section, the taxidermist's license of the person convicted may be revoked by the court". Amendment effective October 1, 2011.

*Preamble:* The preamble attached to Ch. 258, L. 2011, provided: "WHEREAS, the 2007 Legislature passed House Joint Resolution No. 16, urging that revision of the criminal codes within Title 87 of the Montana Code Annotated be given priority; and

WHEREAS, House Joint Resolution No. 16 noted that practitioners, judges, and citizens find that the criminal codes intertwined within the fish and game laws in Title 87 are difficult to read, understand, and prosecute; and

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WHEREAS, revision of the fish and game criminal statutes will benefit the hunting and fishing public, magistrates, and prosecutors by codifying crimes and penalties in a separate chapter of Montana law, rather than being intertwined throughout Title 87."

*Saving Clause:* Section 131, Ch. 258, L. 2011, was a saving clause.

*Severability:* Section 132, Ch. 258, L. 2011, was a severability clause.

*2003 Amendment:* Chapter 129 in (2) near middle after "obtain from the" substituted "department" for "director" and at end increased amount of annual license fee from $15 to $50; and made minor changes in style. Amendment effective October 1, 2003.

## Part 3
## Fur Dealers

### 87-4-301. Fur dealers defined.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 87-4-303. Persons required to have fur dealer's license.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 87-4-304. License classification and fees.

**Compiler's Comments**

*1991 Amendment:* In (1), after "licenses", substituted "may" for "shall"; and made minor changes in style.

*1989 Amendment:* In (1)(b) substituted the reciprocal fee provisions for former fee of $50.

**Case Notes**

*Not Incumbent Upon Agent to Procure or Possess License:* When defendant had been convicted in Justice Court of buying furs for a fur dealer without a license, a misdemeanor, and again found guilty in District Court on appeal, the complaint did not state a public offense since under this section as amended in 1941 it was not incumbent upon the agent to procure or possess a license for buying furs but rather upon the fur dealer to procure a license for himself and his agent. St. v. Salina, 116 M 478, 154 P2d 484 (1944).

### 87-4-306. Violations.

**Compiler's Comments**

*2011 Amendment:* Chapter 258 inserted second sentence regarding penalties; and made minor changes in style. Amendment effective October 1, 2011.

*Preamble:* The preamble attached to Ch. 258, L. 2011, provided: "WHEREAS, the 2007 Legislature passed House Joint Resolution No. 16, urging that revision of the criminal codes within Title 87 of the Montana Code Annotated be given priority; and

WHEREAS, House Joint Resolution No. 16 noted that practitioners, judges, and citizens find that the criminal codes intertwined within the fish and game laws in Title 87 are difficult to read, understand, and prosecute; and

WHEREAS, House Joint Resolution No. 16 directed that revision of the Title 87 criminal code should not include policy changes to current laws and should adhere to the intent of the legislatures that crafted the laws; and

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WHEREAS, revision of the fish and game criminal statutes will benefit the hunting and fishing public, magistrates, and prosecutors by codifying crimes and penalties in a separate chapter of Montana law, rather than being intertwined throughout Title 87."

*Saving Clause:* Section 131, Ch. 258, L. 2011, was a saving clause.

*Severability:* Section 132, Ch. 258, L. 2011, was a severability clause.

## Part 4
## Alternative Livestock Ranches

**Part Administrative Rules**

Title 12, chapter 6, subchapter 15, ARM Game farms.

**Part Case Notes**

*Use of New Licensing Procedures Not Retroactive Application of Law and Not Violation of Department's Internal Policy:* The Wallaces argued that the Department of Fish, Wildlife, and Parks had violated the law by retroactively applying license approval criteria for game farm (now alternative livestock ranch) approval to them when they had filed their license application prior to 1993 legislative changes to the licensing law. The Wallaces also argued that the Department had not followed its own internal policies that required it to act on the application within 60 days of receipt. The Supreme Court held that the Department had correctly applied the new licensing criteria because a license is a privilege, not a vested right, the Department is required to comply with the law circumscribing its powers, and as a general rule, an agency is required to make its decisions on the law as it exists at the time that the decision is made, despite the fact that the law may have changed. The Supreme Court also held that the 60-day requirement to approve or disapprove a license application had been a statutory requirement under the previous law and had ceased to be a requirement when the amendments to the law became effective. Wallace v. Dept. of Fish, Wildlife, and Parks, 269 M 364, 889 P2d 817, 52 St. Rep. 30 (1995). See also Harlem v. St. Highway Comm'n, 149 M 281, 425 P2d 718 (1967), and Saint Vincent Hosp. v. Blue Cross, 261 M 56, 862 P2d 6 (1993).

**Part Attorney General's Opinions**

*Wild Game Animals — Removal:* When the fence of a game farm (now alternative livestock ranch) permittee encloses native wild big game animals, these animals remain the property of the state and may be hunted and taken only in compliance with state law. The state has no responsibility to remove the wild game animals from the enclosure. 38 A.G. Op. 68 (1980). Note: Portions of this opinion have been obviated by Ch. 570, L. 1983.

*Game Harvesting — Game Ranch:* The Fish and Game Commission (now Fish, Wildlife, and Parks Commission) does not have the authority to regulate the hunting and killing of privately owned game through the imposition of licensing requirements on individual hunters or open and closed seasons. 36 A.G. Op. 112 (1976).

### 87-4-406. Definitions.

**Compiler's Comments**

*1999 Amendments — Composite Section:* Chapter 322 in definition of game farm animal after "caribou" deleted "black bear, mountain lion". Amendment effective October 1, 1999. The amendment was rendered void by Ch. 574, which deleted the definition of game farm animal.

Chapter 574 inserted definitions of alternative livestock and alternative livestock ranch; in definition of facilities at end substituted "alternative livestock" for "game farm animals"; deleted former definition of game farm that read: ""Game farm" means the enclosed land area upon which game farm animals may be kept for purposes of obtaining, rearing in captivity, keeping, or selling game farm animals or parts of game farm animals, as authorized under this part"; deleted former definition of game farm animal that read: ""Game farm animal" means a privately owned caribou, black bear, mountain lion, white-tailed deer, mule deer, elk, moose, antelope, mountain sheep, or mountain goat indigenous to the state of Montana, a privately owned reindeer, or any other cloven-hoofed ungulate as classified by the department"; and made minor changes in style. Amendment effective October 1, 1999.

*1995 Amendment:* Chapter 503 inserted definition of cloven-hoofed ungulate; in definition of game farm animal inserted "a privately owned reindeer"; and made minor changes in style. Amendment effective July 1, 1995.

*1993 Amendment:* Chapter 315 inserted definition of facilities; in definition of game farm, in two places before "animals", inserted "farm"; deleted former definition of game farm shooting license that read: ""Game farm shooting license" means the license required under 87-4-421 for a game farm operator to hunt the game farm animals indigenous to the state of Montana on his game farm"; and made minor changes in style. Amendment effective April 12, 1993.

*1985 Amendment:* In (4) substituted "black bear" for "bear".

**Administrative Rules**

ARM 12.6.1520 Definitions.

### 87-4-407. License required — moratorium — penalty — seizure of illegally possessed animals.

**Compiler's Comments**

*2011 Amendment:* Chapter 258 in (2) after "87-4-424 is" deleted "guilty of a misdemeanor and is" and at end substituted "87-6-705" for "87-4-427(4)". Amendment effective October 1, 2011.

*Preamble:* The preamble attached to Ch. 258, L. 2011, provided: "WHEREAS, the 2007 Legislature passed House Joint Resolution No. 16, urging that revision of the criminal codes within Title 87 of the Montana Code Annotated be given priority; and

WHEREAS, House Joint Resolution No. 16 noted that practitioners, judges, and citizens find that the criminal codes intertwined within the fish and game laws in Title 87 are difficult to read, understand, and prosecute; and

WHEREAS, House Joint Resolution No. 16 directed that revision of the Title 87 criminal code should not include policy changes to current laws and should adhere to the intent of the legislatures that crafted the laws; and

WHEREAS, in 2008, the Director of Fish, Wildlife, and Parks appointed a Title 87 criminal code revision working group, consisting of Justices of the Peace, County Attorneys, an Assistant Attorney General, legal counsel and the enforcement administrator of the Department of Fish, Wildlife, and Parks, and legislative staff; and

WHEREAS, the working group met numerous times and spent countless hours crafting a revision that makes the Title 87 criminal code more understandable without making substantive or policy changes to present law; and

WHEREAS, revision of the fish and game criminal statutes will benefit the hunting and fishing public, magistrates, and prosecutors by codifying crimes and penalties in a separate chapter of Montana law, rather than being intertwined throughout Title 87."

*Saving Clause:* Section 131, Ch. 258, L. 2011, was a saving clause.

*Severability:* Section 132, Ch. 258, L. 2011, was a severability clause.

*2000 Amendment by Initiative:* Initiative Measure No. 143 in (1) at end of first sentence inserted "prior to November 7, 2000", inserted second sentence prohibiting new licenses, and deleted former second sentence that read: "The department may not accept any new applications for an initial alternative livestock ranch license until a live test for chronic wasting disease is developed and is approved by the department of livestock"; and made minor changes in style. Amendment effective November 7, 2000.

*Severability:* Section 10, Initiative Measure No. 143, was a severability clause.

*2000 Amendment:* Chapter 1 in (1) inserted second sentence imposing moratorium on new applications until a live test for chronic wasting disease is approved. Amendment effective May 11, 2000.

*Saving Clause:* Section 3, Ch. 1, Sp. L. May 2000, was a saving clause.

*1999 Amendment:* Chapter 574 in (1) after "operate" substituted "an alternative livestock ranch" for "a game farm" and after "obtaining" substituted "an alternative livestock ranch" for "a game farm"; and in (2) near beginning after "operates" substituted "an alternative livestock ranch" for "a game farm". Amendment effective October 1, 1999.

*1993 Amendment:* Chapter 315 inserted (2) providing for a misdemeanor penalty; inserted (3) providing for seizure of illegally possessed animals; and made minor changes in style. Amendment effective April 12, 1993.

## 87-4-408. Jurisdiction.

### Compiler's Comments

*2000 Amendment by Initiative:* Initiative Measure No. 143 in (1) near middle deleted "removal of game animals under 87-4-410"; and made minor changes in style. Amendment effective November 7, 2000.

*Severability:* Section 10, Initiative Measure No. 143, was a severability clause.

*1999 Amendment:* Chapter 574 in (1) near beginning after "jurisdiction over" substituted "alternative livestock ranches" for "game farms", after "fencing" substituted "classification of certain species under 87-4-424" for "classification of exotic species", and after "87-4-410" inserted "unlawful capture under 87-4-418"; in (2) after "jurisdiction over" substituted "alternative livestock ranches" for "game farms"; and made minor changes in style. Amendment effective October 1, 1999.

*1995 Amendment:* Chapter 503 in (1) inserted language concerning the Department's jurisdiction regarding licensing, recordkeeping, fencing, species classification, animal removal, inspection, and enforcement; in (2), at beginning, deleted "A game farm licensee must also comply with all applicable laws and rules administered by", after "livestock" inserted "has primary jurisdiction over game farms", after "transportation" inserted "importation, quarantine, hold orders, interior facilities", and after "health" inserted "and relating to the enforcement of the functions listed in this subsection"; and made minor changes in style. Amendment effective July 1, 1995.

*1991 Amendment:* At end of (2) inserted language concerning compliance with laws and rules relating to marketing, inspection, transportation, and health.

**Case Notes**

*Transfer of Alternative Livestock to Unlicensed Tribal Lands Illegal:* The Wallaces, licensed alternative livestock ranchers, sought to reduce the size of their elk herd by transferring about 500 elk to the Crow Indian Reservation for subsequent release into the wild. The elk had been certified as free of tuberculosis, brucellosis, and elk-red deer hybridization by the Department of Livestock (DOL). Despite notification by the Department of Fish, Wildlife, and Parks (DFWP) that such an act violated state law, the Wallaces transferred 68 elk to the tribe. DFWP requested and received a permanent injunction prohibiting any further transfer of elk to the tribe, and the Wallaces appealed, questioning DFWP jurisdiction. The Supreme Court noted that DFWP has a statutory basis for its jurisdiction over the Wallaces as licensees. Based on DFWP jurisdiction over exterior fencing, and the Department's knowledge that the elk would not be contained behind a game-proof fence upon delivery to the tribe, DFWP had statutory authority to seek the permanent injunction to prevent the transfer. Also, the introduction or transplantation of any wildlife into the wild, including game farm elk, requires the approval of DFWP. Further, 87-4-414 provides that alternative livestock may be kept only on a licensed alternative livestock ranch, and because the tribe is not a licensed facility under Montana law, neither DFWP nor DOL had authority to permit the transfer. The Wallaces knew that the elk were destined for an unlicensed location where they would be released into the wild and could migrate back into Montana, so the transfer violated the Wallaces' duty as licensees to act in accordance with law, and the District Court correctly enjoined the transportation of the elk. Hagener v. Wallace, 2002 MT 109, 309 M 473, 47 P3d 847 (2002).

**87-4-411. License renewal fees — deposit of fees.**

**Compiler's Comments**

*2000 Amendment by Initiative:* Initiative Measure No. 143 in (1) substituted "The department shall charge an annual renewal" for "Except as provided in 87-4-407(1), the department shall charge an initial" and after "fee" deleted "and an annual renewal fee"; in (1)(a) deleted "an initial license fee of $200 and an annual renewal"; in (1)(b) deleted "an initial license fee of $300 and an annual renewal"; in (1)(c) deleted "an initial license fee of $400 and an annual renewal"; deleted former (2) that read: "(2) In addition to the fees assessed under subsection (1), the department shall charge applicants a fee of $4 an acre based on the total number of acres indicated in the application for a license. In cases of an application for a license modification, the fee applies only if an acreage expansion is proposed"; in (3)(a) after "(1)" deleted "and all of the fees collected pursuant to subsection (2)"; and made minor changes in style. Amendment effective November 7, 2000.

*Severability:* Section 10, Initiative Measure No. 143, was a severability clause.

*2000 Amendment:* Chapter 1 at beginning of (1) inserted exception clause. Amendment effective May 11, 2000.

*Saving Clause:* Section 3, Ch. 1, Sp. L. May 2000, was a saving clause.

*1999 Amendment:* Chapter 574 throughout section substituted references to alternative livestock ranch for references to game farm and substituted references to alternative livestock for references to game farm animals; in (1)(a) at end increased annual renewal fee from $50 to $100; in (1)(b) at end increased annual renewal fee from $100 to $200; in (1)(c) at end increased annual renewal fee from $200 to $400; inserted (2) establishing fee of $4 an acre; inserted (3) establishing fee of $50 for imported alternative livestock; in (4)(a) at beginning inserted "One-half of the fees collected pursuant to subsection (1) and all of the fees collected pursuant to subsection (2)"; inserted (4)(b) regarding deposit of remaining half of license fees; and made minor changes in style. Amendment effective October 1, 1999.

*1995 Amendment:* Chapter 503 in (1) substituted "game farm license fee and an annual renewal fee based on the following scale" for "game farm license fee of $200 and shall charge an annual renewal fee of $50"; and inserted (1)(a) through (1)(c) concerning an initial and renewal license fee schedule. Amendment effective July 1, 1995.

*1993 Amendment:* Chapter 315 increased initial license fee from $100 to $200 and annual renewal fee from $25 to $50; and made minor changes in style. Amendment effective April 12, 1993.

*1983 Amendment:* In (2), substituted "state special revenue fund" for "earmarked revenue fund".

### 87-4-412. Term of license — renewal — transfer prohibited.

**Compiler's Comments**

*2000 Amendment by Initiative:* Initiative Measure No. 143 in (2) substituted "not transferable" for "transferable with the consent of the department. The department's consent must be given if:

(a) the transferee meets the requirements of 87-4-426(1);

(b) the alternative livestock ranch and facilities are in compliance with requirements in place at the time the license was issued;

(c) the alternative livestock ranch is not under quarantine by the department;

(d) alternative livestock to be transferred are not prohibited under this part and department rules; and

(e) the transfer is not proposed as a means to evade a requirement imposed on the licensee." Amendment effective November 7, 2000.

*Severability:* Section 10, Initiative Measure No. 143, was a severability clause.

*1999 Amendment:* Chapter 574 throughout section substituted references to alternative livestock ranch for references to game farm; in (1) near beginning after "expires on" substituted "March 1" for "January 31"; in (2)(c) at end after "department" deleted "of livestock"; and in (2)(d) at beginning substituted "alternative livestock" for "game farm animals". Amendment effective October 1, 1999.

*1993 Amendment:* Chapter 315 at end of (1) substituted "complied with all recording and reporting requirements" for "not violated any provisions under which the license was granted"; and substituted (2) regarding transferability of game farm license for former language that read: "A game farm license is nontransferable." Amendment effective April 12, 1993.

**Case Notes**

*Initiative Prohibiting Fee Shooting on Game Farms Not Unconstitutional Taking:* In 2000 Montana voters approved Initiative No. 143 prohibiting the shooting of alternative livestock on game farms for a fee. Plaintiff game farm owners claimed that the initiative constituted a taking of their private property by the state without compensation in violation of Art. II, sec. 29, Mont. Const., because it removed the expectation of profitability from their businesses. The District Court held that the initiative did not constitute a regulatory taking of compensable property interests in plaintiffs' lands and that plaintiffs were not entitled to compensation for damage to the goodwill and going concern value of their businesses. On appeal, the Supreme Court affirmed. Compensable property interests can exist in government-issued licenses or permits if the licenses or permits are free from express statutory language precluding the formation of a property right in combination with the presence of the right to transfer and the right to exclude. In this case, the state retained the power at all times to revoke or change plaintiffs' licenses if it chose to do so, so plaintiffs possessed no common-law property right to the licenses. Therefore, the licenses were not compensable property interests under Art. II, sec. 29, Mont. Const. Further, an expectation of profitability in a highly regulated field of business that requires a license or permit for participation is virtually never considered a compensable property interest, so plaintiffs were not entitled to compensation for damage to the goodwill and going concern value of their businesses. Plaintiffs should reasonably have anticipated that the game farm industry might be phased out because of health and safety concerns over chronic wasting disease or even that the state might make the regulatory burden so onerous that game farms would no longer be profitable enterprises, and the elimination of the in-state market for fee shooting should have been within plaintiffs' reasonable investment-backed expectations given the absence of assurances from the state on that point. That expectation factor also weighed against finding of a compensable regulatory taking of plaintiffs' alternative livestock. Kafka v. Mont. Dept. of Fish, Wildlife & Parks, 2008 MT 460, 348 M 80, 201 P3d 8 (2008), distinguishing NRG Co. v. U.S., 24 Fed. Cl. 51 (Cl. Ct. 1991), and Cienega Gardens v. U.S., 331 F3d 1319 (Fed. Cir. 2003). See also Penn Cent. Transp. Co. v. New York City, 438 US 104 (1978), Lucas v. S. Car. Coastal Council, 505 US 1003 (1992), Members of Peanut Quota Holders Ass'n, Inc. v. U.S., 421 F3d 1323 (Fed. Cir. 2005), Huntleigh USA Corp. v. U.S., 75 Fed. Cl. 642 (2007), and Buhmann v. St., 2008 MT 465, 348 M 205, 201 P3d 70 (2008).

### 87-4-413. Inspection.

**Compiler's Comments**

*2000 Amendment by Initiative:* Initiative Measure No. 143 deleted former (1) that read: "(1) Upon receipt of an application for an alternative livestock ranch license, the department shall inspect the land proposed to be covered by the license"; and made minor changes in style. Amendment effective November 7, 2000.

*Severability:* Section 10, Initiative Measure No. 143, was a severability clause.

*1999 Amendment:* Chapter 574 in (1) after "application for" substituted "an alternative livestock ranch" for "a game farm"; in (2) at beginning deleted "After issuance of a game farm license", after "inspect the" substituted "alternative livestock ranch" for "game farm", and after "licensee's" substituted "alternative livestock ranch records" for "game farm books"; and made minor changes in style. Amendment effective October 1, 1999.

## 87-4-414. Alternative livestock as private property — source — marking — fee shooting prohibited.

### Compiler's Comments

*2000 Amendment by Initiative:* Initiative Measure No. 143 at end of (2) inserted exception clause prohibiting fee shooting. Amendment effective November 7, 2000.

*Severability:* Section 10, Initiative Measure No. 143, was a severability clause.

*1999 Amendment:* Chapter 574 throughout section substituted references to alternative livestock for references to game farm animals; in (1) near middle substituted "alternative livestock ranch" for "game farm"; in (6) at end of second sentence substituted "alternative livestock ranch" for "game farm"; in (7) at beginning after "Except" substituted "as otherwise provided in this part" for "for importation permits and health certificates required under 81-2-703" and at end substituted "alternative livestock ranch" for "game farm"; and made minor changes in style. Amendment effective October 1, 1999.

*1995 Amendment:* Chapter 503 in (2) substituted "handle" for "capture"; in (3), after "livestock", inserted "as required under subsection (4)"; inserted (4) concerning the Department's responsibility for identification tags and the marking of game farm animals; inserted (5) concerning temporary waiver of identification and manner of identification; in (6) inserted second, third, and fourth sentences concerning keeping game farm animals on game farm, the obligations of a licensee not owning the game farm animal, and records and reports submitted by a licensee; and made minor changes in style. Amendment effective July 1, 1995.

*1993 Amendment:* Chapter 315 in (1), after "lawfully", substituted "possessed" for "raised" and at end substituted "for which the licensee is responsible as provided by law" for "of the licensee"; in (2) substituted "harvest" for "kill"; in (3), before "ownership", substituted "indicates" for "facilitates" and after "ownership" inserted "and provides individual"; substituted (4) requiring that animals be lawfully obtained for former language that read: "Before allowing hunting of any game farm animals on a game farm, the game farm licensee must obtain a game farm shooting license from the department"; and made minor changes in style. Amendment effective April 12, 1993.

*1991 Amendment:* Inserted (3) concerning marking game farm animals to facilitate identification for inspection, transportation, reporting, and taxation purposes; and at beginning of (5) inserted exception clause concerning importation permits and health certificates.

### Case Notes

*Initiative Prohibiting Fee Shooting on Game Farms Not Unconstitutional Taking:* In 2000 Montana voters approved Initiative No. 143 prohibiting the shooting of alternative livestock on game farms for a fee. Plaintiff game farm owners claimed that the initiative constituted a taking of their private property by the state without compensation in violation of Art. II, sec. 29, Mont. Const., because it removed the expectation of profitability from their businesses. The District Court held that the initiative did not constitute a regulatory taking of compensable property interests in plaintiffs' lands and that plaintiffs were not entitled to compensation for damage to the goodwill and going concern value of their businesses. On appeal, the Supreme Court affirmed. Compensable property interests can exist in government-issued licenses or permits if the licenses or permits are free from express statutory language precluding the formation of a property right in combination with the presence of the right to transfer and the right to exclude. In this case, the state retained the power at all times to revoke or change plaintiffs' licenses if it chose to do so, so plaintiffs possessed no common-law property right to the licenses. Therefore, the licenses were not compensable property interests under Art. II, sec. 29, Mont. Const. Further, an expectation of profitability in a highly regulated field of business that requires a license or permit for participation is virtually never considered a compensable property interest, so plaintiffs were not entitled to compensation for damage to the goodwill and going concern value of their businesses. Plaintiffs should reasonably have anticipated that the game farm industry might be phased out because of health and safety concerns over chronic wasting disease or even that the state might make the regulatory burden so onerous that game farms would no longer be profitable enterprises, and the elimination of the in-state market for fee shooting should have been within plaintiffs' reasonable investment-backed expectations given the absence of assurances from the state on that point. That expectation factor also weighed against finding of a compensable regulatory taking of plaintiffs' alternative livestock. Kafka v. Mont. Dept. of Fish, Wildlife & Parks, 2008 MT 460, 348 M 80, 201 P3d 8 (2008), distinguishing NRG Co. v. U.S., 24 Fed. Cl. 51 (Cl. Ct. 1991), and Cienega Gardens v. U.S., 331 F3d 1319 (Fed. Cir. 2003). See also Penn Cent. Transp. Co. v. New York City, 438 US 104 (1978), Lucas v. S. Car. Coastal Council, 505 US 1003 (1992), Members of Peanut Quota Holders Ass'n, Inc. v. U.S., 421 F3d 1323 (Fed. Cir. 2005), Huntleigh USA Corp. v. U.S., 75 Fed. Cl. 642 (2007), and Buhmann v. St., 2008 MT 465, 348 M 205, 201 P3d 70 (2008).

*Enforcement of Fee Shooting Ban Improperly Enjoined — No Challenge to Constitutionality of Initiative Measure No. 143:* In November 2000, voters enacted Initiative Measure No. 143, which included a ban on fee shooting of animals on alternative livestock ranches. Spoklie was granted a preliminary injunction prohibiting the state from interfering with the sale of alternative livestock to third persons, even if the third persons subsequently shot the animals at the alternative livestock ranch. The state and intervenors moved to dissolve the injunction, but the motion was denied. On appeal, the Supreme Court reversed. Spoklie clearly considered the right of third persons to harvest elk at an alternative livestock ranch to be an important part of the consideration received in exchange for fees paid, but the fee shooting arrangement is exactly what is prohibited by this section, as amended by the initiative. The preliminary injunction interfered with the state's enforcement of this section, a statute enacted for the public benefit, and was therefore prohibited under 27-19-103. Further, Spoklie's argument that an injunction was proper upon a showing of irreparable harm, as stated in dicta in The New Club Carlin, Inc. v. Billings, 237 M 194, 772 P2d 303 (1989), was also misplaced. As set out in State ex rel. Freebourn v. District Court, 85 M 439, 279 P 234 (1929), courts are prohibited from issuing injunctions to prevent the execution of a public statute by officers of the law for the public benefit. The only exception is when a statute or ordinance is unconstitutional or otherwise invalid and when, in the attempt to enforce it, there is a direct invasion of property rights resulting in irreparable injury. Spoklie neither alleged nor demonstrated that Initiative Measure No. 143 or this section was unconstitutional; therefore, the District Court erred as a matter of law when it enjoined the state's execution of this section. The order denying the motion to dissolve the injunction was reversed. Spoklie v. Dept. of Fish, Wildlife, and Parks, 2002 MT 228, 311 M 427, 56 P3d 349 (2002).

*Purpose of Alternative Livestock Transfer Regulations — Quarantine Exception to Commerce Clause Applicable:* The Wallaces, licensed alternative livestock ranchers, sought to reduce the size of their elk herd by transferring about 500 elk to the Crow Indian Reservation for release into the wild. The Department of Fish, Wildlife, and Parks requested and received an injunction prohibiting any transfer of elk to tribal lands, and the Wallaces appealed, asserting that the injunction violated Art. I, sec. 8, clause 3, of the U.S. Constitution, known as the commerce clause. The Wallaces contended that prohibiting the transfer of alternative livestock to a recipient that is not licensed by the state constituted extraterritorial application of Montana's regulatory scheme to foreign nations, other states, and Indian nations in violation of federal law. The Supreme Court found that this case falls within the quarantine exception to the traditional commerce clause analysis. The quarantine exception recognizes that states may have a local interest in protecting public safety as a competing value when reviewing state burdens on interstate commerce. With the alarming spread of serious wildlife diseases throughout the country, the state has a compelling interest to enact regulations to ensure that alternative livestock cannot simply roam into Montana and threaten native populations. Because elk released on the Crow Indian Reservation could migrate back into Montana, the restrictions regarding transfer of alternative livestock in this section fall squarely within the quarantine exception to the commerce clause. Thus, the permanent injunction was affirmed. Hagener v. Wallace, 2002 MT 109, 309 M 473, 47 P3d 847 (2002). See also Bowman v. Chicago & NW. Ry. Co., 125 US 465 (1888).

*Appropriateness of Intervention in Action Challenging Enforcement of Ballot Initiative:* Two sporting groups sought to intervene in an action challenging the enforcement of a ballot initiative that prohibited the shooting of alternative livestock for a fee. The District Court denied the motion, and the groups appealed. After accepting supervisory control, the Supreme Court noted that an application for intervention as a matter of right must satisfy each of the following factors: (1) timeliness; (2) interest in the subject matter of the litigation; (3) a showing that protection of the interest may be impaired by disposition of the action; and (4) a showing that the interest is not adequately represented by an existing party. In the present case, timeliness was not disputed. Regarding the second factor, the Supreme Court cited Idaho Farm Bureau Fed'n v.

Babbitt, 58 F3d 1392 (9th Cir. 1995), for the proposition that a public interest group is entitled as a matter of right to intervene in an action challenging the legality of a measure that the group has supported. The District Court did not address the third factor because it determined that the groups had no legally protectable interest in the litigation. However, the Supreme Court found that an adverse decision in the suit would impair the groups' interest in the management and protection of Montana's game animals, so the third factor was met. Finally, the District Court determined that the groups failed to demonstrate that the Attorney General, on behalf of the Department of Fish, Wildlife, and Parks, would not zealously defend the groups' position in the suit. The Supreme Court concluded that the groups that actively drafted and supported the initiative may be in the best position to defend their interpretation of the resulting legislation and may not have been adequately represented by the Department. Thus, all four factors were met, and the Supreme Court ordered the District Court to permit the groups to intervene in the case. Sportsmen for I-143 v. District Court, 2002 MT 18, 308 M 189, 40 P3d 400 (2002).

**Attorney General's Opinions**

*Wild Game Animals — Removal:* When the fence of a game farm (now alternative livestock ranch) permittee encloses native wild big game animals, these animals remain the property of the state and may be hunted and taken only in compliance with state law. The state has no responsibility to remove the wild game animals from the enclosure. 38 A.G. Op. 68 (1980). Note: Portions of this opinion have been obviated by Ch. 570, L. 1983. (See also 1999 amendment.)

*Game Harvesting — Game Ranch:* The Fish and Game Commission (now Fish, Wildlife, and Parks Commission) does not have the authority to regulate the hunting and killing of privately owned game through the imposition of licensing requirements on individual hunters or open and closed seasons. 36 A.G. Op. 112 (1976).

**87-4-415. Transportation, sale, and disposal of alternative livestock — quarantine.**

**Compiler's Comments**

*1999 Amendment:* Chapter 574 throughout section substituted references to alternative livestock for references to game farm animals; in (1) in first sentence substituted reference to alternative livestock ranch for reference to game farm, after "licensee shall" deleted "contact the department of livestock to", after "inspection" inserted "of the alternative livestock, which inspection must be completed", and at end after "agent" deleted "for all game farm animals, except carnivores and omnivores", deleted former second sentence that read: "In the case of carnivores and omnivores, the game farm licensee shall contact the department to request an inspection by a department official", and in third sentence after "dead" substituted "alternative livestock" for "game farm animals, except carnivores and omnivores"; in (2)(a) after "subsection (1)" deleted "except inspection of carnivores and omnivores"; and made minor changes in style. Amendment effective October 1, 1999.

*1995 Amendment:* Chapter 503 in (1), near middle of first sentence, substituted "designated agent" for "stock inspector" and substituted third sentence concerning reporting of dead game farm animals for former third sentence that read: "This section applies to all game farm animals, whether alive or dead"; substituted (2) concerning inspection of game farm animals under subsection (1) and certificate of inspection for former (2) that read: "(2)(a) Inspection under subsection (1) must include examination of the game farm animal and all marks, tags, and tattoos to identify ownership prior to issuance of a certificate of inspection.

(b) A certificate of inspection must be made in triplicate and must specify:

(i) the date of inspection;

(ii) the place of origin and destination of the shipment;

(iii) the name and address of the owner of the game farm animals and of the purchaser or transferee;

(iv) the number, species, age, and sex of game farm animals transported or disposed of;

(v) ear tag numbers and tattoos on each animal; and

(vi) any other information that the department of livestock may require.

(c) A copy of the certificate must be:

(i) retained by the inspector;

(ii) furnished by the inspector to the owner or shipper of the game farm animals, to accompany the animals to their destination;

(iii) filed by the inspector with the department of livestock within 5 days of inspection; and

(iv) provided by the department of livestock to the department within 10 days of inspection"; and in (3), after "quarantine", inserted "or issue a hold order on". Amendment effective July 1, 1995.

*1993 Amendment:* Chapter 315 substituted (1) regarding inspection of game farm animals for former language that read: "Whenever the licensee of a licensed game farm sells or disposes of one or more game farm animals, he shall, at the same time, deliver to the recipient or otherwise cause to accompany each game farm animal or animals an invoice or bill of sale signed by the licensee or his agent stating the number of the game farm license, the date of acquisition or disposition, the species, the age, sex, and class of game animals disposed of, and the name and address of the transferee. This invoice or bill of sale, along with any required health certifications, authorizes transportation of the game farm animal or animals being sold, transferred, or disposed of"; and substituted (2) regarding inspection criteria for former language that read: "Within 10 days after movement or sale, the licensee or his agent shall mail postpaid a duplicate of the invoice or bill of sale to the department of livestock and the department." Amendment effective April 12, 1993.

*1991 Amendment:* In (1), near middle of first sentence before "disposition", inserted "acquisition or" and before "disposed" substituted "age, sex, and class of game animals" for "number" and in second sentence, after "bill of sale", inserted "along with any required health certifications"; at beginning of (2) substituted "Within 10 days after movement or sale" for "Within a reasonable time after disposition"; inserted (3) concerning Department of Livestock quarantining game farm animals pending inspection and concerning notification to Department of Livestock by Department of Fish, Wildlife, and Parks of importation or transportation of game farm animal with wildlife disease; and made minor changes in style.

**Administrative Rules**

ARM 12.6.1537 Transportation — carnivores and omnivores.

## 87-4-416. Sale of carcass and meat — regenerative parts excluded.

**Compiler's Comments**

*1999 Amendment:* Chapter 574 throughout section substituted references to alternative livestock ranch for references to game farm and substituted references to alternative livestock for references to game farm animals; in (1) in first sentence after "carcass" deleted "parts, or byproducts" and in third sentence after "carcass" deleted "parts, or byproducts"; inserted (3) excluding sale of regenerative parts from statutory requirements; and made minor changes in style. Amendment effective October 1, 1999.

*1993 Amendment:* Chapter 315 in (1), at end of first sentence, substituted "in accordance with the provisions of 87-4-415" for "only upon preparing an invoice or bill of sale and attaching", in second sentence substituted "certificate of inspection" for "it" and at end, after "container", deleted "and keeping a copy for his records", and in third sentence, in two places, substituted "certificate of inspection" for "invoice or bill of sale"; and made minor changes in style. Amendment effective April 12, 1993.

**Administrative Rules**

Title 12, chapter 6, subchapter 15, ARM Game farms.

**Case Notes**

*Transfer of Alternative Livestock to Unlicensed Tribal Lands Illegal:* The Wallaces, licensed alternative livestock ranchers, sought to reduce the size of their elk herd by transferring about 500 elk to the Crow Indian Reservation for subsequent release into the wild. The elk had been certified as free of tuberculosis, brucellosis, and elk-red deer hybridization by the Department of Livestock (DOL). Despite notification by the Department of Fish, Wildlife, and Parks (DFWP) that such an act violated state law, the Wallaces transferred 68 elk to the tribe. DFWP requested and received a permanent injunction prohibiting any further transfer of elk to the tribe, and the Wallaces appealed, questioning DFWP jurisdiction. The Supreme Court noted that DFWP has a statutory basis for its jurisdiction over the Wallaces as licensees. Based on DFWP jurisdiction over exterior fencing, and the Department's knowledge that the elk would not be contained behind a game-proof fence upon delivery to the tribe, DFWP had statutory authority to seek the permanent injunction to prevent the transfer. Also, the introduction or transplantation of any wildlife into the wild, including game farm elk, requires the approval of DFWP. Further, 87-4-414 provides that alternative livestock may be kept only on a licensed alternative livestock ranch, and because the tribe is not a licensed facility under Montana law, neither DFWP nor DOL had authority to permit the transfer. The Wallaces knew that the elk were destined for an unlicensed location where they would be released into the wild and could migrate back into Montana, so the transfer violated the Wallaces' duty as licensees to act in accordance with law, and the District Court correctly enjoined the transportation of the elk. Hagener v. Wallace, 2002 MT 109, 309 M 473, 47 P3d 847 (2002).

### 87-4-417. Records and reporting — rules.

**Compiler's Comments**

*1999 Amendment:* Chapter 574 throughout section substituted references to alternative livestock ranch for references to game farm and substituted references to alternative livestock for references to game farm animals; in (1) in introductory clause after "deaths" substituted "on forms provided by the department" for "of game farm animals"; and made minor changes in style. Amendment effective October 1, 1999.

*1995 Amendment:* Chapter 503 in (1), after "sales", inserted "births, and deaths"; in (1)(c), after "sold", inserted "or born or that died. However, a calf or fawn that dies prior to being marked pursuant to 87-4-414(4) need not be identified"; in (2), at beginning, inserted "Unless a different reporting frequency has been established pursuant to subsection (3)", in two places, after "January 1", deleted "April 1", in two places substituted "July 1" for "September 1", near end, before "bought", inserted "that escaped, that were", and after "sold" substituted "transferred, recaptured, or born, or that died" for "or propagated"; inserted (3) concerning the Department establishing rules for reporting frequency; and made minor changes in style. Amendment effective July 1, 1995.

*1995 Statement of Intent:* The statement of intent attached to Ch. 503, L. 1995, provided: "A statement of intent is required for this bill in order to clarify rulemaking authority of the department of fish, wildlife, and parks and the department of livestock with regard to the administration and regulation of game farms [now alternative livestock ranches]. It is intended that rules promulgated pursuant to Title 87, chapter 4, part 4, be adopted in accordance with the Montana Negotiated Rulemaking Act, Title 2, chapter 5, part 1.

(1) It is intended that the department of fish, wildlife, and parks have primary authority with regard to rules governing:

(a) game farm [now alternative livestock ranch] licensure;

(b) reporting requirements;

(c) exterior fencing requirements;

(d) classification of species the importation of which may present a threat to the state's wildlife population;

(e) general enforcement of game farm [now alternative livestock ranch] licensing violations; and

(f) the definition of "reasonable time" in the context of 87-4-419(2), which must reflect specific seasonal issues related to breeding and disease.

(2) It is intended that the department of livestock have primary authority with regard to rules governing:

(a) transportation and identification of game farm animals [now alternative livestock];

(b) health inspection and game farm [now alternative livestock ranch] quarantines, including interior facilities; and

(c) importation restrictions on exotic species.

(3) It is intended that the department of livestock's rules address the issue of immediate depopulation of game farm animals [now alternative livestock] that test positive for tuberculosis.

(4) It is intended that both the department of fish, wildlife, and parks and the department of livestock consider the feasibility of using DNA as an additional method of identification of game farm animals [now alternative livestock].

(5) It is intended that the game farm advisory council [now alternative livestock advisory council] advise both the department of fish, wildlife, and parks and the department of livestock regarding the administration of game farm [now alternative livestock ranch] operations, which may include input into the rules adopted pursuant to [this act].

(6) It is the intent of the legislature that in adopting rules pursuant to 87-4-426(6) [now repealed], the department of fish, wildlife, and parks provide for a timely and simplified process for minor amendments to an existing license. This may include, when appropriate, a categorical exclusion under the provisions of Title 75, chapter 1, part 1."

*1993 Amendment:* Chapter 315 at beginning of (2) substituted "Within 2 weeks after January 1, April 1, and September 1" for "On or before January 31", near middle, after "January 1", inserted "April 1, and September 1", near end, after "sold", inserted "or propagated", and at end substituted "reporting period" for "past year"; and made minor changes in style. Amendment effective April 12, 1993.

*1991 Amendment:* At beginning of (1)(c), before "identification", inserted "individual".

**Administrative Rules**

ARM 12.6.1539 Game farm records and reports.

## 87-4-418. Unlawful capture.

**Compiler's Comments**

*1999 Amendment:* Chapter 574 at end substituted "an alternative livestock ranch" for "a game farm except as provided in 87-4-410"; and made minor changes in style. Amendment effective October 1, 1999.

**Administrative Rules**

ARM 12.6.1543 Confiscation procedures.

**Case Notes**

*Evidence Sufficient to Support Conviction for Game Farm (now Alternative Livestock Ranch) Violations:* Evidence of the presence of wild elk on Brogan's game farm (now alternative livestock ranch), gathered by wardens through direct observation and supported by circumstantial evidence, such as animal tracks, the presence of hay near gates, the absence of electric power in the game farm (now alternative livestock ranch) fence, and Brogan's evasive conduct, was sufficient to support Brogan's conviction for capturing wild elk for use on the game farm (now alternative livestock ranch) and for failure to maintain fences. St. v. Brogan, 261 M 79, 862 P2d 19, 50 St. Rep. 1204 (1993).

## 87-4-419. Escape from alternative livestock ranch — effect.

**Compiler's Comments**

*1999 Amendment:* Chapter 574 in (1) after "escapes from" substituted "an alternative livestock ranch" for "a game farm" and in two places substituted references to alternative livestock for references to game farm; and made minor changes in style. Amendment effective October 1, 1999.

*1995 Amendment:* Chapter 503 in second sentence of (1), after "time", inserted "the department may kill the animal. If recapture or killing of the animal is unsuccessful within a reasonable time"; inserted (2) requiring the Department to adopt a rule defining reasonable time; and made minor changes in style. Amendment effective July 1, 1995.

*1995 Statement of Intent:* The statement of intent attached to Ch. 503, L. 1995, provided: "A statement of intent is required for this bill in order to clarify rulemaking authority of the department of fish, wildlife, and parks and the department of livestock with regard to the administration and regulation of game farms [now alternative livestock ranches]. It is intended that rules promulgated pursuant to Title 87, chapter 4, part 4, be adopted in accordance with the Montana Negotiated Rulemaking Act, Title 2, chapter 5, part 1.

(1) It is intended that the department of fish, wildlife, and parks have primary authority with regard to rules governing:

(a) game farm [now alternative livestock ranch] licensure;

(b) reporting requirements;

(c) exterior fencing requirements;

(d) classification of species the importation of which may present a threat to the state's wildlife population;

(e) general enforcement of game farm [now alternative livestock ranch] licensing violations; and

(f) the definition of "reasonable time" in the context of 87-4-419(2), which must reflect specific seasonal issues related to breeding and disease.

(2) It is intended that the department of livestock have primary authority with regard to rules governing:

(a) transportation and identification of game farm animals [now alternative livestock];

(b) health inspection and game farm [now alternative livestock ranch] quarantines, including interior facilities; and

(c) importation restrictions on exotic species.

(3) It is intended that the department of livestock's rules address the issue of immediate depopulation of game farm animals [now alternative livestock] that test positive for tuberculosis.

(4) It is intended that both the department of fish, wildlife, and parks and the department of livestock consider the feasibility of using DNA as an additional method of identification of game farm animals [now alternative livestock].

(5) It is intended that the game farm advisory council [now alternative livestock advisory council] advise both the department of fish, wildlife, and parks and the department of livestock regarding the administration of game farm [now alternative livestock ranch] operations, which may include input into the rules adopted pursuant to [this act].

(6) It is the intent of the legislature that in adopting rules pursuant to 87-4-426(6) [now repealed], the department of fish, wildlife, and parks provide for a timely and simplified process for minor amendments to an existing license. This may include, when appropriate, a categorical exclusion under the provisions of Title 75, chapter 1, part 1."

**Administrative Rules**

ARM 12.6.1538 Egress and ingress.

### 87-4-420. Taxation.

**Compiler's Comments**

*1999 Amendment:* Chapter 574 at beginning after "All" substituted "alternative livestock" for "game farm animals", after "raised on" substituted "an alternative livestock ranch" for "a game farm", and at end inserted "similar to other livestock". Amendment effective October 1, 1999.

### 87-4-422. Rulemaking.

**Compiler's Comments**

*1999 Amendment:* Chapter 574 in (1) after "regulation of" substituted "alternative livestock ranches" for "game farms"; substituted (2) regarding adoption and enforcement of rules for former text that read: "The department of livestock may adopt rules addressing the transportation and importation of game farm animals, restrictions on importation, identification, sale of game farm animal parts, quarantine, hold orders, interior facilities, health regulations, and the care and maintenance of game farm animals"; deleted former (3) that read: "(3) Rules promulgated pursuant to this part must be adopted in accordance with the Montana Negotiated Rulemaking Act, Title 2, chapter 5, part 1"; and made minor changes in style. Amendment effective October 1, 1999.

*1995 Amendment:* Chapter 503 in (1), after "part", inserted "over which the department has primary jurisdiction"; substituted (2) concerning the adoption of rules addressing transportation, importation, identification, sale, quarantine, hold orders, interior facilities, and the health, care, and maintenance of game farm animals for former (2) that read: "(2) The rules may address but are not limited to the classifying of cloven-hoofed ungulates, requirements for facilities, reporting and recordkeeping requirements, transportation and importation, restrictions on importation, identification, sale of animal parts, and the care and maintenance of game farm animals"; and inserted (3) concerning rules adopted pursuant to this part being in accordance with Title 2, chapter 5, part 1. Amendment effective July 1, 1995.

*1995 Statement of Intent:* The statement of intent attached to Ch. 503, L. 1995, provided: "A statement of intent is required for this bill in order to clarify rulemaking authority of the department of fish, wildlife, and parks and the department of livestock with regard to the administration and regulation of game farms [now alternative livestock ranches]. It is intended that rules promulgated pursuant to Title 87, chapter 4, part 4, be adopted in accordance with the Montana Negotiated Rulemaking Act, Title 2, chapter 5, part 1.

(1) It is intended that the department of fish, wildlife, and parks have primary authority with regard to rules governing:

(a) game farm [now alternative livestock ranch] licensure;

(b) reporting requirements;

(c) exterior fencing requirements;

(d) classification of species the importation of which may present a threat to the state's wildlife population;

(e) general enforcement of game farm [now alternative livestock ranch] licensing violations; and

(f) the definition of "reasonable time" in the context of 87-4-419(2), which must reflect specific seasonal issues related to breeding and disease.

(2) It is intended that the department of livestock have primary authority with regard to rules governing:

(a) transportation and identification of game farm animals [now alternative livestock];

(b) health inspection and game farm [now alternative livestock ranch] quarantines, including interior facilities; and

(c) importation restrictions on exotic species.

(3) It is intended that the department of livestock's rules address the issue of immediate depopulation of game farm animals [now alternative livestock] that test positive for tuberculosis.

(4) It is intended that both the department of fish, wildlife, and parks and the department of livestock consider the feasibility of using DNA as an additional method of identification of game farm animals [now alternative livestock].

(5) It is intended that the game farm advisory council [now alternative livestock advisory council] advise both the department of fish, wildlife, and parks and the department of livestock regarding the administration of game farm [now alternative livestock ranch] operations, which may include input into the rules adopted pursuant to [this act].

(6) It is the intent of the legislature that in adopting rules pursuant to 87-4-426(6) [now repealed], the department of fish, wildlife, and parks provide for a timely and simplified process for minor amendments to an existing license. This may include, when appropriate, a categorical exclusion under the provisions of Title 75, chapter 1, part 1."

*1993 Amendment:* Chapter 315 at end of (1) inserted "and to coordinate regulation of game farms with the department of livestock"; in (2), after "ungulates", substituted "requirements for facilities" for "fencing requirements", after "reporting" inserted "and recordkeeping", after "importation" inserted "restrictions on importation", and at end deleted "and game farm shooting licenses"; and made minor changes in style. Amendment effective April 12, 1993.

*1983 Statement of Intent:* The statement of intent attached to SB 448 (Ch. 570, L. 1983) provided: "This bill requires the Department of Fish, Wildlife, and Parks to make rules for game animal farms under section 17 [87-4-422], game bird farms under section 32 [87-4-913], and fur farms under section 47 [87-4-1012]. It is the intent of the Legislature that these rules address procedural items necessary for a timely and efficient processing of applications and licenses and provide the information necessary for administration of the criteria provided in those sections. It is intended that the license fees to be set by the Department be in an amount commensurate with the costs of processing the applications and administering the provisions of the act."

**Administrative Rules**

Title 12, chapter 6, subchapter 15, ARM Game farms.

ARM 12.6.1544 Waivers.

## 87-4-423. Revocation of license — procedure — disposition of animals.

**Compiler's Comments**

*1999 Amendment:* Chapter 574 in (4)(a) in three places substituted references to alternative livestock for references to game farm animals. Amendment effective October 1, 1999.

*1993 Amendment:* Chapter 315 substituted (1) regarding revocation proceedings for former language that read: "A game farm license may be revoked for failure to operate the game farm according to the provisions of this part or rules adopted under this part"; inserted (2) concerning initiation of revocation or disciplinary proceedings; near beginning of first sentence of (3), after "violation", inserted "of recordkeeping or reporting requirements that is not a material violation or an attempt to deceive" and inserted second sentence that read: "Upon failure of the licensee to correct the violation, the department may institute revocation proceedings"; deleted former (3) that read: "(3) Upon failure of the licensee to correct the violation, the department may institute revocation proceedings. If the department institutes revocation proceedings, it shall provide reasonable notice and opportunity for a hearing to the licensee. After hearing and upon proof of violation, the department may revoke the game farm license"; and substituted (4) regarding disposal or seizure of game farm animals following license revocation for former language that read: "In addition to the revocation of a license allowed by this section, a person who violates this part or a rule adopted under this part is subject to a fine of not more than $500 or imprisonment in the county jail for not more than 1 year, or both." Amendment effective April 12, 1993.

*1991 Amendment:* Near middle of (2), after "statement", deleted "of a specific time in which" and at end, after "corrected", inserted language concerning a 30-day period to correct violation unless Department approves longer period; inserted (4) concerning fine and imprisonment in addition to license revocation for violations; and made minor change in style.

**Administrative Rules**

ARM 12.6.1543 Confiscation procedures.

## 87-4-424. Classification — restrictions on importation of certain species.

**Compiler's Comments**

*1999 Amendment:* Chapter 574 in (1)(a) after "escaped" substituted "alternative livestock" for "game farm animals"; and in (2) in first sentence after "purposes of" substituted "alternative livestock ranching" for "game farming". Amendment effective October 1, 1999.

*1995 Amendment:* Chapter 503 in (1), at beginning, substituted "In order to properly regulate importation" for "The department or the department of livestock may restrict from importation for purposes of game farming any species or subspecies and their hybrids with native species that are determined through scientific investigation to pose a threat to native wildlife or livestock through nonspecific genetic dilution, habitat degradation or competition caused by feral populations of escaped game farm animals, parasites, or disease"; inserted (1)(a) and (1)(b) concerning the classification of cloven-hoofed ungulates posing a threat to native wildlife or livestock; and inserted (2) concerning the restriction of importation of animals posing a threat to native species or livestock and importation permitted by the Department of Livestock. Amendment effective July 1, 1995.

*1993 Amendment:* Chapter 315 near end, after "dilution", inserted "habitat degradation or competition caused by feral populations of escaped game farm animals". Amendment effective April 12, 1993.

**Administrative Rules**

ARM 12.6.1540 Classification of prohibited and restricted species.

ARM 12.6.1541 Possession of prohibited species.

ARM 12.6.1543 Confiscation procedures.

### 87-4-427. Revocation of license — criteria — penalties.

**Compiler's Comments**

*2011 Amendment:* Chapter 258 in (4) at end after "is subject to" substituted "the penalties provided in 87-6-705" for "criminal prosecution and a fine of not more than $1,000, imprisonment in the county jail for not more than 1 year, or both. Any violation of 87-3-118 is subject to prosecution and penalties under that section." Amendment effective October 1, 2011.

*Preamble:* The preamble attached to Ch. 258, L. 2011, provided: "WHEREAS, the 2007 Legislature passed House Joint Resolution No. 16, urging that revision of the criminal codes within Title 87 of the Montana Code Annotated be given priority; and

WHEREAS, House Joint Resolution No. 16 noted that practitioners, judges, and citizens find that the criminal codes intertwined within the fish and game laws in Title 87 are difficult to read, understand, and prosecute; and

WHEREAS, House Joint Resolution No. 16 directed that revision of the Title 87 criminal code should not include policy changes to current laws and should adhere to the intent of the legislatures that crafted the laws; and

WHEREAS, in 2008, the Director of Fish, Wildlife, and Parks appointed a Title 87 criminal code revision working group, consisting of Justices of the Peace, County Attorneys, an Assistant Attorney General, legal counsel and the enforcement administrator of the Department of Fish, Wildlife, and Parks, and legislative staff; and

WHEREAS, the working group met numerous times and spent countless hours crafting a revision that makes the Title 87 criminal code more understandable without making substantive or policy changes to present law; and

WHEREAS, revision of the fish and game criminal statutes will benefit the hunting and fishing public, magistrates, and prosecutors by codifying crimes and penalties in a separate chapter of Montana law, rather than being intertwined throughout Title 87."

*Saving Clause:* Section 131, Ch. 258, L. 2011, was a saving clause.

*Severability:* Section 132, Ch. 258, L. 2011, was a severability clause.

*1999 Amendment:* Chapter 574 throughout section substituted references to alternative livestock ranch for references to game farm and substituted references to alternative livestock for references to game farm animals; and made minor changes in style. Amendment effective October 1, 1999.

*Effective Date:* Section 18, Ch. 315, L. 1993, provided: "[This act] is effective on passage and approval." Approved April 12, 1993.

**Case Notes**

*Revocation of License — Statute Not Retroactive — Revocation Not Violation of Double Jeopardy:* Revocation of a license under a 1993 statute for prior convictions did not deprive a game farm (now alternative livestock ranch) operator of a vested right or attach additional disabilities to the prior convictions. This section serves a remedial purpose and is not a punitive or penal statute. The Department of Fish, Wildlife, and Parks' revocation of the license was not punishment and did not violate double jeopardy rights. In re Game Farm License No. 319 of Brogan, 283 M 413, 942 P2d 100, 54 St. Rep. 670 (1997).

**87-4-428. Right to administrative hearing.**

**Compiler's Comments**

*2000 Amendment by Initiative:* Initiative Measure No. 143 deleted former (1) that read: "(1) An applicant must be given notice and an opportunity for a hearing on a proposed denial or issuance with stipulations of an alternative livestock ranch license pursuant to 87-4-426 before the department may deny a license or grant a license with stipulations"; in (2) after "license" deleted "withhold consent to the transfer of a license"; and made minor changes in style. Amendment effective November 7, 2000.

*Severability:* Section 10, Initiative Measure No. 143, was a severability clause.

*1999 Amendment:* Chapter 574 in (1) near middle after "stipulations of" substituted "an alternative livestock ranch" for "a game farm". Amendment effective October 1, 1999.

*Effective Date:* Section 18, Ch. 315, L. 1993, provided: "[This act] is effective on passage and approval." Approved April 12, 1993.

**87-4-433. Programmatic environmental review.**

**Compiler's Comments**

*2000 Amendment by Initiative:* Initiative Measure No. 143 deleted former (4) that read: "(4) For an alternative livestock ranch license application that is received after July 1, 2001, the department shall conduct an environmental review, if required, using the programmatic and tiering environmental impacts to the programmatic." Amendment effective November 7, 2000.

*Severability:* Section 10, Initiative Measure No. 143, was a severability clause.

*Effective Dates:* Section 31(1), Ch. 574, L. 1999, provided that subsection (4) of this section is effective October 1, 1999. Section 31(2), Ch. 574, L. 1999, provided that subsections (1) through (3) of this section are effective July 1, 1999.

## Part 5
## Shooting Preserves

**Part Attorney General's Opinions**

*Game Harvesting — Game Ranch:* The Fish and Game Commission (now Fish, Wildlife, and Parks Commission) does not have the authority to regulate the hunting and killing of privately owned game through the imposition of licensing requirements on individual hunters or open and closed seasons. 36 A.G. Op. 112 (1976).

**87-4-501. Authorization for licenses, permits, rules, and regulations.**

**Administrative Rules**

ARM 12.6.1201 Shooting preserve bird tags.

**87-4-502. Size, location, and posting of preserves.**

**Compiler's Comments**

*2021 Amendment:* Chapter 552 in (1) substituted "2,560 contiguous acres" for "1,920 contiguous acres". Amendment effective May 15, 2021.

*2009 Amendment:* Chapter 408 in (1) substituted "1,920 contiguous acres and must be located" for "1,280 contiguous acres and shall not be located closer than 10 miles from another preserve"; and made minor changes in style. Amendment effective April 28, 2009.

**87-4-503. Fees.**

**Compiler's Comments**

*2003 Amendment:* Chapter 499 increased fees from $50 to $100 and from $20 to $40 and before "acres of shooting preserve area" substituted "320" for "160"; and made minor changes in style. Amendment effective July 1, 2003.

**87-4-504. Bird license or stamp required.**

**Compiler's Comments**

*1991 Amendment:* At end inserted clause relating to 3-day nonresident shooting preserve bird hunting stamp.

*1987 Amendment:* Inserted "upland" before "game".

**87-4-521. Duration of season.**

**Compiler's Comments**

*1991 Amendment:* At beginning deleted "In order to give a reasonable opportunity for a fair return on a sizeable investment", after "preserves" deleted "shall be no less than 120 consecutive days, as designated by the department, during", changed season from 4-month to 7-month period, and changed season's end from December to March 31; and made minor changes in style.

### 87-4-522. Game hunted in preserve.

**Compiler's Comments**

*2021 Amendment:* Chapter 552 in (2) near middle substituted "authorized to be hunted in" for "authorized for"; and inserted (4) relating to maintenance of records for shooting preserve operators. Amendment effective May 15, 2021.

*2003 Amendment:* Chapter 499 in (1) substituted "ring-necked pheasants with no color mutations" for "pheasants", deleted "quail" and "turkeys", and inserted "Merriam's turkeys" and "Hungarian partridges"; in (2) substituted "of 100 birds cumulative of all species authorized for an individual" for "number of stock of each species to be hunted on a" and after "released" inserted "each year" and deleted former second sentence that read: "The minimum number of stock of each species to be released shall be determined by the department before the commencement of the season"; inserted (3) relating to the minimum age and the marking prior to release of artificially propagated birds released on a shooting preserve during the preserve's season; and made minor changes in style. Amendment effective July 1, 2003.

**Administrative Rules**

ARM 12.6.1202 Game hunted in preserve.

### 87-4-524. Preserve operators to establish shooting restrictions.

**Compiler's Comments**

*2003 Amendment:* Chapter 499 in (1) inserted "licensed prior to July 1, 2003"; inserted (2) relating to restrictions on a shooting preserve license issued after July 1, 2003; and made minor changes in style. Amendment effective July 1, 2003.

### 87-4-525. Tagging of game.

**Administrative Rules**

ARM 12.6.1201 Shooting preserve bird tags.

### 87-4-527. Wild game on preserve.

**Compiler's Comments**

*1991 Amendment:* Near beginning, after "applicable", inserted "license"; and made minor changes in style.

### 87-4-529. Penalties.

**Compiler's Comments**

*Preamble:* The preamble attached to Ch. 258, L. 2011, provided: "WHEREAS, the 2007 Legislature passed House Joint Resolution No. 16, urging that revision of the criminal codes within Title 87 of the Montana Code Annotated be given priority; and

WHEREAS, House Joint Resolution No. 16 noted that practitioners, judges, and citizens find that the criminal codes intertwined within the fish and game laws in Title 87 are difficult to read, understand, and prosecute; and

WHEREAS, House Joint Resolution No. 16 directed that revision of the Title 87 criminal code should not include policy changes to current laws and should adhere to the intent of the legislatures that crafted the laws; and

WHEREAS, in 2008, the Director of Fish, Wildlife, and Parks appointed a Title 87 criminal code revision working group, consisting of Justices of the Peace, County Attorneys, an Assistant Attorney General, legal counsel and the enforcement administrator of the Department of Fish, Wildlife, and Parks, and legislative staff; and

WHEREAS, the working group met numerous times and spent countless hours crafting a revision that makes the Title 87 criminal code more understandable without making substantive or policy changes to present law; and

WHEREAS, revision of the fish and game criminal statutes will benefit the hunting and fishing public, magistrates, and prosecutors by codifying crimes and penalties in a separate chapter of Montana law, rather than being intertwined throughout Title 87."

*Effective Date:* This section is effective October 1, 2011.

*Saving Clause:* Section 131, Ch. 258, L. 2011, was a saving clause.

*Severability:* Section 132, Ch. 258, L. 2011, was a severability clause.

**87-4-530. Use of temporary holding pens.**

**Compiler's Comments**

*2021 Amendment:* Chapter 552 in (1) near middle after "artificially propagated" inserted "upland game" and substituted "120 days" for "60 days". Amendment effective May 15, 2021.

*Effective Date:* Section 4, Ch. 132, L. 2013, provided that this section is effective on passage and approval. Approved April 1, 2013.

## Part 6

## Fish Ponds, Seining, and Commercial Taking of Aquatic Fish Food Organisms

**87-4-601. Sale of fish or spawn.**

**Compiler's Comments**

*2019 Amendment:* Chapter 3 in (1) in first sentence before "railroad bridge" deleted "burlington northern". Amendment effective October 1, 2019.

*2017 Amendment:* Chapter 34 in (1) near beginning substituted "June 30, 2028" for "June 30, 2018"; in (4)(b) near beginning of third sentence inserted "paddlefish grant" and near beginning of fourth sentence before "committee" deleted "advisory"; and made minor changes in style. Amendment effective October 1, 2017.

*2011 Amendment:* Chapter 258 deleted former (1) and (2) that read: "(1) Except as provided in subsections (2) through (4), a person may not, for speculative purposes, for market, or for sale, in any way, catch game fish or remove or cause to be removed the eggs or spawn of any game fish. A person may not sell or offer for sale game fish or the eggs or spawn from game fish.

(2) The restrictions of subsection (1) do not apply to:

(a) the catching of fish or the collecting of eggs or spawn in a private fish pond licensed under 87-4-603 by the owner of the pond;

(b) the taking of fish by state authorities for the purpose of obtaining eggs for propagation in state fish hatcheries or by any person who receives a permit from the department to take eggs for use in a private fish pond licensed under 87-4-603;

(c) the catching of whitefish by the holder of a valid fishing license fishing with hook and line or rod in specified waters designated by rules of the commission;

(d) the taking of whitefish by nets or traps in the Kootenai River and in its tributary streams within 1 mile of the Kootenai River, under rules that the commission prescribes; or

(e) the sale by the department of fish eggs produced from brood stock owned by the department but determined to be in excess of the department's needs"; and made minor changes in style. Amendment effective October 1, 2011.

*Preamble:* The preamble attached to Ch. 258, L. 2011, provided: "WHEREAS, the 2007 Legislature passed House Joint Resolution No. 16, urging that revision of the criminal codes within Title 87 of the Montana Code Annotated be given priority; and

WHEREAS, House Joint Resolution No. 16 noted that practitioners, judges, and citizens find that the criminal codes intertwined within the fish and game laws in Title 87 are difficult to read, understand, and prosecute; and

WHEREAS, House Joint Resolution No. 16 directed that revision of the Title 87 criminal code should not include policy changes to current laws and should adhere to the intent of the legislatures that crafted the laws; and

WHEREAS, in 2008, the Director of Fish, Wildlife, and Parks appointed a Title 87 criminal code revision working group, consisting of Justices of the Peace, County Attorneys, an Assistant Attorney General, legal counsel and the enforcement administrator of the Department of Fish, Wildlife, and Parks, and legislative staff; and

WHEREAS, the working group met numerous times and spent countless hours crafting a revision that makes the Title 87 criminal code more understandable without making substantive or policy changes to present law; and

WHEREAS, revision of the fish and game criminal statutes will benefit the hunting and fishing public, magistrates, and prosecutors by codifying crimes and penalties in a separate chapter of Montana law, rather than being intertwined throughout Title 87."

*Saving Clause:* Section 131, Ch. 258, L. 2011, was a saving clause.

*Severability:* Section 132, Ch. 258, L. 2011, was a severability clause.

*2003 Amendments — Composite Section:* Chapter 84 in (1) at beginning in exception clause inserted reference to subsection (3) and near middle of first sentence after "catch" deleted "any of the fish which in this title are classified as" and in second sentence after "fish" deleted "of this state as defined in this title"; in (2)(a) after "fish" inserted "or the collecting of eggs or spawn" and after "private" substituted "fish pond licensed under 87-4-603 by the owner of the pond" for "ponds by the owners thereof"; at end of (2)(b) after "for" substituted "use in a private fish pond licensed under 87-4-603" for "such purposes"; at end of (2)(c) substituted "rules of the commission" for "rules and regulations of the department"; near middle of (2)(d) after "rules" deleted "and regulations"; inserted (3) authorizing person to possess and sell legally taken nongame fish; and made minor changes in style. Amendment effective March 20, 2003.

Chapter 333 in (3)(a) at beginning inserted "Until June 30, 2018" and after reference to railroad bridge at Glendive substituted "North Dakota state line" for "confluence of Cottonwood Creek and the Yellowstone River"; at beginning of (3)(d)(i) substituted "Thirty percent" for "Forty percent"; at beginning of (3)(d)(ii) substituted "Seventy percent" for "Sixty percent"; and made minor changes in style. Amendment effective April 15, 2003.

*Termination Provision Repealed:* Sections 2 and 3, Ch. 333, L. 2003, amended sec. 5, Ch. 409, L. 1989, which terminated the 1989 amendments to this section June 30, 1993, by deleting the termination date and amended sec. 2, Ch. 196, L. 1993, which extended the termination date to June 30, 2003, by deleting the termination date. Effective April 15, 2003.

*1993 Amendment:* Chapter 196 in (3)(a), at beginning of first sentence, substituted description concerning Yellowstone River for "at the Intake fishing access site north of Glendive", deleted former second sentence containing definition of the Intake fishing access site as "the area from the face of Intake dam downstream to the confluence of Cottonwood Creek and the Yellowstone River", in second sentence, after "paddlefish", inserted "may be", substituted "only to" for "into", and before "donation" deleted "cleaning or"; in (3)(d)(i) reduced amount to "Forty percent" from "One-half", after "marketing" deleted "and administration", and after "fishing access" inserted "administration"; in (3)(d)(ii) increased amount to "Sixty percent" from "The other half", after "marketing" deleted "and administration", and inserted reference to nonprofit organization's administrative costs; and made minor changes in style. Amendment effective March 25, 1993.

*Extension of Termination Date:* Section 2, Ch. 196, L. 1993, amended sec. 5, Ch. 409, L. 1989, by extending the termination date imposed by that chapter. Amendment effective March 25, 1993.

*1991 Amendments — Name Change:* Section 2, Ch. 28, L. 1991, directed the Code Commissioner to change the name of the Fish and Game Commission to the Fish, Wildlife, and Parks Commission wherever the name appears in the MCA. Accordingly, the name was changed in this section as directed.

Chapter 68 in (3)(a) of temporary version inserted second through fifth sentences defining Intake fishing access site and clarifying paddlefish and roe that are acceptable for donation to the program. Amendment effective March 13, 1991.

*1989 Amendment:* In (1), near beginning, inserted reference to subsection (3); and inserted (3) providing rules and procedure for donation of paddlefish roe to nonprofit corporation for use in caviar production and designating how profits are to be used (see 1989 Session Law for text). Amendment effective July 1, 1989, and terminates June 30, 1993.

*1989 Statement of Intent:* The statement of intent attached to Ch. 409, L. 1989, provided: "A statement of intent is required for this bill because 87-4-601(3) grants rulemaking authority to the department of fish, wildlife, and parks to implement the paddlefish roe donation program. The legislature intends that the priority in implementing the provisions of this bill be on maintaining the paddlefish fishery. At a minimum, it is intended that the rules address the following:

(1) a process for the selection of a Montana nonprofit corporation to accept roe donations and to process and market the paddlefish roe;

(2) recordkeeping required of the selected corporation and commercial buyers to assure proper administration of the program;

(3) a process for development of recommendations and review of projects in expending funds raised through the paddlefish roe program;

(4) a provision that the total number of paddlefish taken in the Yellowstone River Basin may not exceed 3,500 in any year; and

(5) any other topics necessary for administration of the program."

*1987 Amendment:* Inserted (2)(e) relating to the sale of fish eggs.

*1983 Amendment:* Inserted (2)(d) relating to the taking of whitefish by nets or traps.

**Administrative Rules**

Title 12, chapter 7, subchapter 9, ARM Sale of excess fish eggs.

Title 12, chapter 7, subchapter 10, ARM Paddlefish egg donations and marketing.

### 87-4-602. Seining licenses.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

*1983 Amendment:* Substituted reference to state special revenue fund for reference to earmarked revenue fund.

**Administrative Rules**

Title 12, chapter 7, subchapter 1, ARM Commercial fishing permit.

Title 12, chapter 7, subchapter 2, ARM Commercial seining license.

### 87-4-603. Fish pond license for private fish pond — records.

**Compiler's Comments**

*2019 Amendments — Composite Section:* Chapter 277 in (1) in five places substituted "licensee" for references to the holder of a private fish pond license or license holder, in two places before "pond" deleted "lake or", and in first sentence after "lawfully controls" deleted "an artificial lake or pond or" and near end substituted "department" for "director"; in (1)(a) after "license; and" deleted "also conditioned to the effect that the license holder"; in (1)(b) at end substituted "department pursuant to subsection (6)" for "director"; inserted (2) regarding eligibility for a temporary fish pond license; in (3)(a) inserted current text for former text that read: ""Artificial lake or pond" or "private fish pond", as used in this section, means a body of water that is"; in (3)(b)(i) at end deleted "or by a diversion of water that does not exceed 500 acres in surface area"; in (3)(b)(ii) after "instream pond" deleted "that does not exceed 500 acres"; deleted former (3)(b)(iii) that read: "(iii) not determined by the department to pose an unacceptable risk to game fish or fish species of special concern in adjacent waters"; in (5) after "may condition" substituted "a fish pond license" for "the license" and near end substituted "a private fish pond" for "an artificial lake or pond"; in (7) in first sentence substituted "a private fish pond" for "an artificial lake or pond", in second and third sentences in three places substituted references to "the pond" for references to "body of water", and in third sentence substituted "a pond" for "an artificial lake or a pond"; in (8) in first sentence substituted "a licensed private fish pond or a natural lake" for "a licensed fish pond, an artificial lake or pond, or a natural lake"; and made minor changes in style. Amendment effective October 1, 2019.

Chapter 278 in (1) in first sentence substituted "licensee" for "holder of a private fish pond license", in third and fourth sentences in four places substituted "licensee" for "license holder"; in (1)(a) at end deleted "also conditioned to the effect that the license holder"; in (1)(b) at end substituted "department pursuant to subsection (6)" for "director"; inserted (6)(a)(iv) concerning a requirement to keep an accurate record of the number and verification of validity of a purchaser's private fish pond license; in (6)(a)(v) inserted "or addresses"; and made minor changes in style. Amendment effective October 1, 2019.

*1999 Amendment:* Chapter 108 in first sentence in (1) and in (2)(a) after reference to artificial lake or pond inserted reference to private fish pond; in (2)(a) substituted current definition of artificial lake or pond or private fish pond for former text that read: "does not include a natural pond or body of water, including streams and rivers, created by natural means or any portion of the streambed or lakebed of a natural pond or body of water. It includes only bodies of water created by artificial means or diversion of water that do not exceed 500 acres of surface area"; inserted (2)(b) excluding certain water from definition of artificial lake or pond or private fish pond; inserted (3) requiring applicant to provide verification regarding game fish or fish species in instream private fish pond; and made minor changes in style. Amendment effective March 18, 1999.

*1995 Amendment:* Chapter 425 in (1), in second sentence after "pond with", substituted "fish" for "fry"; in (2), after "water", inserted "including streams and rivers"; inserted (5) concerning request for inspection to determine presence of disease or illegal introduction of species and notice of intent to enter; inserted (6) concerning action taken because of disease or illegal introduction, including emergency action; and made minor changes in style. Amendment effective April 13, 1995.

*Preamble:* The preamble attached to Ch. 425, L. 1995, provided: "WHEREAS, whirling disease was recently discovered in the world famous fishery of the upper Madison River and is the leading suspect for the 90% reduction in the numbers of wild rainbow trout in those waters; and

WHEREAS, Governor Racicot, in a recent communication to concerned parties, stated, "There is genuine reason to believe whirling disease is the worst disease threat our wild trout have ever faced"; and

WHEREAS, Governor Racicot has further stated that it is essential for the Department of Fish, Wildlife, and Parks to mobilize an unprecedented effort to research and combat this disease; and

WHEREAS, the wild trout fisheries in Montana provide in excess of $125 million in annual benefits to the state's economy; and

WHEREAS, the wild trout fisheries provide inestimable recreational pleasures for the citizens of the state; and

WHEREAS, there is significant potential for whirling disease to spread to other blue ribbon trout waters of the state; and

WHEREAS, the Department of Fish, Wildlife, and Parks currently lacks both the authority and the staffing to combat a similar spread of disease; and

WHEREAS, whirling disease primarily results from the introduction of infected hatchery or wild fish; and

WHEREAS, the illegal introduction and movement of fish pose a serious threat to Montana's wild fisheries, including native fisheries; and

WHEREAS, many landowners with fish ponds and hatcheries need reassurance that their fish are disease-free."

*1989 Amendment:* In (1), in third sentence after "pond", inserted "and otherwise condition the license", in fourth sentence, after "this state", inserted "or violate the conditions of his license", after "will" inserted "submit an annual", after "report" inserted "on transactions", after "director" deleted reference to quantity of fish, eggs, and spawn taken, and deleted former fifth and sixth sentences regarding requirement for annual oath, requirement for record of species and pounds of fish, eggs, and fry sold, date of transaction, and purchaser; inserted (3) authorizing Department to condition license to require device to prevent escape of fish; inserted (4) requiring licensed seller to keep and file annually a record of species and quantities sold or purchased, date of sale or purchase, purchaser's or seller's name, and transfer locations; and made minor changes in style.

**Case Notes**

*Artificial Ponds:* State Fish and Game Commission (now Fish, Wildlife, and Parks Commission) abused discretion in failing to renew previously issued licenses for ponds that were entirely artificial and manmade within meaning of statute. (See 1999 amendment.) Paradise Rainbow v. Fish & Game Comm'n, 148 M 412, 421 P2d 717 (1966).

## 87-4-606. Term of fish pond license — fees — site inspections — license not transferable — exception for transfer.

**Compiler's Comments**

*2019 Amendment:* Chapter 277 in (1) near middle substituted "a fish pond license issued pursuant to 87-4-603" for "a private fish pond license"; in (2), (3)(a), and (5)(a) before "fish pond license" deleted "private"; in (3)(b) in first sentence deleted "private fish pond"; deleted former (3)(c) that read: "(c) For a license that has been in effect for more than 10 years as of April 8, 2005, the license holder shall apply for renewal within 1 year of April 8, 2005"; and made minor changes in style. Amendment effective October 1, 2019.

*2005 Amendment:* Chapter 157 inserted (1) providing that, with some exceptions, a private fish pond license is valid for 10 years; inserted (2) providing for a $10 application fee and a $10 renewal fee; inserted (3)(a) providing for license expiration; in (3)(b) in second sentence after "expires on" substituted "February 28" for "January 31"; inserted (3)(c) regarding renewal of a license that has been in effect for more than 10 years as of April 8, 2005; in (3)(d) at end of second sentence after "granted" inserted "and if the licensee has met all of the requirements governing private fish ponds in 87-4-603 and this section"; in (4) at beginning after "A" deleted "licensee who does not sell fish or eggs is not required to renew his license"; in (5)(a) at beginning inserted exception clause; inserted (5)(b) and (5)(c) regarding license transfer; and made minor changes in style. Amendment effective April 8, 2005.

*Applicability:* Section 3, Ch. 157, L. 2005, provided: "[This act] applies to any private fish pond license application pending review and approval by the department on [the effective date of this act] and applies prospectively to any fish pond license as of [the effective date of this act]." Effective April 8, 2005.

## 87-4-607. Revocation of fish pond license.

**Compiler's Comments**

*2019 Amendment:* Chapter 277 in (1) near beginning inserted "or a temporary fish pond license issued pursuant to 87-4-603"; and made minor changes in style. Amendment effective October 1, 2019.

## 87-4-609. Regulation of commercial taking of fish or aquatic organisms — permit — rulemaking authority.

**Compiler's Comments**

*2011 Amendment:* Chapter 258 in (2) before "to enable the department" substituted current text for "It is unlawful for a person to take fish or aquatic organisms for commercial purposes without obtaining a permit from the department. A permit applicant shall provide the department with sufficient details of the proposed operation to take any fish or aquatic organism for sale or commercial distribution". Amendment effective October 1, 2011.

*Preamble:* The preamble attached to Ch. 258, L. 2011, provided: "WHEREAS, the 2007 Legislature passed House Joint Resolution No. 16, urging that revision of the criminal codes within Title 87 of the Montana Code Annotated be given priority; and

WHEREAS, House Joint Resolution No. 16 noted that practitioners, judges, and citizens find that the criminal codes intertwined within the fish and game laws in Title 87 are difficult to read, understand, and prosecute; and

WHEREAS, House Joint Resolution No. 16 directed that revision of the Title 87 criminal code should not include policy changes to current laws and should adhere to the intent of the legislatures that crafted the laws; and

WHEREAS, in 2008, the Director of Fish, Wildlife, and Parks appointed a Title 87 criminal code revision working group, consisting of Justices of the Peace, County Attorneys, an Assistant Attorney General, legal counsel and the enforcement administrator of the Department of Fish, Wildlife, and Parks, and legislative staff; and

WHEREAS, the working group met numerous times and spent countless hours crafting a revision that makes the Title 87 criminal code more understandable without making substantive or policy changes to present law; and

WHEREAS, revision of the fish and game criminal statutes will benefit the hunting and fishing public, magistrates, and prosecutors by codifying crimes and penalties in a separate chapter of Montana law, rather than being intertwined throughout Title 87."

*Saving Clause:* Section 131, Ch. 258, L. 2011, was a saving clause.

*Severability:* Section 132, Ch. 258, L. 2011, was a severability clause.

*2003 Amendment:* Chapter 84 inserted (1)(d) and (1)(e) requiring department to regulate taking of designated species of nongame fish and whitefish; at end of (1)(f) after "organisms" deleted "that provide a food source for fish"; in first and second sentences in (2) and near beginning of (5) substituted references to taking fish or aquatic organisms for references to taking aquatic fish food organisms; near middle of (5) after "requirements" deleted "for a particular aquatic fish food organism, in order"; and made minor changes in style. Amendment effective March 20, 2003.

*1993 Amendment:* Chapter 456 in (1), after "distribution, of", inserted "crayfish for fishing bait" and after "crayfish" inserted "from private fish ponds regulated under 87-4-603".

*1989 Statement of Intent:* The statement of intent attached to Ch. 246, L. 1989, provided: "A statement of intent is required for this bill because rulemaking authority is granted to the department of fish, wildlife, and parks in [section 1] [87-4-609] to regulate the taking, for sale or commercial distribution, of aquatic fish food organisms. Even though the bill provides for approval of permits for this activity on a case-by-case basis, the legislature anticipates that commercial activities for certain aquatic fish food organisms may increase to the extent that there is a need for general rulemaking. It is further anticipated that if this occurs, the department will have gathered sufficient information through the permit system and other monitoring to have sufficient knowledge to adopt appropriate rules to prevent overharvest of these organisms and conflicts with other uses of the waters.

[Section 2] [87-4-610] allows the department by rule to set reasonable fees for permits and for the use of traps, nets, or seines in the taking of aquatic fish food organisms for commercial purposes. It is intended that any fees should not exceed an amount necessary to meet administrative and monitoring costs of the department."

*Effective Date:* Section 5, Ch. 246, L. 1989, provided: "[This act] is effective on passage and approval." Approved March 22, 1989.

### 87-4-610. Fees for commercial taking of fish or aquatic organisms — use of fees.

**Compiler's Comments**

*2003 Amendment:* Chapter 84 in (1)(b) before "taking" inserted "commercial", after "of" inserted "nongame fish, whitefish, as authorized by statute", and after "aquatic" deleted "fish food"; and made minor changes in style. Amendment effective March 20, 2003.

*1989 Statement of Intent:* The statement of intent attached to Ch. 246, L. 1989, provided: "A statement of intent is required for this bill because rulemaking authority is granted to the department of fish, wildlife, and parks in [section 1] [87-4-609] to regulate the taking, for sale or commercial distribution, of aquatic fish food organisms. Even though the bill provides for approval of permits for this activity on a case-by-case basis, the legislature anticipates that commercial activities for certain aquatic fish food organisms may increase to the extent that there is a need for general rulemaking. It is further anticipated that if this occurs, the department will have gathered sufficient information through the permit system and other monitoring to have sufficient knowledge to adopt appropriate rules to prevent overharvest of these organisms and conflicts with other uses of the waters.

[Section 2] [87-4-610] allows the department by rule to set reasonable fees for permits and for the use of traps, nets, or seines in the taking of aquatic fish food organisms for commercial purposes. It is intended that any fees should not exceed an amount necessary to meet administrative and monitoring costs of the department."

*Effective Date:* Section 5, Ch. 246, L. 1989, provided: "[This act] is effective on passage and approval." Approved March 22, 1989.

## Part 7
## Sale of Game in Commercial Trade

### 87-4-702. Possession of game by merchants, hotelkeepers, or restaurant keepers.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

*1985 Amendment:* In (1), at beginning inserted exception clause, and made minor changes in phraseology; inserted (2) prohibiting sale of any part of a grizzly bear.

### 87-4-703. Evidence of lawful possession of game.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 87-4-704. Record to be kept.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 87-4-705. Noncompliance with law.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

## Part 8
## Menageries, Sanctuaries, and Zoos

### 87-4-801. Definitions.

**Compiler's Comments**

*2021 Amendment:* Chapter 211 inserted definition of wildlife sanctuary; in definition of roadside menagerie after "attracting trade" inserted "or other commercial purposes"; in definition of zoo substituted current definition for former definition that read: ""Zoo" means any zoological garden chartered as a nonprofit corporation by the state or any facility participating in the American zoo and aquarium association accreditation program for the purpose of exhibiting wild animals for public viewing"; and made minor changes in style. Amendment effective October 1, 2021.

*1999 Amendment:* Chapter 322 in definition of roadside menagerie in first sentence near beginning after ""Roadside menagerie"" deleted "or zoo" and at end after "trade" inserted "on or off the facility premises" and near middle of second sentence after "institution or" deleted "in a zoological garden chartered as a nonprofit corporation by the state and does not include animals exhibited" and at end after "circus" inserted "based outside of Montana"; inserted definitions of wild animal menagerie and zoo; and made minor changes in style. Amendment effective October 1, 1999.

### 87-4-802. Department regulations.

**Compiler's Comments**

*2021 Amendment:* Chapter 211 in two places after ""wild animal menageries" inserted "wildlife sanctuaries". Amendment effective October 1, 2021.

*1999 Amendment:* Chapter 322 near middle after "roadside menageries" inserted "wild animal menageries, and zoos" and at end inserted "and for the licensing of roadside menageries, wild animal menageries, and zoos"; and made minor changes in style. Amendment effective October 1, 1999.

**Administrative Rules**

Title 12, chapter 6, subchapter 13, ARM Roadside zoo regulations.

### 87-4-803. Permits.

**Compiler's Comments**

*2021 Amendment:* Chapter 211 in (1) in first sentence after "wild animal menageries" inserted "wildlife sanctuaries"; in (2)(c) before "a zoo" inserted "a wildlife sanctuary or"; and in (2)(c)(v) after "a copy of the" substituted "association of zoos and aquariums, the zoological association of America, the American sanctuary association, or the global federation of animal sanctuaries" for "American zoo and aquarium association". Amendment effective October 1, 2021.

*2011 Amendment:* Chapter 258 in (1) deleted former second sentence that read: "It is unlawful for any person to operate a roadside menagerie or wild animal menagerie without a permit" and near end substituted "subject to the provisions of 87-6-715" for "guilty of a misdemeanor". Amendment effective October 1, 2011.

*Preamble:* The preamble attached to Ch. 258, L. 2011, provided: "WHEREAS, the 2007 Legislature passed House Joint Resolution No. 16, urging that revision of the criminal codes within Title 87 of the Montana Code Annotated be given priority; and

WHEREAS, House Joint Resolution No. 16 noted that practitioners, judges, and citizens find that the criminal codes intertwined within the fish and game laws in Title 87 are difficult to read, understand, and prosecute; and

WHEREAS, House Joint Resolution No. 16 directed that revision of the Title 87 criminal code should not include policy changes to current laws and should adhere to the intent of the legislatures that crafted the laws; and

WHEREAS, in 2008, the Director of Fish, Wildlife, and Parks appointed a Title 87 criminal code revision working group, consisting of Justices of the Peace, County Attorneys, an Assistant Attorney General, legal counsel and the enforcement administrator of the Department of Fish, Wildlife, and Parks, and legislative staff; and

WHEREAS, the working group met numerous times and spent countless hours crafting a revision that makes the Title 87 criminal code more understandable without making substantive or policy changes to present law; and

WHEREAS, revision of the fish and game criminal statutes will benefit the hunting and fishing public, magistrates, and prosecutors by codifying crimes and penalties in a separate chapter of Montana law, rather than being intertwined throughout Title 87."

*Saving Clause:* Section 131, Ch. 258, L. 2011, was a saving clause.

*Severability:* Section 132, Ch. 258, L. 2011, was a severability clause.

*1999 Amendment:* Chapter 322 in (1) in first sentence near beginning after "department" substituted "may" for "shall" and after "roadside menageries" substituted "wild animal menageries, and zoos" for "or zoos", in second sentence after "roadside menagerie" inserted "or wild animal menagerie", at end of sixth sentence after "fee" inserted "and submission of a renewal application", and at end of eighth sentence after "misdemeanor" inserted "and may be denied a permit"; inserted (2) outlining required permit application information; inserted (3) requiring that a renewal application include an accounting of wild animals on the facility; in (5) after "person" deleted "unless the roadside menagerie or zoo to which it pertains is also transferred to the same person. The director's approval must be obtained prior to such permit transfer and prior to a transfer of any wild animals held under the permit"; and made minor changes in style. Amendment effective October 1, 1999.

**Administrative Rules**

ARM 12.6.1301 Records and display of permit.

## 87-4-804. Permit to obtain wild animals.

**Compiler's Comments**

*2021 Amendment:* Chapter 211 in (1) substituted current text for former text that read: "(1) It is unlawful to obtain wild animals for a roadside menagerie, wild animal menagerie, or zoo by capture from the wild or by purchase except as authorized by the department in accordance with the terms of a permit"; in (2) before "a zoo" inserted "a wildlife sanctuary or"; in (3) after "by capture for use in" substituted "a wildlife sanctuary or a zoo" for "zoos"; in (4) in two places inserted references to wildlife sanctuaries; and made minor changes in style. Amendment effective October 1, 2021.

*1999 Amendment:* Chapter 322 in (1) after "for a" inserted "roadside menagerie, wild animal" and after "except" inserted "as authorized by the department"; in (2) in first sentence of introductory clause after "Application for" substituted "a capture permit" for "such permit" and after "permit" substituted "may be made only by a zoo and must" for "shall" and in second sentence after "issue" substituted "a capture permit" for "such permit"; in (3) after "by capture" inserted "for use in zoos"; in (4) substituted language regarding obtaining captive-bred animals for former text that read: "Nongame animals may be bought, sold, or transferred under such regulations as the department may prescribe"; and made minor changes in style. Amendment effective October 1, 1999.

**Administrative Rules**

ARM 12.6.1306 Stock obtained lawfully.

ARM 12.6.1307 Disposing of wildlife stock.

**Attorney General's Opinions**

*Game Harvesting — Game Ranch:* The Fish and Game Commission (now Fish, Wildlife, and Parks Commission) does not have the authority to regulate the hunting and killing of privately owned game through the imposition of licensing requirements on individual hunters or open and closed seasons. 36 A.G. Op. 112 (1976).

## 87-4-806. Inspection, permit revocation, and redemption of wildlife.

**Compiler's Comments**

*2021 Amendment:* Chapter 211 in (1) in first sentence substituted "A roadside menagerie, wild animal menagerie, wildlife sanctuary, or zoo" for "All roadside menageries, wild animal menageries, and zoos", after second and third "wild animal menagerie" inserted "wildlife sanctuary", in second sentence near end after "the director" substituted "may" for "shall"; in third sentence substituted "If a permit is revoked, the department shall take possession" for "and shall redeem possession"; and made minor changes in style. Amendment effective October 1, 2021.

*1999 Amendment:* Chapter 322 in first sentence after "roadside menageries" substituted "wild animal menageries, and zoos" for "or zoos" and after "connection" substituted "with any roadside menagerie, wild animal menagerie, or zoo must" for "therewith shall" and in second sentence after "found that the" inserted "roadside menagerie, wild animal"; and made minor changes in style. Amendment effective October 1, 1999.

## 87-4-807. Enforcement and penalty.

**Compiler's Comments**

*2011 Amendment:* Chapter 258 in (1) in second sentence substituted "87-6-715" for "87-1-102"; and made minor changes in style. Amendment effective October 1, 2011.

*Preamble:* The preamble attached to Ch. 258, L. 2011, provided: "WHEREAS, the 2007 Legislature passed House Joint Resolution No. 16, urging that revision of the criminal codes within Title 87 of the Montana Code Annotated be given priority; and

WHEREAS, House Joint Resolution No. 16 noted that practitioners, judges, and citizens find that the criminal codes intertwined within the fish and game laws in Title 87 are difficult to read, understand, and prosecute; and

WHEREAS, House Joint Resolution No. 16 directed that revision of the Title 87 criminal code should not include policy changes to current laws and should adhere to the intent of the legislatures that crafted the laws; and

WHEREAS, in 2008, the Director of Fish, Wildlife, and Parks appointed a Title 87 criminal code revision working group, consisting of Justices of the Peace, County Attorneys, an Assistant

Attorney General, legal counsel and the enforcement administrator of the Department of Fish, Wildlife, and Parks, and legislative staff; and

WHEREAS, the working group met numerous times and spent countless hours crafting a revision that makes the Title 87 criminal code more understandable without making substantive or policy changes to present law; and

WHEREAS, revision of the fish and game criminal statutes will benefit the hunting and fishing public, magistrates, and prosecutors by codifying crimes and penalties in a separate chapter of Montana law, rather than being intertwined throughout Title 87."

*Saving Clause:* Section 131, Ch. 258, L. 2011, was a saving clause.

*Severability:* Section 132, Ch. 258, L. 2011, was a severability clause.

**Administrative Rules**

ARM 12.6.1309 Enforcement.

**87-4-808. Fines, bonds, penalties, and fees.**

**Compiler's Comments**

*2001 Amendment:* Chapter 257 substituted reference to department of revenue for reference to state treasurer; and made minor changes in style. Amendment effective July 1, 2001.

*Applicability:* Section 49, Ch. 257, L. 2001, provided: "[This act] applies to remittances of state money made to the department of revenue for fiscal years beginning after June 30, 2001."

*1987 Amendment:* In first sentence, after "penalties", inserted "except those obtained by a justice's court".

*1983 Amendment:* Substituted reference to state special revenue fund for reference to earmarked revenue fund.

## Part 9
## Game Bird Farms

**Part Administrative Rules**

Title 12, chapter 6, subchapter 16, ARM Game bird farms.

**87-4-901. Definitions.**

**Compiler's Comments**

*2003 Amendment:* Chapter 499 in definition of game birds inserted "upland" and at end deleted "except that the only pheasants included are ring-necked pheasants, and quail are not included". Amendment effective July 1, 2003.

**87-4-902. Exemption.**

**Compiler's Comments**

*2013 Amendment:* Chapter 132 inserted (3) exempting holders of shooting preserve licenses who use temporary holding pens; and made minor changes in style. Amendment effective April 1, 2013.

*Sunset Repealed:* Section 1, Ch. 227, L. 1989, repealed sec. 4, Ch. 262, L. 1985, which provided that subsection (2) of this section was to terminate September 30, 1989. Repealed effective March 22, 1989.

*1985 Amendment:* Inserted (2) relating to holder of migratory game bird avicultural permit. Amendment terminates September 30, 1989 (sec. 4, Ch. 262, L. 1985). Termination provision repealed effective March 22, 1989. See 1989 compiler's comment.

**87-4-903. Game bird farm license required.**

**Compiler's Comments**

*2011 Amendment:* Chapter 258 inserted last sentence regarding penalties. Amendment effective October 1, 2011.

*Preamble:* The preamble attached to Ch. 258, L. 2011, provided: "WHEREAS, the 2007 Legislature passed House Joint Resolution No. 16, urging that revision of the criminal codes within Title 87 of the Montana Code Annotated be given priority; and

WHEREAS, House Joint Resolution No. 16 noted that practitioners, judges, and citizens find that the criminal codes intertwined within the fish and game laws in Title 87 are difficult to read, understand, and prosecute; and

WHEREAS, House Joint Resolution No. 16 directed that revision of the Title 87 criminal code should not include policy changes to current laws and should adhere to the intent of the legislatures that crafted the laws; and

WHEREAS, in 2008, the Director of Fish, Wildlife, and Parks appointed a Title 87 criminal code revision working group, consisting of Justices of the Peace, County Attorneys, an Assistant Attorney General, legal counsel and the enforcement administrator of the Department of Fish, Wildlife, and Parks, and legislative staff; and

WHEREAS, the working group met numerous times and spent countless hours crafting a revision that makes the Title 87 criminal code more understandable without making substantive or policy changes to present law; and

WHEREAS, revision of the fish and game criminal statutes will benefit the hunting and fishing public, magistrates, and prosecutors by codifying crimes and penalties in a separate chapter of Montana law, rather than being intertwined throughout Title 87."

*Saving Clause:* Section 131, Ch. 258, L. 2011, was a saving clause.

*Severability:* Section 132, Ch. 258, L. 2011, was a severability clause.

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

**87-4-904. Application for game bird farm license — limitation on issuance.**

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

**87-4-905. License and renewal fee — deposit of fees.**

**Compiler's Comments**

*1983 Amendment:* In (2), substituted "state special revenue fund" for "earmarked revenue fund".

**87-4-911. Sale of meat.**

**Administrative Rules**

Title 12, chapter 6, subchapter 16, ARM Game bird farms.

**87-4-913. Rulemaking.**

**Compiler's Comments**

*Statement of Intent:* The statement of intent attached to SB 448 (Ch. 570, L. 1983) provided: "This bill requires the Department of Fish, Wildlife, and Parks to make rules for game animal farms under section 17 [87-4-422], game bird farms under section 32 [87-4-913], and fur farms under section 47 [87-4-1012]. It is the intent of the Legislature that these rules address procedural items necessary for a timely and efficient processing of applications and licenses and provide the information necessary for administration of the criteria provided in those sections. It is intended that the license fees to be set by the Department be in an amount commensurate with the costs of processing the applications and administering the provisions of the act."

**Administrative Rules**

Title 12, chapter 6, subchapter 16, ARM Game bird farms.

## Part 10
## Fur Farms

**87-4-1002. Fur farm license required — applicability.**

**Compiler's Comments**

*2011 Amendment:* Chapter 258 inserted (3) regarding penalties. Amendment effective October 1, 2011.

*Preamble:* The preamble attached to Ch. 258, L. 2011, provided: "WHEREAS, the 2007 Legislature passed House Joint Resolution No. 16, urging that revision of the criminal codes within Title 87 of the Montana Code Annotated be given priority; and

WHEREAS, House Joint Resolution No. 16 noted that practitioners, judges, and citizens find that the criminal codes intertwined within the fish and game laws in Title 87 are difficult to read, understand, and prosecute; and

WHEREAS, House Joint Resolution No. 16 directed that revision of the Title 87 criminal code should not include policy changes to current laws and should adhere to the intent of the legislatures that crafted the laws; and

WHEREAS, in 2008, the Director of Fish, Wildlife, and Parks appointed a Title 87 criminal code revision working group, consisting of Justices of the Peace, County Attorneys, an Assistant

Attorney General, legal counsel and the enforcement administrator of the Department of Fish, Wildlife, and Parks, and legislative staff; and

WHEREAS, the working group met numerous times and spent countless hours crafting a revision that makes the Title 87 criminal code more understandable without making substantive or policy changes to present law; and

WHEREAS, revision of the fish and game criminal statutes will benefit the hunting and fishing public, magistrates, and prosecutors by codifying crimes and penalties in a separate chapter of Montana law, rather than being intertwined throughout Title 87."

*Saving Clause:* Section 131, Ch. 258, L. 2011, was a saving clause.

*Severability:* Section 132, Ch. 258, L. 2011, was a severability clause.

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 87-4-1003. Application for license.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

**Administrative Rules**

Title 12, chapter 6, subchapter 17, ARM Fur farms.

### 87-4-1004. License and renewal fee — deposit.

**Compiler's Comments**

*1983 Amendment:* In (2), substituted "state special revenue fund" for "earmarked revenue fund".

### 87-4-1012. Rulemaking.

**Compiler's Comments**

*Statement of Intent:* The statement of intent attached to SB 448 (Ch. 570, L. 1983) provided: "This bill requires the Department of Fish, Wildlife, and Parks to make rules for game animal farms under section 17 [87-4-422], game bird farms under section 32 [87-4-913], and fur farms under section 47 [87-4-1012]. It is the intent of the Legislature that these rules address procedural items necessary for a timely and efficient processing of applications and licenses and provide the information necessary for administration of the criteria provided in those sections. It is intended that the license fees to be set by the Department be in an amount commensurate with the costs of processing the applications and administering the provisions of the act."

**Administrative Rules**

Title 12, chapter 6, subchapter 17, ARM Fur farms.

## Part 11
## General Provisions

### 87-4-1101. Transfer of ownership interest in commercial licenses.

**Compiler's Comments**

*Effective Date:* Section 32(1), Ch. 552, L. 2021, provided that this section is effective May 15, 2021.

# CHAPTER 5
# WILDLIFE PROTECTION

**Chapter Compiler's Comments**

*Preamble:* The preamble attached to Ch. 352, L. 2013, provided: "WHEREAS, the greater sage-grouse (Centrocercus urophasianus) is an iconic species that inhabits much of the sagebrush-grassland habitats in Montana; and

WHEREAS, the State of Montana currently enjoys viable and widespread populations of the species, the second largest abundance of greater sage-grouse among western states; and

WHEREAS, the United States Fish and Wildlife Service (USFWS) has determined that the greater sage-grouse species is warranted for listing as a threatened or endangered species under the Endangered Species Act (ESA) but is precluded by other higher priority species; and

WHEREAS, the United States District Court for the District of Idaho ruled on February 2, 2012, that the USFWS must reevaluate the status of the greater sage-grouse by September 30, 2015; and

WHEREAS, the United States Secretary of the Interior has invited Montana and other western states impacted by the potential listing of the greater sage-grouse to develop state-specific regulatory mechanisms to conserve the species and preclude the need to list it under the ESA; and

WHEREAS, the development of a state-specific strategy in Montana will be critical in demonstrating to the USFWS that the species does not warrant federal protection under the ESA; and

WHEREAS, the United States Bureau of Land Management (BLM) and the United States Forest Service (USFS) are currently implementing national instruction memoranda to guide interim management of public lands and to develop greater sage-grouse conservation measures for incorporation into the agencies' respective land use plans; and

WHEREAS, the development of a state-specific strategy will enable the BLM and USFS to incorporate relevant elements from the strategy into their land use plans and environmental analyses; and

WHEREAS, approximately half of greater sage-grouse habitat in Montana involves private property, and maintaining the species will require effective conservation strategies across property ownerships; and

WHEREAS, the State of Montana has management authority over greater sage-grouse populations in Montana; and

WHEREAS, the State of Montana in collaboration with stakeholders developed and adopted a state greater sage-grouse plan in 2004, pertaining to sage-grouse population responses to large scale changes in habitat; and

WHEREAS, the State of Montana has identified and will update, as appropriate, greater sage-grouse core areas, which include priority habitats for conservation; and

WHEREAS, it is in the interest of this state to bring stakeholders and experts together to recommend a course of action that will provide for conservation measures sufficient to preclude the need to list the greater sage-grouse; and

WHEREAS, the listing of the greater sage-grouse could have a significant adverse effect on the economy of the state of Montana; and

WHEREAS, it is appropriate and beneficial to fund the Greater Sage-Grouse Habitat Conservation Advisory Council established by Governor Steve Bullock in Executive Order No. 2-2013."

**Chapter Case Notes**

*Media Coverage of Search Involving Alleged Wildlife Violation Outside Scope of Warrant — Open Fields Doctrine and Invited Informer Doctrine Inapplicable:* Federal agents who suspected a wildlife violation searched the Bergers' ranch pursuant to a search warrant and to a written contract with two national broadcasting networks authorizing the filming and recording of the search for broadcast on environmental television shows. After Berger was convicted of one misdemeanor count of improper use of a pesticide, he sued both the networks and the federal agents for violations of constitutional rights. On appeal, the Ninth Circuit Court held that activities conducted pursuant to the search were not authorized by the open fields doctrine, which allows law enforcement officers to obtain evidence while on privately owned open fields, because Berger had a reasonable expectation of privacy with regard to outbuildings that were photographed and because that doctrine does not authorize trespass by third parties. Further, the invited informer doctrine, which allows the use of informers with recording devices to obtain information as part of a good faith government investigation, did not apply in this instance because the recording of Berger's conversations was used to assist commercial television, not to further law enforcement objectives. Pursuant to the joint action test, the networks were considered to be acting under color of law and, as such, were liable for damages as government actors for contractually engaging in a search enterprise that only the government could lawfully institute for the mutual benefit of both private and governmental interests in publicity. The case was reversed for further consideration of Berger's state claims of trespass and intentional infliction of emotional distress. Berger v. Hanlon, 129 F3d 505 (9th Cir. 1997).

## Part 1
## Nongame and Endangered Species

**87-5-102. Definitions.**

**Compiler's Comments**

*2009 Amendment:* Chapter 301 in definition of management in first sentence after "purposes of" substituted "conserving populations of wildlife consistent with other uses of land and habitat" for "increasing the number of individuals within species and populations of wildlife up to the optimum carrying capacity of their habitat and maintaining those levels", in second sentence following "improvement" inserted "control", and in third sentence following "periodic" deleted "or total"; deleted definition of optimum carrying capacity that read: ""Optimum carrying capacity" means that point at which a given habitat can support healthy populations of wildlife species, having regard to the total ecosystem, without diminishing the ability of the habitat to continue that function"; and made minor changes in style. Amendment effective April 18, 2009.

*2001 Amendments — Composite Section:* Chapter 301 inserted definition of commercial purposes; and made minor changes in style. Amendment effective October 1, 2001.

Chapter 521 in definition of endangered species in (d) substituted "artificial factors" for "man-made factors"; in definition of management in first sentence substituted "conserving populations of wildlife consistent with other uses of land and habitat" for "increasing the number of individuals within species and populations of wildlife up to the optimum carrying capacity of their habitat and maintaining such levels", in second sentence after "improvement" inserted "control", and in third sentence after "periodic" deleted "or total"; in definition of nongame wildlife inserted third sentence providing that prairie dogs are nongame wildlife that may be managed, controlled, and regulated, inserted fourth sentence concerning management and control by counties and departments of agriculture and natural resources and conservation if consistent with approved management plan, and inserted fifth sentence prohibiting interpretation of law to limit landowner's control of prairie dog concentrations on private lands; and made minor changes in style. Amendment effective May 1, 2001, and terminates October 1, 2007.

*Preamble:* The preamble attached to Ch. 301, L. 2001, provided: "WHEREAS, the Legislature finds it desirable to regulate or manage the collection, harvest, possession, or transportation of nongame wildlife for commercial purposes."

The preamble attached to Ch. 521, L. 2001, provided: "WHEREAS, Montana has a responsibility to ensure that a viable prairie dog population is maintained in the state for the long term, as well as to ensure the long-term existence of species associated with prairie dogs; and

WHEREAS, the Montana Prairie Dog Working Group is developing a conservation plan for prairie dogs in Montana to provide for management of populations and habitats in order to ensure both the long-term existence of prairie dogs and the control of prairie dogs to protect existing land uses; and

WHEREAS, the only existing statutory authority for prairie dog management is to control them as rodents under Title 7, chapter 22, part 22, MCA, and as vertebrate pests under section 80-7-1101, MCA; and

WHEREAS, the U.S. Fish and Wildlife Service (USFWS) has found that the black-tailed prairie dog is warranted for listing under the federal Endangered Species Act (ESA) over an 11-state area that includes Montana, but that listing of this species is precluded at the present time because other candidate species have a higher priority for listing; and

WHEREAS, the USFWS finding is based in part on the inadequacy of regulatory mechanisms that Montana and other states currently possess to ensure maintenance of viable prairie dog populations for the long term; and

WHEREAS, Montana and 10 other states have entered into an agreement to jointly develop management plans that address the needs of the species across virtually its entire range, thus improving the status of the black-tailed prairie dog to the point that it can be removed from consideration for listing under the ESA; and

WHEREAS, the USFWS will review the status of the black-tailed prairie dog on an annual basis; and

WHEREAS, it is desirable to enable the Department of Fish, Wildlife, and Parks and the Department of Agriculture to implement management actions contained in Montana's prairie dog conservation plan while specifically protecting the current ability of landowners to manage prairie dogs on their lands; and

WHEREAS, it is desirable to facilitate long-term conservation of prairie dogs according to the conservation plan for prairie dogs in Montana while simultaneously reducing the likelihood that the black-tailed prairie dog will be listed under the ESA."

*1983 Amendment:* Inserted (1) defining account; and in second sentence of (4) after "habitat" deleted "acquisition and".

## 87-5-103. Legislative intent, findings, and policy.

**Compiler's Comments**

*2003 Amendment:* Chapter 361 inserted (1) relating to constitutional obligations and legislative intent; and made minor changes in style. Amendment effective April 16, 2003.

*Preamble:* The preamble attached to Ch. 361, L. 2003, provided: "WHEREAS, Article II, section 3, of the Montana Constitution enumerates certain inalienable individual rights, including the right to a clean and healthful environment, the right of pursuing life's basic necessities, the right of enjoying and defending an individual's life and liberty, the right of acquiring, possessing, and protecting property, and the right of seeking individual safety, health, and happiness in all lawful ways; and

WHEREAS, the constitutionally enumerated rights are by their very nature bound to result in competing interests in specific fact situations; and

WHEREAS, Article IX, section 1, of the Montana Constitution provides that the state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations and directs the Legislature to provide for the administration and enforcement of this duty and also directs the Legislature to provide adequate remedies for the protection of the environmental life support system from degradation and to provide adequate remedies to prevent unreasonable depletion and degradation of natural resources; and

WHEREAS, the Legislature has reviewed the intent of the framers of the 1972 Montana Constitution as evidenced in the verbatim transcripts of the constitutional convention; and

WHEREAS, there is no indication that one enumerated inalienable right is intended to supersede other inalienable rights, including the right to use property in all lawful means; and

WHEREAS, the Legislature, mindful of its constitutional obligation to provide for the administration and enforcement of the constitution, has enacted a comprehensive set of laws to accomplish the goals of the constitution, including the Montana Clean Indoor Air Act of 1979, Title 50, chapter 40, part 1, MCA; the Montana Environmental Policy Act, Title 75, chapter 1, parts 1 through 3, MCA; the Clean Air Act of Montana, Title 75, chapter 2, parts 1 through 4, MCA; water quality laws, Title 75, chapter 5, MCA; The Natural Streambed and Land Preservation Act of 1975, Title 75, chapter 7, part 1, MCA; The Montana Solid Waste Management Act, Title 75, chapter 10, part 2, MCA; The Montana Hazardous Waste Act, Title 75, chapter 10, part 4, MCA; the Comprehensive Environmental Cleanup and Responsibility Act, Title 75, chapter 10, part 7, MCA; the Montana Megalandfill Siting Act, sections 75-10-901 through 75-10-945, MCA; the Montana Underground Storage Tank Installer and Inspector Licensing and Permitting Act, Title 75, chapter 11, part 2, MCA; the Montana Underground Storage Tank Act, Title 75, chapter 11, part 5, MCA; the Montana Major Facility Siting Act, Title 75, chapter 20, MCA; the Open-Space Land and Voluntary Conservation Easement Act, Title 76, chapter 6, MCA; the Environmental Control Easement Act, Title 76, chapter 7, MCA; The Strip and Underground Mine Siting Act, Title 82, chapter 4, part 1, MCA; The Montana Strip and Underground Mine Reclamation Act, Title 82, chapter 4, part 2, MCA; The Opencut Mining Act, Title 82, chapter 4, part 4, MCA; and The Nongame and Endangered Species Conservation Act, Title 87, chapter 5, part 1, MCA."

*Severability:* Section 39, Ch. 361, L. 2003, was a severability clause.

*Retroactive Applicability:* Section 41, Ch. 361, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to actions for judicial review or other causes of action challenging the issuance of a permit, petition for review, amendment, license, arbitration, action, certificate, or inspection that are pending but not yet decided on or after [the effective date of this act]." Effective April 16, 2003.

## 87-5-105. Regulations to manage nongame wildlife.

**Compiler's Comments**

*2001 Amendment:* Chapter 316 in (1) at end deleted last sentence that read: "The department may from time to time amend such regulations on the approval of the legislature by adding or deleting therefrom species or subspecies of nongame wildlife"; in (2) before "limitations" deleted "proposed" and at end inserted "that is designated in need of management", and deleted former last sentence that read: "The department may make such changes in the proposed regulations as are consistent with effective management of nongame wildlife as designated by the legislature"; and made minor changes in style. Amendment effective April 21, 2001.

**Administrative Rules**

ARM 12.2.501 Nongame wildlife in need of management.

Title 12, chapter 9, subchapter 10, ARM Translocation of prairie dogs.

Title 12, chapter 9, subchapter 13, ARM Gray wolf management.

### 87-5-107. List of endangered species.

**Compiler's Comments**

*2005 Amendment:* Chapter 46 in (1)(a) near middle after "organizations" deleted "but not later than 1 year after July 1, 1973"; in (2)(a) near end of first sentence after "species" deleted "within not more than 2 years from its effective date and" and near middle of second sentence after "additions" deleted "or deletions"; inserted (2)(b) allowing the department to remove an endangered species from the state list of endangered species without legislative approval when the species has been removed from the federal list of endangered native species; in (4) near beginning after "subspecies of" inserted "fish and"; in (5) near beginning after "modified" deleted "subsequent to July 1, 1973" and after "additions" deleted "or deletions"; and made minor changes in style. Amendment effective March 24, 2005.

*1987 Amendment:* In (1)(b), near beginning before "include", substituted "The department may propose legislation to specifically" for "The department shall have authority to recommend that the legislature"; in (2), at beginning of second sentence before "to amend", substituted "The department may propose specific legislation" for "The department shall request the legislature"; and near end of (5) substituted "the department proposes" for "the department recommends".

**Administrative Rules**

ARM 12.5.201 Endangered species list.

**Law Review Articles**

Listing the Bull Trout Under the Endangered Species Act: The Passive-Aggressive Strategy of the United States Fish and Wildlife Service to Prevent Protecting Warranted Species, Bechtold, 20 Pub. Land & Resources L. Rev. 99 (1999).

The Public Trust and Parens Patriae Doctrines: Protecting Wildlife in Uncertain Political Times, Musiker, France, & Hallenbeck, 16 Pub. Land L. Rev. 87 (1995).

Endangered Species Conservation: What Should We Expect of Federal Agencies?, Fischman, 13 Pub. Land. L. Rev. 1 (1992).

The Meaning of "Species" Under the Endangered Species Act, Gleaves, Kuruc, & Montanio, 13 Pub. Land. L. Rev. 25 (1992).

Do Species and Nature Have Rights?, Huffman, 13 Pub. Land. L. Rev. 51 (1992).

Taking Stock: The Endangered Species Act in the Eye of a Growing Storm, Bean, 13 Pub. Land. L. Rev. 77 (1992).

The Endangered Species Act: On a Collision Course With Human Needs, Hardy, 13 Pub. Land L. Rev. 87 (1992).

Stay the Hand: New Direction for the Endangered Species Act, France & Tuholske, 7 Pub. Land L. Rev. 1 (1986).

### 87-5-108. Establishment of programs.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 87-5-109. Taking of species for educational, scientific, or other purposes.

**Compiler's Comments**

*1987 Amendment:* At end of section changed "87-5-104" to "87-5-105".

### 87-5-112. Construction.

**Compiler's Comments**

*1997 Amendment:* Chapter 42 at beginning of second sentence substituted "this section may not be construed" for "this subsection may not be construed"; and made minor changes in style. Amendment effective March 12, 1997.

*Subsection Not Codified — Severability Clause:* Section 26-1809(2), R.C.M. 1947, a severability clause, was not codified in the MCA. This subsection has not been repealed and is still valid law. Citation may be made to sec. 9, Ch. 461, L. 1973.

## 87-5-116. Limited taking of certain nongame wildlife for commercial purposes — exceptions.

**Compiler's Comments**

*Preamble:* The preamble attached to Ch. 301, L. 2001, provided: "WHEREAS, the Legislature finds it desirable to regulate or manage the collection, harvest, possession, or transportation of nongame wildlife for commercial purposes."

*Effective Date:* This section is effective October 1, 2001.

## 87-5-121. Nongame wildlife account.

**Compiler's Comments**

*Extension of Effective Date:* Section 107, Ch. 576, L. 2021, amended sec. 56, Initiative Measure No. 190, by extending the effective date imposed by I.M. No. 190 to January 1, 2022. Effective May 18, 2021.

*2020 Amendment by Initiative:* Initiative Measure No. 190 inserted (2)(b) concerning money from marijuana taxes; and made minor changes in style. Amendment effective October 1, 2021.

*Severability:* Section 55, Initiative Measure No. 190, was a severability clause.

*1991 Amendment:* At end of (2), after "account", deleted "except as provided in subsection (5)"; deleted former (5) that read: "(5) The department of revenue may deduct from collections an amount not to exceed $1 for each tax checkoff contribution for administering the voluntary checkoff program"; and made minor change in style.

*1987 Amendment:* In (2), at end, changed reference to subsection (6) to reference to subsection (5); deleted former (5) and (6) that read: "(5) Money derived from tax checkoff contributions to the account will replace license fee funding for nongame wildlife programs after June 30, 1985, and may not be used to replace money that would otherwise be appropriated for nongame wildlife programs.

(6) The department of revenue may deduct from collections an amount not to exceed $7,884 in fiscal year 1986 and $7,884 in fiscal year 1987 for administering the voluntary checkoff program. The department is authorized to spend the amounts and hire necessary personnel and shall provide an itemized accounting to the legislative finance committee of the cost of administering the checkoff program during fiscal years 1986 and 1987"; and inserted (5) based on contingency described below.

*Contingency Authorization:* Section 5, Ch. 589, L. 1987, provided: "The authorization for deduction of administrative costs for the department of revenue in 87-5-121(5) of this act is contingent on passage and approval by the 50th legislature of legislation to require a similar deduction for administrative costs for all voluntary income tax checkoff programs authorized by law." (This contingency did not occur.)

*1985 Amendment:* In (2) in middle, inserted "and all interest earned by the fund before being expended under this section"; and in (6) in first sentence, after "exceed", substituted "$7,884 in fiscal year 1986 and $7,884 in fiscal year 1987" for "$6,638 in fiscal year 1984 and $4,238 in fiscal year 1985", in middle of second sentence substituted "legislative finance committee" for "49th legislature" and at end, after "fiscal years", substituted "1986 and 1987" for "1984 and 1985".

*1983 Amendment:* In (1), substituted "state special revenue fund" for "earmarked revenue fund".

*Applicability:* Section 7, Ch. 627, L. 1983, provided: "(1) This act applies to tax returns which by law are required to be filed after January 1, 1984.

(2) This act shall terminate December 31, 1987."

## 87-5-122. Duties of commission.

**Compiler's Comments**

*Statement of Intent:* The statement of intent attached to HB 377 (Ch. 627, L. 1983) provided: "A statement of intent is required of this bill because rulemaking authority is granted to the Fish and Game Commission [now Fish, Wildlife, and Parks Commission] in section 4 [87-5-122] for the use of the nongame wildlife account and for the review and approval process for nongame wildlife program projects.

It is intended that the rules promulgated by the Commission would include adequate provisions for public notice and comment during the review and approval process. In addition, it is intended that the Commission would provide for adequate consultation with the Department of Agriculture prior to and during the review and approval process for nongame wildlife program projects."

### 87-5-131. Process for delisting of gray wolf — management following delisting.

**Compiler's Comments**

*2021 Amendment:* Chapter 552 in (2) at end of first sentence inserted "or furbearer" and in second sentence in two places substituted "a game animal" for "a big game animal". Amendment effective May 15, 2021.

*2009 Amendment:* Chapter 275 inserted (3)(b) requiring that an approved wolf management plan allow the issuance of special kill permits; and made minor changes in style. Amendment effective April 17, 2009.

*Effective Date:* Section 11, Ch. 316, L. 2001, provided that this section is effective on passage and approval. Approved April 21, 2001.

### 87-5-132. Use of radio-tracking collars for monitoring wolf packs.

**Compiler's Comments**

*2011 Amendments — Composite Section:* Chapter 390 in (2) near beginning substituted "may expend any federal funds received" for "shall expend only the federal funds" and after "purposes" inserted "and the portion of money allocated from the wolf management account established in 87-1-623"; in (3) after "The department" substituted current text for "may collaborate and cooperate with other state and federal agencies to fulfill the requirements of this section". Amendment effective July 1, 2011.

Chapter 400 in (1) inserted "or a collar that uses global positioning system technology"; and in (2) substituted "may expend state and federal funds" for "shall expend only the federal funds". Amendment effective July 1, 2011.

*Preamble:* The preamble attached to Ch. 400, L. 2011, provided:

"WHEREAS, the gray wolf was listed as an endangered species under the Endangered Species Act (ESA) in 1973; and

WHEREAS, gray wolves were reintroduced in Yellowstone National Park and central Idaho in 1995 and 1996 by the United States Fish and Wildlife Service (USFWS) to speed up recovery of the gray wolf population in the Northern Rocky Mountain region; and

WHEREAS, the biological requirement established by the USFWS for the recovery of the gray wolf population in the Northern Rocky Mountains is a minimum of 30 breeding pairs and 300 wolves in Montana, Idaho, and Wyoming combined or effectively 10 breeding pairs and 100 wolves per state; and

WHEREAS, the USFWS approved the Montana Gray Wolf Conservation and Management Plan in January 2004, under which Montana agreed to use adaptive management strategies to ensure its portion of the biological recovery goal is met; and

WHEREAS, the gray wolf population in Montana, Idaho, and Wyoming achieved the biological requirements of 30 breeding pairs and 300 wolves in 2002; and

WHEREAS, the most recent data available show that at the end of 2009, the estimated minimum number of wolves in Montana was 524 wolves with an estimated minimum of 37 breeding pairs in Montana; and

WHEREAS, the final environmental impact statement prepared by the Montana Department of Fish, Wildlife, and Parks (MDFWP) for the Montana Gray Wolf Conservation and Management Plan, submitted to the USFWS in October 2003, estimated that MDFWP's required budget for the wolf management alternative that was ultimately selected would be $924,739 to $1,062,399, of which 90% would be provided by the federal government under Section 6 of the ESA and 10% would be the responsibility of Montana; and

WHEREAS, the 90%-10% cost share was never implemented because the USFWS allocated funding directly to MDFWP rather than it being necessary for MDFWP to request funding under Section 6 of the ESA; and

WHEREAS, the USFWS allocated an average of $573,000 annually to Montana for wolf management under a 5-year contract that expired June 30, 2010; and

WHEREAS, that annual allocation was far below the estimate included in the final environmental impact statement; and

WHEREAS, under MDFWP's new contract for July 1, 2010, through June 30, 2015, the USFWS allocates only $626,000 to Montana for the entire 5-year period."

*Effective Date:* This section is effective October 1, 2005.

*Severability:* Section 8, Ch. 390, L. 2011, was a severability clause.

## Part 2
## Wild Birds — Regulation of Raptors

### 87-5-201. Protection of wild birds and their nests and eggs.

**Compiler's Comments**

*1983 Amendment:* Inserted (2)(b) relating to parts of eagles used for Indian religious purposes.

**Administrative Rules**

ARM 12.9.301 Wild bird permits.

### 87-5-203. Regulation of raptors.

**Case Notes**

*Vagueness:* Where defendant was convicted of illegally possessing and transporting falcons, after having fraudulently obtained a permit to possess and transport falcons, conviction under 87-5-206(4) (repealed, 1991) and this section was sustained despite defendant's contention that the sections were unconstitutionally vague because they did not clearly prohibit possession or transportation with a fraudulently obtained permit. U.S. v. Doyle, 786 F2d 1440 (1986), certiorari denied, 479 US 984, 93 L Ed 2d 576, 107 S Ct 572 (1986).

### 87-5-204. License and rules for falconry and raptors.

**Compiler's Comments**

*2011 Amendment:* Chapter 258 in (1) deleted former last sentence that read: "Except as provided in 87-5-210, it is unlawful for any person to possess a raptor or to train a raptor in the practice of falconry without a license." Amendment effective October 1, 2011.

*Preamble:* The preamble attached to Ch. 258, L. 2011, provided: "WHEREAS, the 2007 Legislature passed House Joint Resolution No. 16, urging that revision of the criminal codes within Title 87 of the Montana Code Annotated be given priority; and

WHEREAS, House Joint Resolution No. 16 noted that practitioners, judges, and citizens find that the criminal codes intertwined within the fish and game laws in Title 87 are difficult to read, understand, and prosecute; and

WHEREAS, House Joint Resolution No. 16 directed that revision of the Title 87 criminal code should not include policy changes to current laws and should adhere to the intent of the legislatures that crafted the laws; and

WHEREAS, in 2008, the Director of Fish, Wildlife, and Parks appointed a Title 87 criminal code revision working group, consisting of Justices of the Peace, County Attorneys, an Assistant Attorney General, legal counsel and the enforcement administrator of the Department of Fish, Wildlife, and Parks, and legislative staff; and

WHEREAS, the working group met numerous times and spent countless hours crafting a revision that makes the Title 87 criminal code more understandable without making substantive or policy changes to present law; and

WHEREAS, revision of the fish and game criminal statutes will benefit the hunting and fishing public, magistrates, and prosecutors by codifying crimes and penalties in a separate chapter of Montana law, rather than being intertwined throughout Title 87."

*Saving Clause:* Section 131, Ch. 258, L. 2011, was a saving clause.

*Severability:* Section 132, Ch. 258, L. 2011, was a severability clause.

*1991 Amendment:* In (1), near beginning of first sentence, substituted "commission shall" for "department may", near middle, after "possession", inserted "by residents and nonresidents, selling or transfer of possession", at end, after "falconry", inserted "and set license qualifications and fees", and inserted second sentence requiring conformance with federal law; deleted former (2) and (3) that read: "(2) The fee for a falconry license is $3 a year or any part of a year. A license expires April 30 each year.

(3) A license may not be issued to a person under the age of 12 years"; and made minor changes in style.

*1991 Statement of Intent:* The statement of intent attached to Ch. 243, L. 1991, provided: "A statement of intent is required for this bill because 87-5-204 and 87-5-210 require the fish and game commission [now fish, wildlife, and parks commission] to adopt rules regarding certain aspects of the use and breeding of raptors and the sport of falconry. Because the regulation of raptors and the sport of falconry are in large part regulated by federal law and because detailed and precise standards are rapidly changing, the rules must comply with federal law and regulations as adopted or amended from time to time. The legislature recognizes that the commission has the power to determine the extent and nature of measures that control wildlife in Montana and that the commission's expertise makes it the proper forum for addressing the regulation of raptors and the sport of falconry. At a minimum, the rules must address:

(1) the regulation of raptors and restrictions on taking, possessing, and selling raptors, including:

(a) the number of raptors that may legally be possessed;

(b) appropriate times and areas for trapping raptors and removing of raptors from the nest;

(c) notification requirements regarding transfer of ownership;

(d) permitting requirements regarding sale and transportation of raptors; and

(e) possession of and hunting with raptors by nonresidents;

(2) licenses and rules for falconry and the allowable uses of raptors in the sport of falconry, including:

(a) appropriate falconry license fees;

(b) age requirements regarding issuance of falconry licenses;

(c) the necessity of possessing other valid game licenses when practicing falconry; and

(d) the transfer and revocation of falconry licenses; and

(3) the regulation of captive breeding of raptors, including:

(a) appropriate breeding permit fees;

(b) transferability and revocation of breeding permits; and

(c) any other aspects of captive breeding considered appropriate by the commission."

*1987 Amendment:* In (4), in second sentence, inserted "upland" before "game" and following "license" inserted "or waterfowl stamp, as appropriate".

*1983 Amendment:* In last sentence of (1), inserted exception clause.

**Administrative Rules**

Title 12, chapter 6, subchapter 11, ARM Falconer license regulations.

## 87-5-205. Restrictions on species allowed for falconry.

**Compiler's Comments**

*1999 Amendment:* Chapter 383 at beginning of (1) substituted "Bald eagles, any raptors listed pursuant to 50 CFR, part 17, and any species that has been listed pursuant to 87-5-107" for "The peregrine falcon (Falco peregrinus), bald eagle (Haliaeetus leucocephalus), and osprey (Pandion haliaetus)"; and made minor changes in style. Amendment effective April 20, 1999.

*1987 Amendment:* In (1) deleted "golden eagle (Aquila chrysaetos)" from list.

**Administrative Rules**

ARM 12.6.1101 Definitions.

ARM 12.6.1103 Falconry permit classes.

**Case Notes**

*Application to Anatum Peregrine Falcon:* Jury instruction that anatum peregrine falcon cannot be trapped legally for use in a falconry was not inaccurate under this section, and although there may be some ambiguity under Montana law, it is clear that by federal regulation anatum peregrine falcons are an endangered species and cannot be legally trapped for falconry. (See 1999 amendment.) U.S. v. Doyle, 786 F2d 1440 (1986), certiorari denied, 479 US 984, 93 L Ed 2d 576, 107 S Ct 572 (1986).

## 87-5-208. Nonresidents allowed raptors in state — capture.

**Compiler's Comments**

*2011 Amendment:* Chapter 118 deleted former (2) that read: "(2) A nonresident is not allowed to capture raptors from the wild in the state of Montana for falconry or captive breeding purposes"; inserted (2) regarding nonresident capture of raptors according to rule; and inserted (3) regarding other states' reciprocity for trapping raptors. Amendment effective October 1, 2011.

*1991 Amendment:* In (1) substituted first sentence regarding practice of falconry by federally licensed nonresidents for former first sentence that read: "Nonresidents who are working, attending schools, or otherwise living temporarily in the state of Montana may obtain a Montana falconry license and bring raptors, legally acquired in other states or countries, into the state of Montana"; inserted (2) disallowing raptor capture in Montana by nonresidents; and made minor change in style.

*1991 Statement of Intent:* The statement of intent attached to Ch. 243, L. 1991, provided: "A statement of intent is required for this bill because 87-5-204 and 87-5-210 require the fish and game commission [now fish, wildlife, and parks commission] to adopt rules regarding certain aspects of the use and breeding of raptors and the sport of falconry. Because the regulation of raptors and the sport of falconry are in large part regulated by federal law and because detailed and precise standards are rapidly changing, the rules must comply with federal law and regulations as adopted or amended from time to time. The legislature recognizes that the commission has the power to determine the extent and nature of measures that control wildlife in Montana and that the commission's expertise makes it the proper forum for addressing the regulation of raptors and the sport of falconry. At a minimum, the rules must address:

(1) the regulation of raptors and restrictions on taking, possessing, and selling raptors, including:

(a) the number of raptors that may legally be possessed;
(b) appropriate times and areas for trapping raptors and removing of raptors from the nest;
(c) notification requirements regarding transfer of ownership;
(d) permitting requirements regarding sale and transportation of raptors; and
(e) possession of and hunting with raptors by nonresidents;

(2) licenses and rules for falconry and the allowable uses of raptors in the sport of falconry, including:

(a) appropriate falconry license fees;
(b) age requirements regarding issuance of falconry licenses;
(c) the necessity of possessing other valid game licenses when practicing falconry; and
(d) the transfer and revocation of falconry licenses; and

(3) the regulation of captive breeding of raptors, including:

(a) appropriate breeding permit fees;
(b) transferability and revocation of breeding permits; and
(c) any other aspects of captive breeding considered appropriate by the commission."

### 87-5-210. Captive breeding of raptors — permit — transfer and revocation — rules.

**Compiler's Comments**

*1991 Amendment:* In (1), near end of first sentence after "part", inserted "and with rules adopted by the commission" and inserted second sentence regarding adoption of permit qualifications and fees by rule; deleted former (2) that read: "(2) The fee for a captive breeding permit is $20 a year"; at end of (2) substituted "commission" for "department"; in (3), near beginning of first sentence, substituted "commission shall" for "department may", after "rules" substituted "regarding" for "for the keeping of records on, the trapping, taking, possession, propagation, and release of, and the sale of progeny of", and inserted second sentence requiring conformance with federal law.

*1991 Statement of Intent:* The statement of intent attached to Ch. 243, L. 1991, provided: "A statement of intent is required for this bill because 87-5-204 and 87-5-210 require the fish and game commission [now fish, wildlife, and parks commission] to adopt rules regarding certain aspects of the use and breeding of raptors and the sport of falconry. Because the regulation of raptors and the sport of falconry are in large part regulated by federal law and because detailed and precise standards are rapidly changing, the rules must comply with federal law and regulations as adopted or amended from time to time. The legislature recognizes that the commission has the power to determine the extent and nature of measures that control wildlife in Montana and that the commission's expertise makes it the proper forum for addressing the regulation of raptors and the sport of falconry. At a minimum, the rules must address:

(1) the regulation of raptors and restrictions on taking, possessing, and selling raptors, including:

(a) the number of raptors that may legally be possessed;
(b) appropriate times and areas for trapping raptors and removing of raptors from the nest;
(c) notification requirements regarding transfer of ownership;
(d) permitting requirements regarding sale and transportation of raptors; and
(e) possession of and hunting with raptors by nonresidents;

(2) licenses and rules for falconry and the allowable uses of raptors in the sport of falconry, including:

(a) appropriate falconry license fees;
(b) age requirements regarding issuance of falconry licenses;
(c) the necessity of possessing other valid game licenses when practicing falconry; and
(d) the transfer and revocation of falconry licenses; and

(3) the regulation of captive breeding of raptors, including:

(a) appropriate breeding permit fees;
(b) transferability and revocation of breeding permits; and
(c) any other aspects of captive breeding considered appropriate by the commission."

*1987 Amendment:* In (4) inserted "and the sale of progeny of" and made minor changes in grammar.

*Report on Sale of Progeny of Raptors — 51st Legislature:* Section 3, Ch. 532, L. 1987, read: "The department [of Fish, Wildlife, and Parks] shall report to the 51st legislature the results of the program regulating the sale of the progeny of raptors, including but not limited to the numbers of birds sold, a description of the enforcement efforts undertaken, and the cost of the program to the department."

*Codification Without Instruction:* This section was enacted without a codification instruction. The apparent intent was that it become an integral part of Title 87, chapter 5, part 2, and the Code Commissioner has codified it accordingly.

*Statement of Intent:* The statement of intent attached to HB 94 (Ch. 297, L. 1983), first adopted by the House Fish and Game Committee, read: "House Bill No. 94 requires a statement of intent because the proposed amendments [to the bill enacting this section] would provide the Department of Fish, Wildlife, and Parks with the authority to pass regulations on the taking and keeping of raptors for captive breeding purposes.

The reason for the Department to pass regulations controlling captive breeding is to avoid abuses which could endanger the birds captured or in some cases to protect species which are already rare or unusual in Montana. Accordingly, regulations may be adopted which would regulate the kinds of raptors which may be captured, the methods used to capture birds, the facilities in which the birds are kept and bred, the times of capture, the kinds of records to be kept regarding the bird, and the qualifications of the people requesting a captive breeding permit."

**Administrative Rules**

Title 12, chapter 6, subchapter 14, ARM Captive breeding of raptors.

## Part 3
## Grizzly Bear

**Part Administrative Rules**

ARM 12.9.1404 through 12.9.1406 Grizzly bear management.

**Part Law Review Articles**

Subdelegation of Authority Under the Endangered Species Act: Secretarial Authority to Subdelegate His Duties to a Citizen Management Committee as Proposed for the Selway-Bitterroot Wilderness Grizzly Bear Reintroduction, Hall, 20 Pub. Land & Resources L. Rev. 81 (1999).

### 87-5-301. Grizzly bear — findings — policy.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 1, Ch. 670, L. 2023. Amendment effective October 1, 2023.

*2021 Amendment:* Chapter 338 in (2)(b) at beginning inserted "subject to the provisions of subsection (3)"; inserted (3)(a) concerning restrictions relating to the relocation of a grizzly bear; and inserted (3)(b) concerning a departmental response to a grizzly bear that is causing conflict outside of a federal recovery zone. Amendment effective March 1, 2022.

*2011 Amendments — Composite Section:* Chapter 292 substituted current language in (2) for "It is hereby declared the policy of the state of Montana to protect, conserve, and manage grizzly bear as a rare species of Montana wildlife." Amendment effective March 1, 2012.

Chapter 416 inserted (1) concerning legislative findings; in (2)(a) before "manage" deleted "protect, conserve, and" and substituted "to avoid conflicts with humans and livestock" for "as a rare species of Montana wildlife"; inserted (2)(b) concerning proactive management; and made minor changes in style. Amendment effective May 14, 2011.

Style changes were slightly different in the chapters. In each case, the codifier chose appropriate text.

### 87-5-302. Commission regulations on grizzly bears.

**Compiler's Comments**

*2011 Amendment:* Chapter 292 substituted current language for "The commission shall have authority to provide open and closed seasons; means of taking; shooting hours; tagging requirements for carcasses, skulls, and hides; possession limits; and requirements for transportation, exportation, and importation of grizzly bear." Amendment effective March 1, 2012.

## Part 4
## Game Preserves and Closed Areas

### 87-5-401. Creation of game preserves and general provisions.

**Compiler's Comments**

*1981 Amendment:* Inserted "otherwise" and substituted "part" for "section" in second sentence of (1).

**Administrative Rules**

Title 12, chapter 9, subchapter 2, ARM Game preserves.

### 87-5-402. Posting of notice and additional provisions.

**Compiler's Comments**

*2007 Amendment:* Chapter 16 in (1) near middle of second sentence after "be made" deleted "as provided in 87-1-202" and inserted third sentence requiring publication in a newspaper having general circulation in the locality; and made minor changes in style. Amendment effective March 16, 2007.

**Administrative Rules**

Title 12, chapter 9, subchapter 2, ARM Game preserves.

### 87-5-404. Flathead Lake bird preserve — university of Montana-Missoula biological reserve.

**Compiler's Comments**

*1995 Amendment:* Chapter 417 in (2) and (3), near beginning, substituted "hunt, as defined in 87-2-101" for "kill, shoot, capture" and after "nests or to" substituted "hunt" for "shoot at, wound, or kill"; and made minor changes in style. Amendment effective July 1, 1995.

*Name Change — Directions to Code Commissioner:* Pursuant to sec. 36, Ch. 308, L. 1995, in this section the Code Commissioner changed "university of Montana" to "university of Montana-Missoula".

*Severability:* Section 37, Ch. 417, L. 1995, was a severability clause.

### 87-5-406. Gates of the Mountains game preserve.

**Compiler's Comments**

*1995 Amendment:* Chapter 417 in (2), near beginning, substituted "hunt, as defined in 87-2-101" for "shoot, kill, capture" and after "nests or to" substituted "hunt" for "shoot at, wound, or kill"; and made minor changes in style. Amendment effective July 1, 1995.

*Severability:* Section 37, Ch. 417, L. 1995, was a severability clause.

## Part 5
## Stream Protection

**Part Attorney General's Opinions**

*Application of Part to Government Projects Including Highway Contractor Discretionary Work Bridges:* This part was enacted to regulate projects undertaken by governmental entities, and the Natural Streambed and Land Preservation Act of 1975 (Title 75, ch. 7, part 7) was enacted to control projects not subject to this part. Because highway projects are governmental undertakings, all activities in such a project that may impact upon a stream are within the jurisdiction of the Department of Fish, Wildlife, and Parks under this part, including activities such as temporary work bridges erected at a private contractor's discretion and not reflected on the Department of Highways' (now Department of Transportation's) construction plans. 40 A.G. Op. 71 (1984).

*Application of Streambed Act:* The Legislature did not intend to regulate any federally constructed projects under The Natural Streambed and Land Preservation Act of 1975. However, the mere location of a nonfederal project on federal land does not preempt state regulation under the Act. The Act is applicable to private projects on state lands, but state or local projects are regulated by the Fish and Game Commission (now Fish, Wildlife, and Parks Commission) under applicable statutes. As to Indian reservations, the Act does not apply to projects constructed by Indians within the reservations, but projects constructed by non-Indians on non-Indian land within a reservation may be regulated by the state if it does not interfere with tribal self-government. 37 A.G. Op. 15 (1977).

**Part Law Review Articles**

*Water Law:* A state cannot “appropriate” a minimum flow of water in a natural stream for preservation of fish. (Colorado River Water Conservation Dist. v. Rocky Mountain Power Co., 406 P2d 798 (Colo. 1965)), Gordon, 27 Mont. L. Rev. 211 (1966).

The Row on the Ruby: State Management of Public Trust Resources, the Right to Exclude, and the Future of Recreational Stream Access in Montana, Stauffer, 36 Envtl. L. 1421 (2006).

## 87-5-501. State policy.

**Law Review Articles**

*Recent Developments in Montana Land Use Law:* See paragraph VIII D, Streambed Preservation. Goetz, 38 Mont. L. Rev. 165 (1977).

## 87-5-502. Notice of construction or hydraulic projects.

**Compiler’s Comments**

*Purported Amendment:* Section 1, Ch. 133, L. 1971, purported to amend this section but made no change.

**Attorney General’s Opinions**

*Notice of Planned Repairs and Maintenance of Bridges and Roads Required:* Counties must give notice to the Department of Fish, Wildlife, and Parks of planned repairs and maintenance of bridges and roads in accordance with 87-5-502, except when an emergency threatens a bridge or road, in which case the provisions of 87-5-506 apply. The language of 7-14-2203 relating to county authority to make emergency repairs does not expressly or impliedly waive compliance with 87-5-502. 41 A.G. Op. 63 (1986).

*Notice Required for Private Contractors of State:* Under this section, the Department of Highways (now Department of Transportation) must notify the Department of Fish, Wildlife, and Parks of the construction of work bridges by private contractors on state highway projects when such bridges may or will obstruct, damage, diminish, destroy, change, modify, or vary the natural existing shape and form of any stream or its banks or tributaries. 40 A.G. Op. 71 (1984).

## 87-5-506. Vested water rights preserved and emergency actions excepted.

**Attorney General’s Opinions**

*Notice of Planned Repairs and Maintenance of Bridges and Roads Required:* Counties must give notice to the Department of Fish, Wildlife, and Parks of planned repairs and maintenance of bridges and roads in accordance with 87-5-502, except when an emergency threatens a bridge or road, in which case the provisions of 87-5-506 apply. The language of 7-14-2203 relating to county authority to make emergency repairs does not expressly or impliedly waive compliance with 87-5-502. 41 A.G. Op. 63 (1986).

## 87-5-507. Irrigation projects excepted.

**Attorney General’s Opinions**

*Irrigation District Subject to Natural Streambed and Land Preservation Act:* An irrigation district is a “person” within the meaning of 75-7-103(4) of The Natural Streambed and Land Preservation Act of 1975. 44 A.G. Op. 33 (1987).

## 87-5-508. Federal actions injuring fish and wildlife.

**Law Review Articles**

*Federal Dominance as to Fisheries and Dams:* Federal Power Commission v. Oregon, 349 US 435, 99 L Ed 1215, 75 S Ct 832 (1955), evidenced that the federal government can disregard the wishes of a state concerning its fisheries wherever it believes that the interests of the nation are best served by permitting a dam to be built, and this applies even where the waters are nonnavigable, provided only that the powersite is on reserved lands of the United States. Jasperson, 18 Mont. L. Rev. 118 (1956).

## 87-5-509. Penalty and restoration.

**Compiler’s Comments**

*1983 Amendment:* Substituted reference to state special revenue fund for reference to earmarked revenue fund.

*Severability Clause:* Section 2, Ch. 339, L. 1975, read: “If a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of the act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.”

## Part 6
## Fish and Wildlife Crimestoppers

**Part Law Review Articles**

The Lacey Act: America's Premier Weapon in the Fight Against Unlawful Wildlife Trafficking, Anderson, 16 Pub. Land L. Rev. 27 (1995).

### 87-5-601. Short title.

**Compiler's Comments**

*1997 Amendment:* Chapter 393 inserted "and Parks"; and made minor changes in style. Amendment effective April 28, 1997.

### 87-5-602. Definitions.

**Compiler's Comments**

*1997 Amendment:* Chapter 393 in definition of Board and program inserted "and parks"; and made minor changes in style. Amendment effective April 28, 1997.

### 87-5-603. Functions of board.

**Compiler's Comments**

*1997 Amendment:* Chapter 393 substituted "fish, wildlife, and parks" for "fish and wildlife"; and made minor changes in style. Amendment effective April 28, 1997.

### 87-5-605. Powers and duties of department — rules.

**Compiler's Comments**

*1997 Amendment:* Chapter 393 throughout section, in four places, substituted "fish, wildlife, and parks" for "fish and wildlife"; in (2)(a) inserted "including neighborhood watch programs"; and made minor changes in style. Amendment effective April 28, 1997.

*Statement of Intent:* The statement of intent attached to SB 209 (Ch. 305, L. 1985) provided: "A statement of intent is required for this bill because it [87-5-605] grants rulemaking authority to the department of fish, wildlife, and parks for the purpose of administering the fish and game crimestoppers program.

It is contemplated that the department establish rules for instituting an award program, including criteria to be used in determining who will receive the rewards and the amount of the rewards in order to guarantee that the rewards be granted through a reasonable and consistent procedure.

It is also contemplated that the department draft rules for guaranteeing the confidentiality of persons providing crime-related information. The rules must comply with the constitutional right to know and the right of privacy; confidentiality will be maintained only when the demand of individual privacy clearly exceeds the merits of public disclosure.

To facilitate the transmitting of crime-related information from the public to the department, the department would establish a toll-free telephone number throughout the state. This toll-free number should be publicized statewide on the radio and in the press."

**Administrative Rules**

Title 12, chapter 6, subchapter 20, ARM Crimestoppers program.

## Part 7
## Importation, Introduction, and Transplantation of Wildlife

**Part Administrative Rules**

Title 12, chapter 6, subchapter 22, ARM Exotic wildlife.

ARM 12.7.1501 General purpose — unauthorized placement of fish.

### 87-5-701. Purpose.

**Compiler's Comments**

*2003 Amendment:* Chapter 536 in first sentence near beginning after "plant species" substituted "livestock, horticultural, forestry, and agricultural production and health and human safety" for "agricultural production of Montana", after "necessary to" substituted "regulate" for "provide for the control of", and at end inserted language concerning importation, transplantation, possession, and sale; in second sentence after "unknown" deleted "to the well-being of native wildlife and plant species and to agricultural production", after the first "introduction of wildlife" substituted "and exotic wildlife into Montana" for "into natural habitats", after "necessitate the" substituted "regulation" for "prohibition", after the second "introduction of wildlife" substituted "and regulation of the importation, transplantation, possession, and sale of exotic wildlife" for "into natural habitats", and near end inserted references to importation, possession, and sale; in third sentence near beginning after "importation" deleted "for introduction or the", after "transplantation" inserted "possession, sale", and near end substituted "wildlife or exotic wildlife" for "the introduced or transplanted population"; and made minor changes in style. Amendment effective January 1, 2004.

**87-5-702. Definitions.**

**Compiler's Comments**

*2003 Amendment:* Chapter 536 inserted definitions of controlled exotic wildlife, domestic animal, exotic wildlife, native wildlife, noncontrolled exotic wildlife, possession, and prohibited exotic wildlife; in definition of feral after "appearance" deleted "in a natural habitat", after "animal" inserted "and any offspring", and after "escaped" substituted "captivity" for "domestication"; in definition of importation after "act of" substituted remainder of definition relating to bringing or shipping into the state for "bringing into the state any wildlife"; in definition of introduction in two places inserted "from captivity" and near end substituted "the wild within" for "natural habitats of"; deleted definition of natural habitat that read: ""Natural habitat" means any area in which the introduction of wildlife species may result in an uncontrolled, naturally reproducing population of that species becoming established"; in definition of transplantation after "into" deleted "natural habitats in"; in definition of wildlife in (a) after "egg" inserted "sperm, embryo" and inserted (b) excluding domestic animals; and made minor changes in style. Amendment effective January 1, 2004.

**87-5-703. Applicability to other provisions for importation or introduction of wildlife.**

**Compiler's Comments**

*2011 Amendment:* Chapter 258 in (2) substituted "87-6-219(1)(a)" for "87-3-207"; and in (3) substituted "87-6-219(1)(b)" for "87-3-209". Amendment effective October 1, 2011.

*Preamble:* The preamble attached to Ch. 258, L. 2011, provided: "WHEREAS, the 2007 Legislature passed House Joint Resolution No. 16, urging that revision of the criminal codes within Title 87 of the Montana Code Annotated be given priority; and

WHEREAS, House Joint Resolution No. 16 noted that practitioners, judges, and citizens find that the criminal codes intertwined within the fish and game laws in Title 87 are difficult to read, understand, and prosecute; and

WHEREAS, House Joint Resolution No. 16 directed that revision of the Title 87 criminal code should not include policy changes to current laws and should adhere to the intent of the legislatures that crafted the laws; and

WHEREAS, in 2008, the Director of Fish, Wildlife, and Parks appointed a Title 87 criminal code revision working group, consisting of Justices of the Peace, County Attorneys, an Assistant Attorney General, legal counsel and the enforcement administrator of the Department of Fish, Wildlife, and Parks, and legislative staff; and

WHEREAS, the working group met numerous times and spent countless hours crafting a revision that makes the Title 87 criminal code more understandable without making substantive or policy changes to present law; and

WHEREAS, revision of the fish and game criminal statutes will benefit the hunting and fishing public, magistrates, and prosecutors by codifying crimes and penalties in a separate chapter of Montana law, rather than being intertwined throughout Title 87."

*Saving Clause:* Section 131, Ch. 258, L. 2011, was a saving clause.

*Severability:* Section 132, Ch. 258, L. 2011, was a severability clause.

*2005 Amendment:* Chapter 281 in introductory clause after "do not apply to" deleted "the importation of wildlife for the commercial pet trade or to". Amendment effective April 19, 2005.

*1989 Amendment:* In (3) inserted "or 87-3-209, 87-3-210, and 87-3-225 through 87-3-227".

**87-5-704. Rulemaking.**

**Compiler's Comments**

*2007 Amendment:* Chapter 44 deleted former (4)(b) that read: "(b) The department may adopt rules regarding the amnesty program provided for in 87-5-709(2)"; and made minor changes in style. Amendment effective October 1, 2007.

*2005 Amendment:* Chapter 281 in (3)(a) near beginning inserted reference to 87-5-712. Amendment effective April 19, 2005.

*2003 Amendment:* Chapter 536 inserted (3) concerning implementing 87-5-705 through 87-5-709 and operation of classification review committee; and inserted (4) concerning adoption of rules for authorization permit and amnesty. Amendment effective January 1, 2004.

*Statement of Intent:* The statement of intent attached to HB 770 (Ch. 624, L. 1985) provided: "A statement of intent is required for this bill because section 10 [87-5-704] grants rulemaking authority to both the fish and game commission [now fish, wildlife, and parks commission] and the department of fish, wildlife, and parks. Section 10 [87-5-704] specifies what sections each entity may implement.

It is the intent of the legislature that the department adopt detailed rules pertaining to the procedure for accepting and processing applications for permission to import for introduction, introduce, or transplant wildlife. The department should address information such as names of applicants, species of wildlife, source of obtaining wildlife, purpose for introducing or transplanting, benefit to the public, potential for harm, and processing fee.

It is the intent of the legislature that the commission review proposals for the introduction or transplantation of wildlife species in the state on a case-by-case basis. It is also the intent of the legislature that the department develop a plan for those applications approved by the commission to assure that the population can be controlled if unforeseen harm should occur."

**Administrative Rules**

Title 12, chapter 7, subchapter 5, ARM Importation of fish.

ARM 12.7.701 Authorization for Department and commercial fish planting.

## 87-5-705. Regulation of exotic wildlife.

**Compiler's Comments**

*Effective Date:* Section 12, Ch. 536, L. 2003, provided that this section is effective January 1, 2004.

**Administrative Rules**

Title 12, chapter 6, subchapter 22, ARM Exotic wildlife.

## 87-5-706. Noncontrolled exotic wildlife authorized for possession or sale.

**Compiler's Comments**

*Effective Date:* Section 12, Ch. 536, L. 2003, provided that this section is effective January 1, 2004.

## 87-5-707. Controlled exotic wildlife list.

**Compiler's Comments**

*Effective Date:* Section 12, Ch. 536, L. 2003, provided that this section is effective January 1, 2004.

## 87-5-708. Classification review committee — composition, appointment, and duties.

**Compiler's Comments**

*Effective Date:* Section 12, Ch. 536, L. 2003, provided that this section is effective January 1, 2004.

## 87-5-709. Exceptions and exemptions to possession and sale of exotic wildlife.

**Compiler's Comments**

*2021 Amendment:* Chapter 211 in (1)(a)(i) after "zoological garden" inserted "or wildlife sanctuary". Amendment effective October 1, 2021.

*2005 Amendment:* Chapter 281 substituted current (1)(a) listing the institutions of zoological gardens, roadside menageries, and research facilities that provide secure confinement of wildlife for former (1)(a) that read: "(a) an accredited zoological garden chartered by the state as a nonprofit corporation if the zoological garden establishes that the proposed facilities are adequate to provide secure confinement of the exotic wildlife in question"; in (2) deleted former first two sentences that read: "The department shall institute and administer an amnesty program for exotic wildlife possessed by a person as of January 1, 2004, who is not in compliance with 87-5-705 through 87-5-708. Until January 1, 2005, a person who reports that person's noncompliance to the department may not be prosecuted for a violation based on the reported noncompliance" and substituted "exotic wildlife" for "species"; and made minor changes in style. Amendment effective April 19, 2005.

*Effective Date:* Section 12, Ch. 536, L. 2003, provided that this section is effective January 1, 2004.

### 87-5-711. Control of importation for introduction and transplantation or introduction of wildlife.

**Compiler's Comments**

*1991 Amendment:* Inserted (2) requiring environmental review prior to transplantation or introduction of fish species.

*Preamble:* The preamble attached to Ch. 501, L. 1991, provided: "WHEREAS, illegal importation, introduction, or transplantation of fish species can be extremely harmful to the management of the state's fisheries, especially the fisheries of sensitive and valuable native species; and

WHEREAS, illegal importation, introduction, and transplantation of fish species, when done knowingly and purposely, should be dealt with by law enforcement officials to their fullest capabilities; and

WHEREAS, the Legislature encourages the Department of Fish, Wildlife, and Parks to focus law enforcement efforts on apprehending persons who commit such criminal acts, including providing for public awareness of these crimes and providing rewards for citizen assistance in solving these crimes through the Department of Fish, Wildlife, and Parks' TIP-MONT program."

**Administrative Rules**

ARM 12.7.701 Authorization for department and commercial fish planting.

**Case Notes**

*Transfer of Alternative Livestock to Unlicensed Tribal Lands Illegal:* The Wallaces, licensed alternative livestock ranchers, sought to reduce the size of their elk herd by transferring about 500 elk to the Crow Indian Reservation for subsequent release into the wild. The elk had been certified as free of tuberculosis, brucellosis, and elk-red deer hybridization by the Department of Livestock (DOL). Despite notification by the Department of Fish, Wildlife, and Parks (DFWP) that such an act violated state law, the Wallaces transferred 68 elk to the tribe. DFWP requested and received a permanent injunction prohibiting any further transfer of elk to the tribe, and the Wallaces appealed, questioning DFWP jurisdiction. The Supreme Court noted that DFWP has a statutory basis for its jurisdiction over the Wallaces as licensees. Based on DFWP jurisdiction over exterior fencing, and the Department's knowledge that the elk would not be contained behind a game-proof fence upon delivery to the tribe, DFWP had statutory authority to seek the permanent injunction to prevent the transfer. Also, the introduction or transplantation of any wildlife into the wild, including game farm elk, requires the approval of DFWP. Further, 87-4-414 provides that alternative livestock may be kept only on a licensed alternative livestock ranch, and because the tribe is not a licensed facility under Montana law, neither DFWP nor DOL had authority to permit the transfer. The Wallaces knew that the elk were destined for an unlicensed location where they would be released into the wild and could migrate back into Montana, so the transfer violated the Wallaces' duty as licensees to act in accordance with law, and the District Court correctly enjoined the transportation of the elk. Hagener v. Wallace, 2002 MT 109, 309 M 473, 47 P3d 847 (2002).

**Law Review Articles**

Creating New Opportunities for Ecosystem Restoration on Public Lands: An Analysis of the Potential for Bureau of Land Management Lands, Forrest, 23 Pub. Land. & Resources L. Rev. 21 (2002).

### 87-5-712. Authority for commission to control importation, possession, or sale of certain wildlife species and exotic wildlife.

**Compiler's Comments**

*2005 Amendment:* Chapter 281 inserted (2) authorizing the commission to make exceptions for certain institutional control; and made minor changes in style. Amendment effective April 19, 2005.

*2003 Amendment:* Chapter 536 in introductory clause in first sentence after "hearing" inserted language relating to classification review committee, after "species" substituted "or exotic wildlife that may not be imported, possessed, or sold as pets" for "prohibited from importation", and at end inserted "for any other reason" and at beginning of second sentence inserted clause concerning placement of wildlife species or exotic wildlife on list and after "finds" deleted "based on scientific investigation"; in (1) at beginning substituted "exotic wildlife" for "species, because of behavioral traits or other biological considerations"; in (2) after "released" substituted "from captivity, the exotic wildlife" for "into natural habitat"; inserted (3) concerning risk posed by exotic wildlife; and made minor changes in style. Amendment effective January 1, 2004.

**87-5-713. Control of wildlife species permitted to be transplanted or introduced.**

**Administrative Rules**

ARM 12.7.540 Permit required for importation of bait leeches.
ARM 12.7.541 Importation of bait leeches — requirements.
ARM 12.7.542 Shipment inspections.
ARM 12.7.701 Authorization for Department and commercial fish planting.

**87-5-714. Wildlife species authorized for introduction or transplantation.**

**Compiler's Comments**

*2011 Amendment:* Chapter 19 in (1)(v) substituted "walleye (Sander vitreus)" for "walleye (Stizostedion vitreum)". Amendment effective October 1, 2011.

**Administrative Rules**

ARM 12.7.701 Authorization for department and commercial fish planting.

**87-5-715. Extermination or control of transplanted or introduced wildlife or feral species posing threat.**

**Compiler's Comments**

*1989 Amendment:* At beginning of first sentence deleted clause referring to 87-5-714 and after "commission" deleted "after scientific investigation by the department and after public hearing"; and deleted third sentence authorizing Department to take action, by emergency rule without hearing, to control or exterminate transplanted wildlife or species posing threat.

**87-5-716. Consultation with departments of agriculture, public health and human services, and livestock.**

**Compiler's Comments**

*2003 Amendment:* Chapter 536 near beginning inserted reference to department of public health and human services, after "wildlife species" inserted "and exotic wildlife", and at end inserted language relating to risk to human health or safety; and made minor changes in style. Amendment effective January 1, 2004.

**87-5-721. Penalty — license and permit revocation and denial.**

**Compiler's Comments**

*2011 Amendments — Composite Section:* Chapter 139 in (1) substituted "convicted of a violation" for "who violates a provision"; in (2)(a) in first sentence increased minimum fine from $500 to $2,000 and increased maximum fine from $5,000 to $10,000 and in third sentence increased minimum fine from $500 to $2,000; in (2)(c) in first sentence substituted "by this state" for "under this title" and substituted "5 years or more than 10 years" for "24 months", in second sentence substituted "the imposed forfeiture period" for "24 months" and substituted "an additional period of time" for "more than 24 months", and in third sentence substituted "life" for "the lifetime of that person"; and made minor changes in style. Amendment effective October 1, 2011.

Chapter 258 in (1) in first sentence after "a person" substituted current text for "who violates a provision of this part is guilty of a misdemeanor punishable as provided in 87-1-102"; and made minor changes in style. Amendment effective October 1, 2011.

*Preamble:* The preamble attached to Ch. 258, L. 2011, provided: "WHEREAS, the 2007 Legislature passed House Joint Resolution No. 16, urging that revision of the criminal codes within Title 87 of the Montana Code Annotated be given priority; and

WHEREAS, House Joint Resolution No. 16 noted that practitioners, judges, and citizens find that the criminal codes intertwined within the fish and game laws in Title 87 are difficult to read, understand, and prosecute; and

WHEREAS, House Joint Resolution No. 16 directed that revision of the Title 87 criminal code should not include policy changes to current laws and should adhere to the intent of the legislatures that crafted the laws; and

WHEREAS, in 2008, the Director of Fish, Wildlife, and Parks appointed a Title 87 criminal code revision working group, consisting of Justices of the Peace, County Attorneys, an Assistant Attorney General, legal counsel and the enforcement administrator of the Department of Fish, Wildlife, and Parks, and legislative staff; and

WHEREAS, the working group met numerous times and spent countless hours crafting a revision that makes the Title 87 criminal code more understandable without making substantive or policy changes to present law; and

WHEREAS, revision of the fish and game criminal statutes will benefit the hunting and fishing public, magistrates, and prosecutors by codifying crimes and penalties in a separate chapter of Montana law, rather than being intertwined throughout Title 87."

*Saving Clause:* Section 2, Ch. 139, L. 2011, was a saving clause.

Section 131, Ch. 258, L. 2011, was a saving clause.

*Severability:* Section 132, Ch. 258, L. 2011, was a severability clause.

*2009 Amendment:* Chapter 429 in (3) at end of first sentence after "within" substituted "a time set by the department, not to exceed 6 months" for "6 months of a conviction or sooner if ordered by the court". Amendment effective July 1, 2009.

*Preamble:* The preamble attached to Ch. 429, L. 2009, provided: "WHEREAS, invasive species can wreak damage on the economy, environment, recreational opportunities, and human health; and

WHEREAS, aquatic invasive species, including Eurasian watermilfoil, the quagga mussel, and the zebra mussel, pose new and imminent threats, which if left unchecked could cost millions of dollars not only in damage to Montana waterways, rivers, and lakes, to water storage, delivery, and irrigation systems, to hydroelectric power structures and systems, and to aquatic ecosystems, but also to the entire state economy; and

WHEREAS, the enormous impact caused by the zebra mussel is clearly demonstrated in the eastern United States where the species was first observed in Lake Ontario in 1988 and spread to Lake Michigan and the Finger Lakes Region in New York State by the following year; and

WHEREAS, the United States Geological Survey estimates that $5 billion has been spent thus far in the Great Lakes Basin alone for damages caused by and control efforts for the zebra mussel; and

WHEREAS, the zebra mussel was first discovered in Lake Mead in January 2007 and has now spread to Lakes Mojave and Havasu and the Colorado River, impacting the states of Arizona, Nevada, and California, as well as to Pueblo Reservoir in Colorado, San Justo Reservoir in California, and Electric Lake in Utah; and

WHEREAS, Eurasian watermilfoil, the zebra mussel, and the quagga mussel are easily carried on vessels used in infested water and then transported to another body of water if the vessel has not been properly cleaned; and

WHEREAS, Eurasian watermilfoil is already present in Montana and unless Montana takes action now to prevent the infestation of its waters with the zebra mussel and quagga mussel it is only a matter of time before their introduction in this state occurs; and

WHEREAS, the most cost-effective way of dealing with an aquatic invasive species is preventing an infestation from occurring."

*Severability:* Section 19, Ch. 429, L. 2009, was a severability clause.

*2005 Amendment:* Chapter 281 inserted (3) relating to the disposition of illegally held exotic wildlife. Amendment effective April 19, 2005.

*1997 Amendment:* Chapter 344 in (2)(a), in first sentence, substituted "an offense" for "a misdemeanor" and substituted "$5,000 and imprisonment for up to 1 year" for "$1,000 or imprisonment for not more than 6 months, or both" and inserted second and third sentences allowing sentencing court to consider community service in lieu of imprisonment and prohibiting the sentencing court from deferring or suspending $500 of the fine amount.

*1993 Amendment:* Chapter 223 in (2)(a), after "$500", substituted language concerning $1,000 fine or imprisonment for "and may be fined up to the amount necessary to eliminate or mitigate the effects of the violation"; inserted (2)(b) regarding civil liability and damages; and made minor changes in style.

*1991 Amendment:* At beginning of (1) inserted exception clause; and inserted (2) relating to penalty for illegal importation, introduction, or transplantation of fish.

## Case Notes

*Fish and Game Restitution Not Within Jurisdiction of Justice Court:* The Justice Court imposed a $515 fine, suspended fishing privileges, and ordered restitution in an amount necessary to mitigate the effects of the violation to be paid by a plaintiff who had intentionally introduced fish into Lake Mary Ronan. On appeal, the Supreme Court vacated the conviction and sentence, holding that the potentially limitless fine that could be imposed to mitigate the effects of a violation of the fish and game statute is inconsistent with the statute that grants Justices' Courts jurisdiction over violations of fish and game statutes that are punishable by a fine not exceeding $1,000. Moseley v. Lake County Justice Court, 256 M 206, 845 P2d 732, 50 St. Rep. 28 (1993).

**87-5-725. Notification of transplantation or introduction of wildlife.**

**Compiler's Comments**

*Effective Date:* Section 3, Ch. 119, L. 2009, provided that this section is effective on passage and approval. Approved April 1, 2009.

## Part 8
## Montana Wildlife Habitat Improvement Act

**Part Compiler's Comments**

*Termination Provision Repealed:* Section 4, Ch. 64, L. 2023, repealed sec. 11, Ch. 342, L. 2017, which terminated this part June 30, 2023. Effective March 16, 2023.

*Effective Date:* Section 10, Ch. 342, L. 2017, provided: "[This act] is effective July 1, 2017."

*Termination:* Section 11, Ch. 342, L. 2017, provided: "[This act] terminates June 30, 2023."

*Preamble:* The preamble attached to Ch. 342, L. 2017, provided: "WHEREAS, noxious weeds already encroach on wildlife habitat throughout Montana and are propagating at rising rates; and

WHEREAS, a noxious weed control program administered by the department of fish, wildlife, and parks will complement and enhance existing noxious weed control efforts; and

WHEREAS, the program would use federal funds to restore wildlife habitat for the benefit of the public; and

WHEREAS, wildlife habitat noxious weed management projects will enhance and steward habitat for the benefit of wildlife."

**Part Administrative Rules**

Title 12, chapter 9, subchapter 16, ARM Wildlife habitat noxious weed grant program.

**87-5-801. Short title.**

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 1, Ch. 64, L. 2023. Amendment effective March 16, 2023.

**87-5-803. Wildlife habitat improvement advisory council — duties — members.**

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 2, Ch. 64, L. 2023. Amendment effective March 16, 2023.

**87-5-806. Administration and expenditure of funds — cooperation with other entities.**

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 3, Ch. 64, L. 2023. Amendment effective March 16, 2023.

## Part 9
## Montana Greater Sage-Grouse Stewardship Act

**Part Compiler's Comments**

*Effective Date:* Section 19, Ch. 445, L. 2015, provided that this part is effective May 7, 2015.

**Part Law Review Articles**

Public-Private Conservation Agreements and the Greater Sage-Grouse, Pidot, 39 Pub. Land & Resources L. Rev. 165 (2018).

**Part Collateral References**

Executive Order No. 21-2015, Office of the Governor (2015).
Executive Order No. 12-2015, Office of the Governor (2015).
Executive Order No. 10-2014, Office of the Governor (2014).

**87-5-904. Montana sage grouse oversight team — rulemaking.**

**Compiler's Comments**

*2017 Amendment:* Chapter 311 in (1) substituted "habitat and populations" for "habitat or populations"; in (2) after "habitat quantification tool" substituted "in consideration of applicable United States fish and wildlife service sage grouse policies, state law, and any rules adopted pursuant to this part" for "subject to the approval of the United States fish and wildlife service"; and made minor changes in style. Amendment effective May 4, 2017.

**Administrative Rules**

ARM 14.6.105 Method to track and maintain the number of credits and debits available and used.

ARM 14.6.106 Method to administer the review and monitoring of MSGOT funded projects.

## 87-5-905. Montana sage grouse oversight team — duties — powers.

**Compiler's Comments**

*2019 Amendment:* Chapter 267 in (1)(g) near beginning substituted "review and act upon" for "review" and after "76-22-111" inserted "with a goal of no net loss of habitat and a net gain preferred"; inserted (1)(h) regarding requirements for semiannual review of requests; inserted (1)(i) regarding work with stakeholders to streamline the compensatory mitigation review process; inserted (1)(j) regarding monitoring long-term staffing needs; and made minor changes in style. Amendment effective May 2, 2019.

**Administrative Rules**

Title 14, chapter 6, subchapter 1, ARM Sage Grouse Stewardship Act rules.

## 87-5-909. Sage grouse stewardship account.

**Compiler's Comments**

*2021 Amendments — Composite Section:* Chapter 285 in (1) in middle inserted "except as provided in subsection (8)"; in (3) near beginning substituted "subsections (4), (5), and (8)" for "subsections (4) and (5)"; inserted (8) directing the oversight team to audit credits and debits and direct the department to transfer up to 10% of any surplus until the $10 million cap is reached; and made minor changes in style. Amendment effective April 23, 2021, and terminates on occurrence of contingency.

Chapter 326 in (6) substituted current text concerning payment from the sage grouse stewardship account for former text that read: "Administrative costs paid from the account are limited to $400,000 in each fiscal year." Amendment effective July 1, 2021, and terminates on occurrence of contingency.

*Retroactive Applicability:* Section 3, Ch. 285, L. 2021, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to calendar years beginning after December 31, 2020."

*Cost-Sharing Agreement:* Section 1, Ch. 326, L. 2021, provided: "Subject to appropriation by the legislature, the department of fish, wildlife, and parks may enter into a cost-sharing agreement with the department of natural resources and conservation to pay costs associated with the implementation of the Montana Greater Sage-Grouse Stewardship Act."

*2017 Amendment:* Chapter 360 in (1) in second sentence deleted "Subject to appropriation by the legislature", after "account" inserted "is statutorily appropriated, as provided in 17-7-502, and", and after "used" inserted "for the administration of and"; inserted (6) limiting the amount of payable administrative costs; in temporary version inserted (2)(a) concerning the amount provided in 15-1-122; and made minor changes in style. Amendment effective May 8, 2017, and insertion of (2)(a) terminates June 30, 2021.

**Administrative Rules**

Title 14, chapter 6, subchapter 1, ARM Sage Grouse Stewardship Act rules.

## 87-5-910. Grants — eligibility.

**Compiler's Comments**

*2017 Amendment:* Chapter 311 in (1)(g) substituted "habitat and populations" for "habitat or populations". Amendment effective May 4, 2017.

**Administrative Rules**

Title 14, chapter 6, subchapter 1, ARM Sage Grouse Stewardship Act rules.

## 87-5-911. Compensatory mitigation — findings.

**Compiler's Comments**

*2019 Amendment:* Chapter 267 inserted (4) regarding submission of alternative locations for a project. Amendment effective May 2, 2019.

*2017 Amendment:* Chapter 311 in (2) substituted "taken in consideration of applicable United States fish and wildlife service sage grouse policies" for "consistent with the United States fish and wildlife service's greater sage-grouse range-wide mitigation framework"; and made minor changes in style. Amendment effective May 4, 2017.

**Administrative Rules**

ARM 14.6.103 Habitat quantification tool designation.
ARM 14.6.104 Compensatory mitigation system.
ARM 14.6.105 Method to track and maintain the number of credits and debits available and used.

### 87-5-912. Leases and conservation easements.

**Administrative Rules**

Title 14, chapter 6, subchapter 1, ARM Sage Grouse Stewardship Act rules.

### 87-5-913. Real property.

**Administrative Rules**

ARM 14.6.103 Habitat quantification tool designation.
ARM 14.6.104 Compensatory mitigation system.

### 87-5-914. Application to mineral estates.

**Administrative Rules**

ARM 14.6.103 Habitat quantification tool designation.
ARM 14.6.104 Compensatory mitigation system.

### 87-5-915. Existing land uses and activities exempt.

**Compiler's Comments**

*Effective Date:* Section 8, Ch. 267, L. 2019, provided: "[This act] is effective on passage and approval." Approved May 2, 2019.

### 87-5-916. Compensatory mitigation reduction or waiver.

**Compiler's Comments**

*2021 Amendment:* Chapter 428 in (1) at beginning of introductory clause inserted exception clause; and inserted (3) concerning waiver for certain opencut operations of a county, city, or town. Amendment effective May 7, 2021.

*Effective Date:* Section 8, Ch. 267, L. 2019, provided: "[This act] is effective on passage and approval." Approved May 2, 2019.

### 87-5-917. Operations and maintenance exempt.

**Compiler's Comments**

*Effective Date:* Section 8, Ch. 267, L. 2019, provided: "[This act] is effective on passage and approval." Approved May 2, 2019.

### 87-5-918. Reporting.

**Compiler's Comments**

*2021 Amendment:* Chapter 261 in (1) in first sentence and in (2) inserted "in accordance with 5-11-210"; and in (2) near beginning substituted "shall annually report" for "shall report". Amendment effective April 20, 2021.

*2019 Amendment:* Chapter 267 inserted (2) requiring the oversight team to report to the environmental quality council on the findings of its review of staffing needs; and made minor changes in style. Amendment effective May 2, 2019.

**Administrative Rules**

Title 14, chapter 6, subchapter 1, ARM Sage Grouse Stewardship Act rules.

## CHAPTER 6
## FISH AND WILDLIFE CRIMINAL PROVISIONS

**Chapter Compiler's Comments**

*Preamble:* The preamble attached to Ch. 258, L. 2011, provided: "WHEREAS, the 2007 Legislature passed House Joint Resolution No. 16, urging that revision of the criminal codes within Title 87 of the Montana Code Annotated be given priority; and

WHEREAS, House Joint Resolution No. 16 noted that practitioners, judges, and citizens find that the criminal codes intertwined within the fish and game laws in Title 87 are difficult to read, understand, and prosecute; and

WHEREAS, House Joint Resolution No. 16 directed that revision of the Title 87 criminal code should not include policy changes to current laws and should adhere to the intent of the legislatures that crafted the laws; and

WHEREAS, in 2008, the Director of Fish, Wildlife, and Parks appointed a Title 87 criminal code revision working group, consisting of Justices of the Peace, County Attorneys, an Assistant Attorney General, legal counsel and the enforcement administrator of the Department of Fish, Wildlife, and Parks, and legislative staff; and

WHEREAS, the working group met numerous times and spent countless hours crafting a revision that makes the Title 87 criminal code more understandable without making substantive or policy changes to present law; and

WHEREAS, revision of the fish and game criminal statutes will benefit the hunting and fishing public, magistrates, and prosecutors by codifying crimes and penalties in a separate chapter of Montana law, rather than being intertwined throughout Title 87."

*Saving Clause:* Section 131, Ch. 258, L. 2011, was a saving clause.

*Severability:* Section 132, Ch. 258, L. 2011, was a severability clause.

*Effective Date:* This chapter is effective October 1, 2011.

*Source — Reorganization and Recodification:* The 62nd Legislature, through the enactment of Senate Bill No. 124 (Ch. 258, L. 2011), significantly reorganized and recodified the fish and game criminal statutes. The following table provides numerical cross-references to former and new MCA sections.

| **Former MCA Code Section** | **New MCA Code Section** |
|---|---|
| 87-1-102(1)(a) | 87-6-102 |
| | 87-6-202 |
| | 87-6-204 |
| | 87-6-207 |
| | 87-6-207 |
| | 87-6-214 |
| | 87-6-216 |
| | 87-6-218 |
| | 87-6-219 |
| | 87-6-220 |
| | 87-6-301 |
| | 87-6-302 |
| | 87-6-304 |
| | 87-6-305 |
| | 87-6-312 |
| | 87-6-401 |
| | 87-6-402 |
| | 87-6-403 |
| | 87-6-403 |
| | 87-6-404 |
| | 87-6-405 |
| | 87-6-406 |
| | 87-6-411 |
| | 87-6-411 |
| | 87-6-412 |
| | 87-6-415 |
| | 87-6-501 |
| | 87-6-601 |
| | 87-6-603 |
| | 87-6-701 |
| | 87-6-703 |
| | 87-6-704 |

| | |
|---|---|
| | 87-6-706 |
| | 87-6-706 |
| | 87-6-707 |
| | 87-6-713 |
| | 87-6-715 |
| | 87-6-716 |
| | 87-6-717 |
| | 87-6-718 |
| | 87-6-801 |
| 87-1-102(1)(b)(i) | 87-6-922 |
| 87-1-102(1)(b)(ii) | 87-6-922 |
| 87-1-102(1)(b)(iii) | 87-6-306 |
| 87-1-102(2)(a) | 87-6-202 |
| | 87-6-207 |
| | 87-6-413 |
| 87-1-102(2)(b) | 87-6-202 |
| | 87-6-207 |
| | 87-6-413 |
| 87-1-102(2)(c) | 87-6-904 |
| 87-1-102(2)(d) | 87-6-202 |
| | 87-6-203 |
| | 87-6-207 |
| | 87-6-413 |
| | 87-6-602 |
| 87-1-102(2)(e) | Moved to Title 45 |
| 87-1-102(2)(f) | Moved to Title 45 |
| 87-1-102(3) | 87-6-903 |
| 87-1-102(4) | 87-6-306 |
| | 87-6-310 |
| | 87-6-311 |
| | 87-6-313 |
| 87-1-102(5) | 87-6-918 |
| | 87-6-314 |
| 87-1-102(6) | 87-6-202 |
| | 87-6-203 |
| | 87-6-204 |
| | 87-6-205 |
| | 87-6-301 |
| | 87-6-401 |
| | 87-6-413 |
| | 87-6-901 |
| | 87-6-903 |
| 87-1-102(7) | 87-6-203 |
| | 87-6-204 |
| | 87-6-301 |
| | 87-6-401 |
| | 87-6-413 |
| | 87-6-902 |
| | 87-6-903 |
| 87-1-102(8) | 87-6-916 |
| 87-1-102(9) | 87-6-917 |

| | |
|---|---|
| 87-1-102(10) | 87-6-105 |
| 87-1-102(11) | 87-6-923 |
| 87-1-102(12) | 87-6-101 |
| 87-1-108(1) | 87-6-919 |
| 87-1-108(2) | 87-6-919 |
| | 87-6-312 |
| 87-1-109 | 87-6-103 |
| 87-1-110 | 87-6-104 |
| 87-1-111 | 87-6-906 |
| | 87-6-202 |
| | 87-6-203 |
| | 87-6-401 |
| | 87-6-402 |
| | 87-6-403 |
| | 87-6-404 |
| | 87-6-405 |
| | 87-6-413 |
| | 87-6-501 |
| | 87-6-601 |
| | 87-6-602 |
| | 87-6-713 |
| | 87-6-718 |
| | 87-6-801 |
| 87-1-112 | 87-6-905 |
| | 87-6-202 |
| | 87-6-203 |
| | 87-6-301 |
| | 87-6-401 |
| | 87-6-402 |
| | 87-6-403 |
| | 87-6-404 |
| | 87-6-405 |
| | 87-6-413 |
| | 87-6-501 |
| | 87-6-601 |
| | 87-6-602 |
| | 87-6-713 |
| | 87-6-718 |
| | 87-6-801 |
| | 87-6-908 |
| 87-1-113 | 87-6-914 |
| 87-1-114 | 87-6-907 |
| 87-1-115 | 87-6-202 |
| | 87-6-301 |
| | 87-6-401 |
| | 87-6-402 |
| | 87-6-403 |
| | 87-6-404 |
| | 87-6-405 |
| | 87-6-413 |
| 87-1-121 | 87-6-915 |

| | |
|---|---|
| 87-1-125 | 87-6-201 |
| 87-1-208 | 87-6-218 |
| 87-1-231 | 87-6-701 |
| 87-1-803(4) | 87-6-306 |
| | 87-6-310 |
| | 87-6-311 |
| 87-1-804(3) | 87-6-313 |
| 87-2-101 | 87-6-101 |
| 87-2-103 | 87-6-301 |
| 87-2-104(1) and (2) | 87-6-304 |
| 87-2-106(1), in part | 87-6-302 |
| 87-2-106(6) | 87-6-302 |
| 87-2-106(8) | 87-6-303 |
| 87-2-106(9) | 87-6-303 |
| 87-2-106(10) | 87-6-302 |
| 87-2-109 | 87-6-304 |
| 87-2-110 | 87-6-304 |
| 87-2-112 | 87-6-920 |
| 87-2-114 | 87-6-305 |
| 87-2-120 | 87-6-501 |
| 87-2-201 | 87-6-302 |
| 87-2-203 | 87-6-302 |
| 87-2-411, in part | 87-6-301 |
| 87-2-509 | 87-6-411 |
| 87-2-604 | 87-6-601 |
| 87-2-804 | 87-6-921 |
| 87-3-101(1) | 87-6-405 |
| 87-3-101(2) | 87-6-403 |
| 87-3-101(3) | 87-6-401 |
| 87-3-102(1), in part | 87-6-205 |
| 87-3-103 | 87-6-413 |
| 87-3-104 | 87-6-204 |
| 87-3-107 | 87-6-601 |
| 87-3-108 | 87-6-401 |
| 87-3-109 | 87-6-217 |
| 87-3-111 | 87-6-202 |
| 87-3-112 | 87-6-501 |
| 87-3-116 | 87-6-702 |
| 87-3-117 | 87-6-202 |
| | 87-6-206 |
| 87-3-118 | 87-6-206 |
| 87-3-121(1) | 87-6-214 |
| 87-3-123 | 87-6-401 |
| 87-3-124 | 87-6-404 |
| 87-3-125 | 87-6-405 |
| 87-3-126(1), (2), and (3) | 87-6-207 |
| 87-3-130(1) | 87-6-106 |
| 87-3-130 (2), (3), (4), and (5) | 87-6-216 |
| 87-3-130(6) | 87-6-101 |
| 87-3-134 | 87-6-401 |
| 87-3-135 | 87-6-401 |

| | |
|---|---|
| | 87-6-501 |
| 87-3-141 | 87-6-215 |
| 87-3-142 | 87-6-215 |
| 87-3-143 | 87-6-215 |
| 87-3-144 | 87-6-215 |
| 87-3-204(1), (2), and (5) | 87-6-501 |
| 87-3-205 | 87-6-501 |
| 87-3-206 | 87-6-501 |
| 87-3-207 | 87-6-219 |
| 87-3-209 | 87-6-219 |
| 87-3-221(2), in part | 87-6-219 |
| 87-3-222(2), in part | 87-6-219 |
| 87-3-301 | 87-6-401 |
| 87-3-302 | 87-6-414 |
| 87-3-304 | 87-6-415 |
| 87-3-305 | 87-6-402 |
| 87-3-306 | 87-6-406 |
| 87-3-307 | 87-6-214 |
| 87-3-401 | 87-6-401 |
| 87-3-402 | 87-6-204 |
| 87-3-403, in part | 87-6-410 |
| 87-3-404 | 87-6-412 |
| 87-3-405 | 87-6-412 |
| 87-3-501 | 87-6-602 |
| 87-3-503 | 87-6-601 |
| 87-3-504 | 87-6-601 |
| 87-3-505 | Repealed |
| 87-3-506 | 87-6-603 |
| 87-3-507 | 87-6-601 |
| 87-4-201(1) | 87-6-101 |
| 87-4-201(2), (3), (4), and (5) | 87-6-703 |
| 87-4-201(5) | 87-6-703 |
| 87-4-301 | 87-6-101 |
| 87-4-302 | 87-6-704 |
| 87-4-303 | 87-6-704 |
| 87-4-406 | 87-6-101 |
| 87-4-427(4) | 87-6-705 |
| 87-4-504 | 87-6-706 |
| 87-4-525 | 87-6-706 |
| 87-4-526(1) | 87-6-706 |
| 87-4-601(1) and (2) | 87-6-707 |
| 87-4-601(4) | 87-6-707 |
| 87-4-608 | 87-6-714 |
| 87-4-609(2) | 87-6-713 |
| 87-4-701(3), in part | 87-6-101 |
| 87-4-801 | 87-6-101 |
| 87-4-803(1), in part | 87-6-715 |
| 87-4-804(1) | 87-6-715 |
| 87-4-903 | 87-6-716 |
| 87-4-915(1) | 87-6-101 |
| 87-4-915(2), in part | 87-6-220 |

| | |
|---|---|
| 87-4-1001 | 87-6-101 |
| 87-4-1002 | 87-6-717 |
| 87-4-1014 | 87-6-718 |
| 87-5-201 | 87-6-801 |
| 87-5-202 | 87-6-101 |
| 87-5-203 through 87-5-210 | 87-6-801 |

## Part 1
## General Provisions

### 87-6-101. Definitions.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 1, Ch. 317, L. 2023. Amendment effective May 1, 2023.

*2021 Amendments — Composite Section:* Chapter 211 inserted definition of wildlife sanctuary; in definition of zoo substituted current definition for former definition that read: "“Zoo” means any zoological garden chartered as a nonprofit corporation by the state or any facility participating in the American zoo and aquarium association accreditation program for the purpose of exhibiting wild animals for public viewing"; and made minor changes in style. Amendment effective October 1, 2021.

Chapter 507 in definition of wild buffalo or bison substituted current language for "“Wild buffalo” means buffalo or bison that have not been reduced to captivity"; and made minor changes in style. Amendment effective May 14, 2021.

*2019 Amendment:* Chapter 103 in definition of field trial substituted "has the meaning provided in 87-3-601" for "means an examination to determine the ability of dogs to point, flush, or retrieve game birds". Amendment effective April 1, 2019.

*2015 Amendments — Composite Section:* Chapter 105 in definition of fishing in two places, in definition of hunt in three places, and in definition of trap in two places inserted references to harvesting; in definition of hunt in first sentence near beginning and in middle inserted reference to taking wildlife; and made minor changes in style. Amendment effective October 1, 2015.

Chapter 149 inserted definition of site of the kill; and made minor changes in style. Amendment effective July 1, 2015.

### 87-6-104. Fish and game code not to supersede criminal code — statute of limitations.

**Case Notes**

*Exclusivity of Title 87 as Remedy for Fish and Game Violations:* Section 87-1-102(1) (1993) provided in part that a "person who purposely or knowingly violates any provision of this title, any other state law pertaining to fish and game, or the orders or rules of the commission or department is guilty of a misdemeanor, except if a felony is expressly provided by law, and shall be fined not less than $50 or more than $500, imprisoned in the county jail for not more than 6 months, or both, unless a different punishment is expressly provided by law for the violation". This provision limits penalties for fish and game violations to those provided in this title and precludes the charging of appellant with felony criminal mischief under Title 45. The portion of St. v. Fertterer, 255 M 73, 841 P2d 467 (1992), holding that this title does not provide the exclusive remedy for fish and game violations and allowing defendant to be charged with felony criminal mischief under Title 45, is manifestly wrong and is expressly overruled. St. v. Gatts, 279 M 42, 928 P2d 114, 53 St. Rep. 1042 (1996). (See 1997 enactment of this section.)

### 87-6-106. Lawful taking to protect livestock or person — findings.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 2, Ch. 670, L. 2023. Amendment effective October 1, 2023.

*2021 Amendment:* Chapter 485 in (1) at beginning inserted first three sentences concerning legislative findings, in fourth sentence at beginning inserted "Therefore" and near middle inserted "pursuant to Montana law", and at end deleted "However, for purposes of protecting livestock, a person may not kill or attempt to kill a grizzly bear unless the grizzly bear is in the act of attacking or killing livestock"; inserted (4) concerning an absolute defense against being charged with a crime for taking a grizzly bear under Montana law; and made minor changes in style. Amendment effective May 12, 2021.

*Applicability:* Section 3, Ch. 485, L. 2021, provided: "[This act] applies to actions occurring on or after [the effective date of this act]." Effective May 12, 2021.

**Administrative Rules**

ARM 12.9.1404 through 12.9.1406 Grizzly bear management.

**Case Notes**

*Claim of Defense of Person Invalid After Seventy-Two Hours:* The District Court did not err in refusing to submit to the jury the issue of whether defendant shot a bobcat in defense of another person when defendant failed to notify the Department within 72 hours, as required by 87-3-130 (now repealed, but see 87-6-106). St. v. Gibbs, 244 M 251, 797 P2d 928, 47 St. Rep. 1584 (1990).

**87-6-107. Unlawful harassment of game animals and game birds with vehicle or device.**

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 2, Ch. 317, L. 2023. Amendment effective May 1, 2023.

*Effective Date:* Section 32(1), Ch. 552, L. 2021, provided that this section is effective May 15, 2021.

## Part 2

## General Hunting, Fishing, and Trapping Offenses — Related Offenses

**Part Case Notes**

*No Error in Suspending Hunting and Fishing Privileges for Outfitting Without License When Suspension Also Assessed for Fish and Game Violations:* Ruiz was convicted of outfitting without a license and for several fish and game violations. The sentencing court suspended Ruiz's hunting and fishing privileges for both violations, designating the suspension periods to run concurrently. Ruiz appealed on grounds that it was error to suspend privileges for outfitting without a license. The Supreme Court agreed that 37-47-344 (now repealed) does not allow for the suspension of privileges for outfitting violations. However, 87-1-102 (now repealed) allows suspension for fish and game violations. The practical effect of the concurrent sentences was suspension in any event, and the District Court did not abuse its lawful discretion in suspending hunting and fishing privileges for Ruiz's violations. St. v. Ruiz, 2005 MT 117, 327 M 109, 112 P3d 1001 (2005).

*Ten-Year Suspension of Accompaniment and Nongame Hunting Privileges Affirmed:* Ruiz was convicted on numerous counts related to hunting, fishing, and outfitting. The District Court suspended Ruiz's privileges to accompany others and partake in nongame hunting for 10 years. Ruiz appealed on grounds that the 10-year suspension of privileges had little connection to and were not statutorily authorized for the underlying charges. The Supreme Court disagreed. Under 87-1-102 (now repealed), a long suspension period is authorized when warranted, and 46-18-202 also allows imposition of sentencing conditions that are reasonably related to the rehabilitation of the offender and the protection of the victim and society. The sentencing court was influenced by the fact that Ruiz attended college and majored in forestry, resource conservation, and wildlife biology and yet deliberately disregarded the hunting laws and regulations, in which he was well-versed, for money and personal benefit. In order to protect wildlife and slow down Ruiz's behavior, the significant restrictions of Ruiz's ability to engage in hunting were warranted. The 10-year suspension of privileges was legal and was affirmed. St. v. Ruiz, 2005 MT 117, 327 M 109, 112 P3d 1001 (2005).

*Appeal to District Court Allowed Only After Trial in Lower Court, Not After Forfeiture of Bond — Exclusive Statutory Remedy for Appeals From Courts of Limited Jurisdiction:* Kempin was charged in Justice's Court with seven fish and game violations but failed to appear for trial, so the appearance bonds that Kempin had posted were forfeited and Kempin's hunting, fishing, and trapping privileges were suspended for 10 years. Kempin appealed to the District Court within 10 days of the Justice's Court judgment, but the appeal was dismissed for lack of jurisdiction and because Kempin had no statutory right to appeal the forfeitures as a matter of law, so Kempin appealed to the Supreme Court. Under Art. VII, sec. 4, Mont. Const., District Courts must hear appeals from inferior courts as trials de novo unless otherwise provided by law, and appeal of a criminal conviction from a court of limited jurisdiction is governed exclusively by 46-17-311, which provides three circumstances under which a criminal defendant may appeal to District Court for a trial de novo: (1) when a defendant pleads guilty or nolo contendere but preserves legal issues raised by pretrial motion for appeal; (2) when a defendant files written notice of intention to appeal within 10 days after a judgment is rendered following a trial; and (3) when a defendant appeals revocation of a suspended sentence. Here, Kempin claimed that denial of a District Court trial by jury following forfeiture in Justice's Court violated his due process rights. However, Kempin raised no appealable pretrial issues, nor was the case an appeal of a suspended sentence, so the first and third circumstances did not apply. Kempin did appeal the judgment within 10 days, but there was no trial, so Kempin was not constitutionally entitled to a trial de novo when there had been no trial initially, nor is 46-17-311 unconstitutionally vague for not explicitly proscribing an appeal following a forfeiture. The Supreme Court agreed with the District Court's explanation in declining jurisdiction—that if a defendant was automatically entitled to a trial de novo on appeal without first having a trial in Justice's Court, a defendant could avoid Justice's Court altogether by not appearing and forfeiting the Justice's Court bonds and then pursuing a trial in District Court, which would render the Justice's Court system meaningless. Kempin's other due process arguments were also not compelling because Kempin waived his trial rights by failing to appear in Justice's Court to assert any constitutional rights and in light of his stated intention to forfeit the bonds and the advance notice of the suspension of the hunting, fishing, and trapping privileges. Absent any statutory basis for an appeal, dismissal of the appeal by the District Court was affirmed. St. v. Kempin, 2001 MT 313, 308 M 17, 38 P3d 859 (2001). See also St. v. Feight, 2001 MT 205, 306 M 312, 33 P3d 623 (2001), and St. v. Schulke, 2005 MT 77, 326 M 390, 109 P3d 744 (2005).

*Exclusivity of Title 87 as Remedy for Fish and Game Violations:*

Section 87-1-102(1) (1993) (now repealed) provided in part that a "person who purposely or knowingly violates any provision of this title, any other state law pertaining to fish and game, or the orders or rules of the commission or department is guilty of a misdemeanor, except if a felony is expressly provided by law, and shall be fined not less than $50 or more than $500, imprisoned in the county jail for not more than 6 months, or both, unless a different punishment is expressly provided by law for the violation". This provision limits penalties for fish and game violations to those provided in this title and precludes the charging of appellant with felony criminal mischief under Title 45. The portion of St. v. Fertterer, 255 M 73, 841 P2d 467 (1992), holding that this title does not provide the exclusive remedy for fish and game violations and allowing defendant to be charged with felony criminal mischief under Title 45, is manifestly wrong and is expressly overruled. St. v. Gatts, 279 M 42, 928 P2d 114, 53 St. Rep. 1042 (1996). (See 1997 enactment of 87-1-110 (now repealed, but see 87-6-104) and 1999 amendment.)

Defendants Richard and David Fertterer were convicted of felony criminal mischief for illegally killing game. They contended on appeal that because of the differences in misdemeanor penalties under Title 87 and felony penalties under Title 45, it is manifestly unjust for them to be convicted under 45-6-101 and is contrary to the intent of the Legislature. Citing the language of 87-1-102 (now repealed), the Supreme Court held that the Legislature did not intend Title 87 to constitute the exclusive penalties for fish and game violations because the penalties under 45-6-101 constitute the "different punishment" contemplated by 87-1-102 (now repealed). St. v. Fertterer, 255 M 73, 841 P2d 467, 49 St. Rep. 846 (1992).

*Hours of Hunting Sufficiently Clear to Withstand Due Process Challenge:* After he shot a bull elk half an hour before sunrise, Johnston was arrested for hunting before the allowed time. Johnston challenged the rules of the Department of Fish, Wildlife, and Parks as being inconsistent, ambiguous, vague, and factually erroneous. The Supreme Court held that the rules establishing the time of sunrise within the hunting district where Johnston shot the elk were clear in that they precisely defined the time of sunrise on the day Johnston shot the elk, leaving no room to guess at what time a hunter could begin shooting. St. v. Johnston, 263 M 179, 867 P2d 1090, 51 St. Rep. 5 (1994).

*Jurisdiction — Hunting and Fishing:* Flathead Tribe had jurisdiction to regulate fishing upon Crow Creek Reservoir, and violation of tribal ordinance requiring permit for fishing constituted federal offense. U.S. v. Zempel, 32 St. Rep. 1130 (D.C. Mont. 1975). (Annotator's Comment: This case was not published in F. Supp.)

*Seasons on Indian Reservation:* Conviction of non-Indian for killing two bull elk on Crow Indian Reservation during season closed by state fish and game laws was not in conflict with act of Congress providing penalty for trespass to possessory rights of reservation Indians or in conflict with The Enabling Act providing that Indian lands shall remain under the absolute jurisdiction and control of Congress of United States. State ex rel. Nepstad v. Danielson, 149 M 438, 427 P2d 689 (1967), followed in U.S. v. Sanford, 547 F2d 1089 (9th Cir. 1976).

*Failure to Tag Deer:* When plaintiff lawfully killed a deer but failed to fill out the tag attached to his hunting license and attach it to the carcass, the deer was not unlawfully possessed and the Game Warden was without authority to seize and confiscate the carcass when he arrested plaintiff for failure to attach the tag. Shipman v. Todd, 131 M 365, 310 P2d 300 (1957).

**Part Attorney General's Opinions**

*Duty of Judge to Notify Defendant of Potential Forfeiture of Hunting, Fishing, and Trapping Privileges — Notification of Loss of Privileges Duty of Department:* In order to ensure that a knowing plea is entered by a defendant accused of a fish and game violation, a judge must inform the defendant of the potential forfeiture of hunting, fishing, and trapping privileges as a result of a conviction, guilty plea, or forfeiture of bond in the case of offenses for which the loss of privileges is a direct and immediate consequence of the violation. Notification of the loss of hunting, fishing, and trapping privileges is statutorily delegated to the Department of Fish, Wildlife, and Parks. 49 A.G. Op. 20 (2002).

**87-6-202. Unlawful possession, shipping, or transportation of game fish, bird, game animal, or fur-bearing animal.**

**Compiler's Comments**

*2021 Amendment:* Chapter 70 in (8) inserted definition of possess; and made minor changes in style. Amendment effective March 23, 2021.

*Applicability:* Section 3, Ch. 70, L. 2021, provided: "[This act] applies to offenses charged after [the effective date of this act]." Effective March 23, 2021.

*2019 Amendment:* Chapter 238 in (4) at beginning inserted exception clause; and made minor changes in style. Amendment effective October 1, 2019.

*2013 Amendment:* Chapter 137 inserted (2)(f) relating to salvaged animals; and made minor changes in style. Amendment effective October 1, 2013.

**Case Notes**

*Questioning at Game Check Station Not Custodial Arrest — Miranda Warning Not Required:* The defendant was stopped at a game check station with a deer he harvested. After some questioning, the defendant eventually made numerous admissions, including that he had used his daughter's tag on the animal and that he had illegally shot two additional deer. The defendant was charged with several crimes relating to illegal hunting. The defendant moved to suppress the evidence, arguing that he had not been issued a Miranda warning at the game check station. The Justice Court denied the motion, finding that the defendant was not subject to custodial interrogation and thus not required to receive Miranda warnings. The Supreme Court subsequently affirmed, holding that based on the totality of the circumstances, the roadside game inspection was not a custodial interrogation, was temporary in nature, and never exceeded the scope of a wildlife crime investigation. As such, the Supreme Court found the defendant made his admissions voluntarily. St. v. Maile, 2017 MT 154, 388 Mont. 33, 396 P.3d 1270.

*Lifetime Hunting, Fishing, and Trapping Ban Not Subject to Early Termination Statute — Statutory Interpretation Must Be Reasonable:* A lifetime hunting, fishing, and trapping prohibition under 87-6-202 is not subject to early termination under 46-18-208 because the prohibition is a separate, independent penalty and not a condition of a suspended sentence. Statutory interpretation must be reasonable and should not lead to absurd results if a reasonable interpretation would avoid it. Holding otherwise would lead to the absurd result of rendering a "lifetime" prohibition meaningless because it would end not with a person's lifetime but with the termination or expiration of a person's sentence. St. v. Harrison, 2016 MT 271, 385 Mont. 227, 383 P.3d 202.

*Supervisory Control Granted — Statute of Limitations Improperly Applied:* The plain language of 87-6-202 makes it illegal to possess illegally taken wildlife. Because the illegal conduct is possession, the crime continues as long as the offender possesses the animal. The statute of limitations begins to run when the offender no longer possesses the animal and thus has stopped violating the law. St. v. Second Judicial District Court, 2015 MT 294, 381 Mont. 250, 358 P.3d 895.

*Felony Convictions for Unlawful Possession of Game Animals Affirmed — Jury Instructions Proper:* The jury found that Norman illegally possessed two buck mule deer, one antelope, and one bull elk in 2007, one cow elk and one buck mule deer in November 2004, and one antelope and one bull elk in 2003, in violation of either 87-1-111 or 87-1-115 (now repealed, but see 87-6-906 and 87-6-907). Under each count, the jury found that the value of the animals either individually or in the aggregate exceeded $1,000. Norman argued on appeal that the District Court improperly instructed the jury by not specifically instructing on the element of value. Norman also argued that, pursuant to the first count, the animals were not part of the "same transaction" under 87-3-111 (now repealed) because they were killed on different dates. Norman also objected to a special instruction that indicated that the jury needed to find Norman guilty of only one offense under each count. The Supreme Court affirmed. The court was not "firmly convinced" that its failure to review the instructions would result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the trial or proceedings, or compromise the integrity of the judicial process. In addition, the prosecutor's grouping of the animals as part of the "same transaction," which allowed the value of the animals to be aggregated, was not improper, and Norman did not object at trial to the special instruction provided to the jury. St. v. Norman, 2010 MT 253, 358 Mont. 252, 244 P.3d 737.

*Interpretation of License Suspension Requirements:* Following Cotterell's conviction for possession of unlawfully killed game animals, the District Court suspended Cotterell's hunting, fishing, and trapping privileges for 2 years from the date of conviction. Cotterell objected on grounds that the court misinterpreted 87-1-102 (now repealed, but see 87-6-202) by concluding that it could not suspend the 2-year forfeiture with appropriate conditions and by suspending fishing privileges even though the convicted offenses were unrelated to fishing. The Supreme Court affirmed the license forfeiture. A violation of 87-1-102(2)(b) (now repealed) triggers a mandatory license forfeiture, and nothing in former subsection (2)(b) allows a sentencing court to suspend any portion of the forfeiture period. Further, the forfeiture of fishing privileges is not tied to violation of any fishing laws but was specifically tied to the offense for which Cotterell was convicted, and nothing in former subsection (2)(b) allows a sentencing court to sever fishing privileges from hunting and trapping privileges. St. v. Cotterell, 2008 MT 409, 347 M 231, 198 P3d 254 (2008).

*Sufficient Corroborating Evidence to Testimony of Legally Accountable Witness:* Corroborating evidence included testimony of the wife of a witness deemed legally accountable for offense, the hunting license records produced by a game warden, the testimony by a game warden as to the opening date of hunting season in 2002, a photo of defendant with the bear carcass, and the game warden's testimony that he inspected bear parts in a freezer located in a lodge owned by defendant. This was sufficient to support an accountable witness's testimony regarding unlawful possession of an illegally killed bear. St. v. Wendler, 2008 MT 370, 346 M 467, 197 P3d 932 (2008).

*No Expectation of Privacy in Animal Cape Taken to Taxidermist:* Bowman took an elk cape to a taxidermist for mounting, but the cape was seized without a warrant when wildlife officials received a tip that Bowman had taken the elk out of season. Bowman contended that the evidence should be suppressed because the search was unlawful. On appeal, the Supreme Court noted that a determination of whether a search is lawful depends in part on whether a person has an actual expectation of privacy that society is willing to recognize as reasonable and that one factor in determining a legitimate expectation of privacy is the extent to which the person took measures to shield the property from public view. Here, any expectation of privacy that Bowman had in the cape was relinquished when, without taking any measures to preserve a claim of privacy, the cape was taken to a public business and placed in possession of a third party, even if the transfer was only temporary. St. v. Bowman, 2004 MT 119, 321 M 176, 89 P3d 986 (2004).

*Sufficient Evidence That Hunter Used Firearm to Take Elk During Archery Season — Conviction Affirmed:* Following conviction for taking a game animal out of season by using a firearm to kill an elk during archery season and for illegal possession of a game animal, Bowman appealed on grounds that there was insufficient evidence to support the verdict. The Supreme Court disagreed, finding sufficient evidence establishing that: (1) the size of entrance wounds in the elk cape were similar to the caliber of more than one weapon found and seized in Bowman's home; (2) the elk Bowman possessed died in close proximity to the time that the bullet wounds were made; and (3) given the position of the entrance and exit wounds in the elk cape, bullets likely caused damage to a major artery, vein, or muscle tissue, caused shock to the spinal cord, and could also have hit the larynx and trachea. The arrow identified by Bowman as the one used to kill the animal had plant material on the blade that was probably from the elk's stomach. Based on the evidence, a jury could have found the essential elements of the crime beyond a reasonable doubt, and the Supreme Court declined to disturb the verdict. St. v. Bowman, 2004 MT 119, 321 M 176, 89 P3d 986 (2004).

*Warrants Based on Anonymous Tip Sufficiently Corroborated by Inculpatory Information — Motion to Suppress Evidence Properly Denied:* Wildlife officials received an anonymous tip that Bowman had taken an elk out of season and seized evidence at a taxidermy shop and at Bowman's home pursuant to two warrants. Bowman moved to suppress the evidence, contending that the warrant applications did not state probable cause. The motion was denied, and on appeal, the Supreme Court affirmed. After receiving the anonymous tip, the wildlife officials obtained independent data that revealed inculpatory information corroborating the criminal conduct disclosed by the tip, which provided a substantial basis to determine that probable cause existed to issue the warrants. Bowman's motion to suppress was properly denied. St. v. Bowman, 2004 MT 119, 321 M 176, 89 P3d 986 (2004).

*Sale of Eagle Parts — Federal Violation Notwithstanding Claims of Religious Use:* Frank and William Hugs admitted active involvement in purchasing and selling eagles and eagle parts but claimed that they did so for religious purposes. Following an undercover investigation, they were convicted of a violation of the federal Bald and Golden Eagle Protection Act (BGEPA), 16 U.S.C. 668(a), which prohibits the taking of eagle parts for religious purposes unless the person has obtained the proper federal permit. The Hugses claimed that the BGEPA infringed on their constitutional guarantee of free exercise of religion and that actions of the undercover agent were so outrageous as to warrant dismissal of the prosecution. The Hugses could challenge only the facial validity of the BGEPA, not the operation of the underlying administrative scheme, because they did not possess a permit and never applied for one. On appeal, it was held that the statute and permit system, while imposing a substantial burden on the practice of religion by restricting the ability of adherents to obtain and possess eagles and eagle parts, nevertheless provided the least restrictive means of conserving eagles while permitting access to eagles and eagle parts for religious purposes. Further, the undercover agent's conduct fell short of the level of outrageousness required to invalidate a prosecution under the due process clause. Judgment was affirmed. U.S. v. Hugs, 109 F3d 1375 (9th Cir. 1997).

*Authority of Tribal Warden to Detain and Turn Nontribal Member Over to State Game Warden:* Horseman was detained by a tribal warden and turned over to a state game warden, who had requested that Horseman be detained for possessing an illegally killed game animal. Horseman argued that he had been unlawfully extradited. The Supreme Court held that Horseman, although Indian, was not a member of the tribe on whose reservation he had been detained and that under Duro v. Reina, 495 US 676 (1990), the tribal game warden had the authority to detain a nontribal member and turn the person over to state authorities. St. v. Horseman, 263 M 87, 866 P2d 1110, 50 St. Rep. 1720 (1993).

*No Treaty Hunting Rights Off Reservation:* Horseman was charged with possessing unlawfully killed game. He argued that an 1855 treaty gave him the right to hunt on traditional tribal hunting grounds located outside the reservation. The Supreme Court held that the treaty Horseman based his argument on had only been for 99 years and had expired in 1954. St. v. Horseman, 263 M 87, 866 P2d 1110, 50 St. Rep. 1720 (1993).

*Tribal Members Subject to State Hunting Laws Off Reservation:* Horseman argued that he could not be charged with possession of unlawfully killed game because, as a tribal member, he was not subject to state game laws. The Supreme Court held that the game had been killed off the reservation and that the state may assume jurisdiction in disputes concerning Indians that arise outside the reservation. St. v. Horseman, 263 M 87, 866 P2d 1110, 50 St. Rep. 1720 (1993).

*Market Value of Deer Taken in Violation of Lacey Act:* The prohibition in the Lacey Act against offering guide services for the illegal taking of wildlife does not involve the "sale" of game in the traditional sense. Rather, the commodity being sold is the opportunity to illegally hunt game with the assistance of a guide. In determining the market value of illegally taken deer, the fine imposed under Montana law for illegal taking did not establish market value, nor was that value established by the value of the deer if sold in open market. Rather, the market value is the amount that hunters were willing to pay for the guide's services. U.S. v. Atkinson, 966 F2d 1270 (9th Cir. 1992).

*Trafficking as Misdemeanor by Classification:* Regardless of the statement in 87-3-111 (now repealed, but see 87-6-202), prior to 1991 amendment, that trafficking in game animals is a felony, because the jail sentence for a trafficking violation does not exceed 1 year, under classification rules provided by the Legislature prior to 1991, trafficking may not be considered a felony. St. v. Gibbs, 244 M 251, 797 P2d 928, 47 St. Rep. 1584 (1990).

*Application of Federal Lacey Act to Outfitting and Guiding — Statute of Limitations on Charges of Conspiracy:* While a prosecution under the federal Lacey Act, 16 U.S.C. 3371, et seq., which prohibits transportation or acquisition in interstate commerce of wildlife in violation of state laws, may not properly be had for the substantive acts of selling guiding services and hunting permits, a prosecution can be maintained for conspiracies to violate the Act while providing outfitting and guiding services, such as arranging for out-of-state hunters to use elk licenses and permits belonging to other hunters, knowing that any elk taken would be transported out of state. The Act applied when evidence was sufficient to establish the involvement of defendant, a hunting guide and outfitter, in a conspiracy to transport elk in interstate commerce in violation of Montana law. Further, the 5-year "catchall" statute of limitations set out in 18 U.S.C. 3282 applied to charges of conspiring to violate the Act. U.S. v. Thomas, 887 F2d 1341 (9th Cir. 1989), distinguishing U.S. v. Stenberg, 803 F2d 422 (9th Cir. 1986).

*Provision of Guiding Service Not an Offer to Sell Wildlife Prohibited by Federal Law:* The alleged provision of guiding services to an unlicensed hunter does not constitute an illegal sale or offer to sell wildlife under the federal Lacey Act (16 U.S.C. 3372, 3373). U.S. v. Stenberg, 803 F2d 422 (9th Cir. 1986).

*Felony Offense Versus Misdemeanor Offense — Jury Instruction:* Hankins was convicted of trafficking in the unlawfully obtained body parts of a protected species in violation of 87-3-111 (now repealed, but see 87-6-202). On appeal, Hankins argued that the court's jury instructions failed to distinguish between the felony and the misdemeanor offenses under 87-3-111 (now repealed, but see 87-6-202). When read together, however, the jury instructions clearly drew a distinction between the felony offense charged and the lesser included misdemeanor offense. St. v. Hankins, 209 M 365, 680 P2d 958, 41 St. Rep. 762 (1984). See also St. v. Gibbs, 244 M 251, 797 P2d 928, 47 St. Rep. 1584 (1990).

*Trafficking — Jury Instruction:* It is not reversible error to give a jury instruction defining "trafficking" that is taken directly from 87-3-111 (now repealed, but see 87-6-202). St. v. Hankins, 209 M 365, 680 P2d 958, 41 St. Rep. 762 (1984).

## **87-6-204. Hunting or fishing during closed season.**

### **Case Notes**

*No Expectation of Privacy in Animal Cape Taken to Taxidermist:* Bowman took an elk cape to a taxidermist for mounting, but the cape was seized without a warrant when wildlife officials received a tip that Bowman had taken the elk out of season. Bowman contended that the evidence should be suppressed because the search was unlawful. On appeal, the Supreme Court noted that a determination of whether a search is lawful depends in part on whether a person has an actual expectation of privacy that society is willing to recognize as reasonable and that one factor in determining a legitimate expectation of privacy is the extent to which the person took measures to shield the property from public view. Here, any expectation of privacy that Bowman had in the cape was relinquished when, without taking any measures to preserve a claim of privacy, the cape was taken to a public business and placed in possession of a third party, even if the transfer was only temporary. St. v. Bowman, 2004 MT 119, 321 M 176, 89 P3d 986 (2004).

*Sufficient Evidence That Hunter Used Firearm to Take Elk During Archery Season — Conviction Affirmed:* Following conviction for taking a game animal out of season by using a firearm to kill an elk during archery season and for illegal possession of a game animal, Bowman appealed on grounds that there was insufficient evidence to support the verdict. The Supreme Court disagreed, finding sufficient evidence establishing that: (1) the size of entrance wounds in the elk cape were similar to the caliber of more than one weapon found and seized in Bowman's home; (2) the elk Bowman possessed died in close proximity to the time that the bullet wounds were made; and (3) given the position of the entrance and exit wounds in the elk cape, bullets likely caused damage to a major artery, vein, or muscle tissue, caused shock to the spinal cord, and could also have hit the larynx and trachea. The arrow identified by Bowman as the one used to kill the animal had plant material on the blade that was probably from the elk's stomach. Based on the evidence, a jury could have found the essential elements of the crime beyond a reasonable doubt, and the Supreme Court declined to disturb the verdict. St. v. Bowman, 2004 MT 119, 321 M 176, 89 P3d 986 (2004).

*Warrants Based on Anonymous Tip Sufficiently Corroborated by Inculpatory Information — Motion to Suppress Evidence Properly Denied:* Wildlife officials received an anonymous tip that Bowman had taken an elk out of season and seized evidence at a taxidermy shop and at Bowman's home pursuant to two warrants. Bowman moved to suppress the evidence, contending that the warrant applications did not state probable cause. The motion was denied, and on appeal, the Supreme Court affirmed. After receiving the anonymous tip, the wildlife officials obtained independent data that revealed inculpatory information corroborating the criminal conduct disclosed by the tip, which provided a substantial basis to determine that probable cause existed to issue the warrants. Bowman's motion to suppress was properly denied. St. v. Bowman, 2004 MT 119, 321 M 176, 89 P3d 986 (2004).

*Road Hunter Pleading Ignorance:* The defendant argued that the state did not prove that he knew road hunting was illegal or that he knew it was not hunting season. The Supreme Court ruled that ignorance of the law is no excuse. St. v. Lynn, 243 M 430, 795 P2d 429, 47 St. Rep. 1288 (1990).

*Indians Hunting on Open and Unclaimed Land:* Members of the Confederated Salish and Kootenai Tribes have a right to hunt free from the regulation of Montana game laws on "open and unclaimed lands" by virtue of Article II of the Treaty of Hell Gate and this includes National Forest Service land. St. v. Stasso, 172 M 242, 563 P2d 562 (1977).

*Regulation Subject to Constitutional Guaranties:* On appeal from a conviction of killing an elk out of season, defendant's defense was predicated upon the constitutional guaranties under sec. 3, 13, and 29, Art. III, 1889 Mont. Const. (now sec. 3 and 12, 1972 Mont. Const.), of the right to enjoy and defend one's property; held, under the facts presented, that legal justification may always be interposed as a defense by a person charged with killing a wild animal contrary to law, and that the general law on the right to use force, 49-1-103, must be construed in pari materia with 87-3-104 (now repealed, but see 87-6-204) when found inoperative, otherwise 87-3-104 (now repealed, but see 87-6-204) would be unconstitutional as denying an inalienable right. Reversed and remanded for a new trial. St. v. Rathbone, 110 M 225, 100 P2d 86 (1940).

*Commission Empowered to Lengthen Hunting Season:* A temporary order restraining the State Fish and Game Commission (now Fish, Wildlife, and Parks Commission) from putting into effect its order lengthening the hunting season on elk in a certain locality, thus modifying the law on fixing of seasons, was improper since under section 26-104, R.C.M. 1947, declaring prior to amendment that the statutes governing "such subjects" should continue in force and effect except as altered or modified by the rules and regulations of the Commission, the Legislature so empowered the Commission, amounting to modification of existing statutes. State ex rel. Fish & Game Comm'n v. District Court, 107 M 289, 84 P2d 798 (1938).

## 87-6-205. Waste of game animal, game bird, or game fish.

### Compiler's Comments

*2021 Amendment:* Chapter 496 in (2)(b) inserted final sentence clarifying what is considered suitable food for migratory birds; and inserted (8) providing that regulations for game birds may not be more restrictive than comparable federal regulations. Amendment effective October 1, 2021.

*2011 Code Commissioner Correction:* In (4) the Code Commissioner substituted "87-3-131" for "87-3-110". Section 87-3-110 was repealed by Ch. 113, L. 2011, and 87-3-110(4) was enacted by Ch. 258, L. 2011. The Code Commissioner has codified 87-3-110(4) from Ch. 258 as 87-3-131.

### Case Notes

*Waste of Game Animal — Photos of Moldy Carcass Held Probative — No Substantial Change in Condition:* Wilmer was charged with waste of a game animal under 87-3-102 (now repealed, but see 87-6-205) and objected to introduction of a photo of the carcass at trial because 3 days had passed between when the carcass was confiscated and when the photo was taken and because there may have been bite marks on it. The Supreme Court noted that roughly 70 days had passed between when the deer was shot and when it was confiscated and that the game warden insisted that the photo showed the condition of the carcass when it was confiscated. The Supreme Court held that the additional 3 days could not have altered the carcass significantly, that the lack of odor of the meat in the photographs went to the weight of the evidence and not its admissibility, that the photos were not unduly prejudicial, and that the District Court properly admitted the photographs. St. v. Wilmer, 2011 MT 78, 360 Mont. 101, 252 P.3d 178.

*Crime of Waste of Game as Absolute Liability Offense:* Defendant contended that because the offense of wasting game meat is punishable by a fine in excess of $500, the offense may not be classed as an absolute liability offense. However, the second element of 45-2-104, wherein a clear legislative purpose validates the imposition of absolute liability, was indicated by the obvious statutory intent to preserve game resources for the benefit of the public and by the recognition of the state's duty to protect public wildlife resources. The trial court did not err in failing to instruct the jury on criminal intent. St. v. Huebner, 252 M 184, 827 P2d 1260, 49 St. Rep. 210 (1992).

*Forfeiture of Game Properly Applied in Case of Waste of Mountain Goat:* Defendant was convicted of wasting game contrary to the provisions of 87-3-102 (now repealed, but see 87-6-205). He contended that it was improper to impose a penalty of forfeiture of the head, cape, and horns of the mountain goat he killed legally. Having failed to comply with the requirement that he not waste the meat, defendant was subject to the game warden's authority under 87-1-506 to seize any parts of the animal. Imposition of forfeiture was not contrary to law. St. v. Huebner, 252 M 184, 827 P2d 1260, 49 St. Rep. 210 (1992).

*No Arbitrary Exceptions in Game Waste Statute:* Unlike the spotlighting statute considered in St. v. Austin, 217 M 265, 704 P2d 55 (1985), 87-3-102 (now repealed, but see 87-6-205) does not contain exceptions that would permit arbitrary and irrational enforcement sufficient to render the statute unconstitutional. St. v. Huebner, 252 M 184, 827 P2d 1260, 49 St. Rep. 210 (1992).

*Statute Not Vague or Overbroad:* Defendant contended that 87-3-102 (now repealed, but see 87-6-205) was unconstitutionally vague because it did not clearly set forth the prohibited conduct. The Supreme Court disagreed, holding that the statute did not fail to give a person of ordinary intelligence a reasonable opportunity to know what was prohibited so that person could act accordingly. Defendant's contention that 87-3-102 (now repealed, but see 87-6-205) was overbroad, in that it could be construed to prohibit otherwise legal activities of a hunter or taxidermist who removed the head, horns, and cape at any time, was also disaffirmed. The court noted that it is not the removal of the specified body parts that is illegal, but rather the removal of only those parts without using the remainder of the animal. St. v. Huebner, 252 M 184, 827 P2d 1260, 49 St. Rep. 210 (1992).

## 87-6-206. Unlawful sale of game fish, bird, game animal, or fur-bearing animal.

### Case Notes

*Admission of Evidence of Prior Game Farm (now Alternative Livestock Ranch) Acts Proper:* The District Court did not err in admitting evidence of prior game farm (now alternative livestock ranch) acts and in limiting references to those acts and not to any subsequent convictions since the earlier case was still pending on appeal because: (1) the prior acts were sufficiently similar, although not identical, to those for which defendant was presently charged; (2) the acts, although occurring 3 years prior, were not so remote as to be inadmissible because of the similarity of the acts; and (3) the state's purpose in introducing the evidence was to establish absence of mistake or accident regarding defendant's possession of unlawfully taken wildlife. St. v. Brogan, 272 M 156, 900 P2d 284, 52 St. Rep. 636 (1995). See also St. v. Matt, 249 M 136, 814 P2d 52 (1991), and St. v. Romero, 261 M 221, 861 P2d 929 (1993).

*Statute Not Unconstitutionally Vague:* Brogan challenged the constitutionality of 87-3-118 (now repealed) as being void for vagueness because it does not sufficiently define "constructive possession" and thus does not give a reasonable person notice of what conduct is proscribed and because no specific intent to possess unlawfully taken wildlife is required. Applying St. v. Crisp, 249 M 199, 814 P2d 981 (1991), the Supreme Court held that by incorporating the intent element of purposely and knowingly, which are statutorily defined terms, into the definition of the offense of possession of unlawfully taken wildlife, the Legislature has given fair warning of the mental state that is an element of the offense. Further, although the term "constructive possession" is not defined by statute, it has been defined in St. v. Meader, 184 M 32, 601 P2d 386 (1979), to mean that the goods are not in actual, physical possession but that the person charged with possession has dominion and control over the goods. Thus, 87-3-118 (now repealed) is not unconstitutionally vague by virtue of the mental state element of the offense or the absence of a statutory definition of "constructive possession". (See 1995 amendment.) St. v. Brogan, 272 M 156, 900 P2d 284, 52 St. Rep. 636 (1995). Meader was followed, as to constructive possession of a firearm, in St. v. Caekaert, 1999 MT 147, 295 M 42, 983 P2d 332, 56 St. Rep. 583 (1999).

## 87-6-207. Unlawful use of boat.

### Compiler's Comments

*2021 Amendment:* Chapter 552 in (1) substituted current text for former text that read: "A person may not use a powerboat, sailboat, or any boat under sail or any floating device towed by a powerboat, sailboat, or any boat under sail for the purpose of killing, capturing, taking, pursuing, concentrating, driving, or stirring up any upland game bird, game animal, or fur-bearing animal." Amendment effective May 15, 2021.

*2013 Amendment:* Chapter 355 deleted former (1) and (2) (see 2013 Session Law for former text); in (2)(b), (2)(c), and (2)(d) substituted "unlawful use of a boat" for "unlawful use of aircraft or boat"; and made minor changes in style. Amendment effective October 1, 2013.

## 87-6-208. Unlawful use of aircraft.

### Compiler's Comments

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 3, Ch. 317, L. 2023. Amendment effective May 1, 2023.

*Effective Date:* This section is effective October 1, 2013.

### 87-6-214. Unlawful contest or prize.

**Compiler's Comments**

*2021 Amendment:* Chapter 286 in (1)(a) near beginning substituted "subsections (1)(b) through (1)(d)" for "subsections (1)(b) and (1)(c)"; and inserted (1)(d) regarding reimbursement for receipts of costs incurred related to the hunting or trapping of wolves. Amendment effective October 1, 2021.

### 87-6-215. Harassment.

**Compiler's Comments**

*2015 Amendment:* Chapter 408 in (2) and (3) after "convicted of" inserted "or who forfeits bond or bail after being charged with"; in (2) inserted second sentence regarding forfeiture of licenses or privileges; in (3) after "violation" inserted "of this section within 5 years", after "be fined not" inserted "less than $500 or", substituted "6 months" for "1 year", and inserted last sentence regarding forfeiture of licenses and privileges; and made minor changes in style. Amendment effective October 1, 2015.

*Saving Clause:* Section 4, Ch. 408, L. 2015, was a saving clause.

**Case Notes**

*Defendant Without Standing to Challenge Constitutionality of Hunter Harassment Law on Basis of Vagueness:* Lilburn alleged that the hunter harassment law is unconstitutionally vague because it leaves several key terms undefined so that there is no statutory guidance to law enforcement officers or the public as to what type of conduct is prohibited. The Supreme Court held that Lilburn's conduct in standing between a hunter and a bison clearly was conduct that disturbed the hunter in the taking of game and that since Lilburn's conduct is clearly prohibited, he did not have standing to raise a facial vagueness challenge. St. v. Lilburn, 265 M 258, 875 P2d 1036, 51 St. Rep. 507 (1994), followed in St. v. Stubblefield, 283 M 292, 940 P2d 444, 54 St. Rep. 605 (1997).

*Hunter Harassment Law Not Violation of Free Speech Rights or Overbroad:* Lilburn challenged the hunter harassment law on the basis that its prohibition of "dissuading" a hunter from taking a wild animal is content-based and designed to prevent the message contained in the dissuading language. The Supreme Court held that the Legislature did not use the term "dissuade" in isolation and that, reading the statute as a whole, it is clear that the conduct proscribed is the "disturbance" of a hunter engaged in a lawful activity. The Supreme Court also held that the law is not overbroad and that, to the extent that the statute might reach constitutionally protected expression, whatever overbreadth might exist should be cured on a case-by-case analysis of the fact situations. St. v. Lilburn, 265 M 258, 875 P2d 1036, 51 St. Rep. 507 (1994).

### 87-6-216. Unlawful supplemental feeding — exemption.

**Compiler's Comments**

*2017 Amendment:* Chapter 417 in (1) at beginning inserted exception clause; in (1), (1)(a), (1)(b), (1)(c), and (3)(e) inserted "or wild turkeys"; inserted (2) allowing provision of supplemental feed to wild turkeys in certain circumstances; and made minor changes in style. Amendment effective October 1, 2017.

### 87-6-218. Checking station offenses.

**Compiler's Comments**

*2019 Amendment:* Chapter 238 in (1) near middle of first sentence inserted "or statement of possession pursuant to 87-3-310". Amendment effective October 1, 2019.

### 87-6-221. Imported urine — use or sale prohibited.

**Compiler's Comments**

*Effective Date:* Section 3, Ch. 423, L. 2017, provided: "[This act] is effective January 1, 2018."

**Administrative Rules**

ARM 12.6.1015 through 12.6.1017 Hunting and trapping — use of imported deer or elk urine.

### 87-6-222. Fish and wildlife location data — penalties.

**Compiler's Comments**

*Effective Date:* Section 3, Ch. 259, L. 2019, provided: "[This act] is effective July 1, 2019."

### 87-6-240. Unlawful recovery and possession of horns and skulls from mountain sheep that died of natural causes.

**Compiler's Comments**

*Effective Date:* Section 4, Ch. 244, L. 2019, provided: "[This act] is effective on passage and approval." Approved May 2, 2019.

*Erroneous Codification Instruction:* Section 3, Ch. 244, L. 2019, provided that this section was to be codified as an integral part of Title 87, chapter 6, part 1. The Code Commissioner has codified this section in Title 87, chapter 6, part 2, to more closely reflect the subject matter.

## Part 3

## Licensing, Tags, and Permits

### 87-6-301. Hunting, fishing, or trapping without license.

**Compiler's Comments**

*2015 Amendment:* Chapter 449 in (1)(e) at end deleted "if the person is 16 years of age or older"; and in (2) in middle of first sentence substituted "87-2-803" for "87-2-803(4)". Amendment effective March 1, 2016.

**Case Notes**

*Three-Year Statute of Limitations Reasonable for Prosecution of Misdemeanor Fish and Game Violations — Equal Protection and Due Process Not Violated:* Defendant was charged with five misdemeanor fish and game and outfitter violations that occurred nearly 2 years earlier. Although misdemeanor violations must generally be charged within 1 year, 45-1-205(5) and (6) allow charges for misdemeanor fish and game crimes to be brought within 3 years of violation. Defendant contended that the extended statute of limitations for charging fish and game crimes violated equal protection and due process guarantees. The District Court reviewed the legislative history of 45-1-205(5) and (6) and concluded that the extended statute of limitations served a reasonable relation to the proper legislative purpose of protecting wildlife and that in order to effectively enforce fish and games laws, additional time to discover and investigate fish and game violations was warranted. The Supreme Court agreed. A separate class of misdemeanors for fish and game violations did not violate equal protection because all persons who commit such crimes are in a similarly situated class and subject to the same treatment. Further, because fish and game and outfitter violations sometimes require investigation over several hunting seasons and involve perpetrators who reside out of state, an extended statute of limitations is a reasonable exercise of the state's legitimate police power in preserving wildlife and does not violate substantive due process. St. v. Egdorf, 2003 MT 264, 317 M 436, 77 P3d 517 (2003).

*Taking Elk Without Valid License — Consent Defense Invalid:* Undercover government agents did not consent to defendant's shooting of elk without a valid Montana hunting license when they provided defendant with a false hunting license. Defendant did not know that the persons who provided him the license were government agents but did know that he was shooting elk without a valid license. Defendant's proposed consent instruction improperly propounded a theory akin to entrapment without stating the proper elements of entrapment and was correctly disallowed. U.S. v. Heuer, 916 F2d 1557 (9th Cir. 1990).

**Attorney General's Opinions**

*Game Harvesting — Game Ranch:* The Fish and Game Commission (now Fish, Wildlife, and Parks Commission) does not have the authority to regulate the hunting and killing of privately owned game through the imposition of licensing requirements on individual hunters or open and closed seasons. 36 A.G. Op. 112 (1976).

### 87-6-302. Unlawful procurement of license, permit, or tag.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 26, Ch. 507, L. 2023. Amendment effective July 1, 2023.

*2019 Amendment:* Chapter 221 in (1)(b) at beginning after "purchase" inserted "or apply for". Amendment effective March 1, 2020.

*2015 Amendment:* Chapter 116 in (1)(a) in second sentence substituted "materially" for "material"; in (3) near beginning of second sentence inserted exception clause; inserted (4) regarding penalty after conviction and each subsequent violation; and made minor changes in style. Amendment effective October 1, 2015.

*Saving Clause:* Section 3, Ch. 116, L. 2015, was a saving clause.

*Severability:* Section 4, Ch. 116, L. 2015, was a severability clause.

## 87-6-303. Nonresident license or permit offenses.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 27, Ch. 507, L. 2023. Amendment effective July 1, 2023.

## 87-6-304. License, permit, or tag offenses.

**Compiler's Comments**

*2021 Amendment:* Chapter 166 in (1) in second sentence substituted "87-2-104(3)" for "87-2-104(2)". Amendment effective April 8, 2021.

*2019 Amendment:* Chapter 351 in (1) near beginning of second sentence after "Class B-5" inserted "or Class E-2"; and made minor changes in style. Amendment effective March 1, 2020.

*2015 Amendment:* Chapter 116 in (6) near beginning of second sentence inserted exception clause; and inserted (7) regarding penalty after conviction and each subsequent violation. Amendment effective October 1, 2015.

*Saving Clause:* Section 3, Ch. 116, L. 2015, was a saving clause.

*Severability:* Section 4, Ch. 116, L. 2015, was a severability clause.

**Case Notes**

*Questioning at Game Check Station Not Custodial Arrest — Miranda Warning Not Required:* The defendant was stopped at a game check station with a deer he harvested. After some questioning, the defendant eventually made numerous admissions, including that he had used his daughter's tag on the animal and that he had illegally shot two additional deer. The defendant was charged with several crimes relating to illegal hunting. The defendant moved to suppress the evidence, arguing that he had not been issued a Miranda warning at the game check station. The Justice Court denied the motion, finding that the defendant was not subject to custodial interrogation and thus not required to receive Miranda warnings. The Supreme Court subsequently affirmed, holding that based on the totality of the circumstances, the roadside game inspection was not a custodial interrogation, was temporary in nature, and never exceeded the scope of a wildlife crime investigation. As such, the Supreme Court found the defendant made his admissions voluntarily. St. v. Maile, 2017 MT 154, 388 Mont. 33, 396 P.3d 1270.

*Game Warden May Reasonably Request Production of Hunting or Fishing License — Particularized Suspicion of Criminal Activity Inapplicable:* Initially concerned for the safety of the occupants of a seemingly unoccupied watercraft, a game warden was assured of Boyer's safety, but when Boyer told the warden that he had been fishing, the warden asked to see Boyer's fishing license. Boyer contended that the warden needed a particularized suspicion of wrongdoing to effectuate detention and the request for the license. However, under 87-2-109 (now repealed, but see 87-6-304) it is unlawful to refuse to show one's fishing license upon demand, and the warden had authority under 87-1-502 to request production of the license. In light of these provisions, the Supreme Court declined to imply a particularized suspicion into the statutes, holding that a game warden may request production of a hunting or fishing license when circumstances reasonably indicate that an individual has been engaged in those activities. St. v. Boyer, 2002 MT 33, 308 M 276, 42 P3d 771 (2002).

*Application of Federal Lacey Act to Outfitting and Guiding — Statute of Limitations on Charges of Conspiracy:* While a prosecution under the federal Lacey Act, 16 U.S.C. 3371, et seq., which prohibits transportation or acquisition in interstate commerce of wildlife in violation of state laws, may not properly be had for the substantive acts of selling guiding services and hunting permits, a prosecution can be maintained for conspiracies to violate the Act while providing outfitting and guiding services, such as arranging for out-of-state hunters to use elk licenses and permits belonging to other hunters, knowing that any elk taken would be transported out of state. The Act applied when evidence was sufficient to establish the involvement of defendant, a hunting guide and outfitter, in a conspiracy to transport elk in interstate commerce in violation of Montana law. Further, the 5-year "catchall" statute of limitations set out in 18 U.S.C. 3282 applied to charges of conspiring to violate the Act. U.S. v. Thomas, 887 F2d 1341 (9th Cir. 1989), distinguishing U.S. v. Stenberg, 803 F2d 422 (9th Cir. 1986).

*Illegal Sale of Special Season Elk Tag Not an Offer to Sell Wildlife Prohibited by Federal Law:* The alleged sale of a special season elk tag in violation of 87-2-110 (now repealed, but see 87-6-304) did not constitute an illegal sale or offer to sell wildlife under the federal Lacey Act (16 U.S.C. 3372, 3373). U.S. v. Stenberg, 803 F2d 422 (9th Cir. 1986).

## 87-6-305. Unlawful possession of hunting or fishing license or permit.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 2, Ch. 316, L. 2023. Amendment effective May 1, 2023.

## 87-6-307. Unlawful use of discounted combination sports license by youth.

**Compiler's Comments**

*Annotator's Note:* Section 87-6-307 is an amended recodification of text formerly contained in 87-2-805.

*Effective Date:* Section 42, Ch. 449, L. 2015, provided that this section is effective March 1, 2016.

# Part 4
# Hunting Offenses

## 87-6-401. Unlawful use of equipment while hunting.

**Compiler's Comments**

*2021 Amendments — Composite Section:* Chapter 232 inserted (1)(i) prohibiting use of certain muzzleloading rifles and other equipment during the special muzzleloader heritage hunting season established in 87-1-304; and made minor changes in style. Amendment effective October 1, 2021.

Chapter 552 in (1)(b) near middle substituted "hunt wildlife" for "assist in the hunting, taking, killing, or capturing of wildlife"; in (1)(c) near beginning substituted "use any device" for "take into a field or forest or have in the person's possession any device"; and in (1)(d) near beginning substituted "use" for "possess". Amendment effective May 15, 2021.

*2017 Amendment:* Chapter 66 in (3) after "provided in 87-6-901" substituted "through 87-6-903" for "and 87-6-902". Amendment effective March 1, 2017.

*2015 Amendment:* Chapter 260 in (1)(c) inserted second sentence relating to the use of devices to silence, muffle, or minimize the report of firearms; and made minor changes in style. Amendment effective April 23, 2015.

*2013 Amendments — Composite Section:* Chapter 13 in (1)(b) after "predatory animals" inserted "wolves"; and made minor changes in style. Amendment effective February 13, 2013.

Chapter 297 in (1)(b) after "predatory animals" inserted "wolves". Amendment effective April 25, 2013.

*Severability:* Section 8, Ch. 297, L. 2013, was a severability clause.

**Administrative Rules**

ARM 12.6.1010 Two-way electronic communication while hunting.

**Case Notes**

*Court Not to Imply Mental State Requirement:* The Supreme Court will not imply a mental state in a statute prohibiting spotlighting while hunting when that statute (87-3-122, now repealed) does not include a mental state. To do so would arbitrarily make some persons guilty of an offense, while excepting others committing the offense. St. v. Austin, 217 M 265, 704 P2d 55, 42 St. Rep. 1186 (1985).

*Invalid Classification:* The classification created by 87-3-122's (now repealed) exemption from its coverage of landowners, lessees, or their agents is not rationally related to the state interest involved, that is, protection of its wildlife. Section 87-3-122 (now repealed) allowed exceptions that would permit arbitrary and irrational enforcement by law enforcement officers and was a nullity. It was inadequate to serve the legislative purpose of prohibiting the use of artificial light with the intent to hunt for animals. St. v. Austin, 217 M 265, 704 P2d 55, 42 St. Rep. 1186 (1985).

*Validity of Statute Under Which Defendant Not Charged:* In ruling 87-3-122 (repealed, 1991) inadequate to serve its legislative purpose and a violation of equal protection, the Supreme Court stated that 87-3-101 (now repealed, but see 87-6-401) correctly prohibits spotlighting in connection with hunting. St. v. Austin, 217 M 265, 704 P2d 55, 42 St. Rep. 1186 (1985).

## 87-6-402. Unlawful hunting within city or town.

**Compiler's Comments**

*2021 Amendment:* Chapter 552 in (1) near beginning substituted "hunt any game animal" for "hunt any deer". Amendment effective May 15, 2021.

## 87-6-403. Unlawful hunting from public highway.

### Compiler's Comments

*2017 Amendment:* Chapter 128 in (1) after "87-2-803" inserted "and 87-6-405". Amendment effective July 1, 2017.

*2015 Amendments — Composite Section:* Chapter 408 in (2) at beginning after "convicted of" inserted "or who forfeits bond or bail after being charged with", after "forfeiture of bond or bail" substituted "shall forfeit" for "may be subject to forfeiture of", and at end substituted "for 24 months from the date of conviction or forfeiture of bond or bail unless the court imposes a longer period" for "or to use state lands, as defined in 77-1-101, for recreational purposes for a period of time set by the court"; and made minor changes in style. Amendment effective October 1, 2015.

Chapter 449 in (1) near beginning substituted "87-2-803" for "87-2-803(4)". Amendment effective March 1, 2016.

*Saving Clause:* Section 4, Ch. 408, L. 2015, was a saving clause.

### Case Notes

*Road Hunter Pleading Ignorance:* The defendant argued that the state did not prove that he knew road hunting was illegal or that he knew it was not hunting season. The Supreme Court ruled that ignorance of the law is no excuse. St. v. Lynn, 243 M 430, 795 P2d 429, 47 St. Rep. 1288 (1990).

*Shooting From Public Highway or Its Shoulder:* The defendant argued that the state had not proved that he had fired at game from a public highway. The Supreme Court stated that the elements of an offense can be proved by circumstantial evidence, including in the case before it the fact that casings of the same brand as those used by the defendant were found beside the road. St. v. Lynn, 243 M 430, 795 P2d 429, 47 St. Rep. 1288 (1990).

## 87-6-404. Unlawful use of dog while hunting.

### Compiler's Comments

*2021 Amendment — Coordination:* Section 30, Ch. 552, L. 2021, a coordination section, provided that if House Bill No. 468 and Ch. 552 were both passed and approved, then sec. 2 of House Bill No. 468, amending 87-6-404, is void, sec. 19, Ch. 552, amending 87-6-404, terminates September 30, 2021, and 87-6-404 was amended as provided in the coordination section. House Bill No. 468 was passed and approved as Ch. 359, L. 2021. Section 30, Ch. 552, inserted (3)(d) relating to black bears and dogs; inserted (4)(b) relating to black bear and dog training seasons; in (5) near middle after "hound" deleted "handler" and after "mountain lions" inserted "or black bears"; and made minor changes in style. Amendment effective October 1, 2021.

Pursuant to sec. 30, Ch. 552, the Code Commissioner has not codified the amendments made by sec. 19, Ch. 552, because of their short duration.

*2019 Amendments — Composite Section:* Chapter 103 inserted (3)(d) concerning training of bird hunting dogs; inserted (3)(e) concerning conducting field trials for bird hunting dogs; deleted former (6) that read: "(6) Any person or association organized for the protection of game may run field trials at any time upon obtaining written permission from the director"; and made minor changes in style. Amendment effective April 1, 2019.

Chapter 378 inserted (5) regarding Class D-4 hound handler license; and made minor changes in style. Amendment effective March 1, 2020.

*2015 Amendment:* Chapter 149 in (5)(a)(v) after "shall" deleted "immediately"; and in (7) in first sentence inserted "or who forfeits bond or bail after being charged with" and in last sentence after "fish" substituted "and" for "or"; and made minor changes in style. Amendment effective July 1, 2015.

*2011 Code Commissioner Correction:* In (5)(a)(ii) the Code Commissioner substituted "87-6-414" for "87-3-302" and in (5)(a)(v) substituted "87-6-411" for "87-2-509". Sections 87-2-509 and 87-3-302 were repealed by Ch. 258, L. 2011. Sections 87-6-411 and 87-6-414, enacted by Ch. 258, deal with the same subject matter as the repealed sections. The authority for the correction is contained in sec. 49, Ch. 19, L. 2011.

## 87-6-405. Unlawful use of vehicle while hunting.

### Compiler's Comments

*2021 Amendment:* Chapter 552 in (2) in beginning substituted "While hunting, a person may not" for "A person may not"; deleted former (2)(a) and (3)(c) (see 2021 Session Law for former text); inserted (2)(c) relating to motor-driven vehicles; and made minor changes in style. Amendment effective May 15, 2021.

*2017 Amendment:* Chapter 128 in (1) inserted last sentence, (1)(a), and (1)(b) regarding activities excluded from hunting; and made minor changes in style. Amendment effective July 1, 2017.

*2015 Amendments — Composite Section:* Chapter 408 substituted current (1) through 3) concerning unlawful use of vehicle for former (1) through (4) that read: "(1) Except as provided in 87-2-803(4), a person may not:

(a) hunt or attempt to hunt any game animal or game bird from any self-propelled or drawn vehicle; or

(b) use a self-propelled vehicle to intentionally concentrate, drive, rally, stir up, or harass wildlife, except predators of this state. This subsection (1)(b) does not apply to landowners and their authorized agents engaged in the immediate protection of that landowner's property.

(2) Except as provided in 87-2-803(4), a person may not, while hunting a game animal or bird:

(a) drive or attempt to drive, run or attempt to run, molest or attempt to molest, flush or attempt to flush, or harass or attempt to harass a game animal or game bird with the use or aid of a motor-driven vehicle;

(b) use a motor-driven vehicle other than on an established road or trail unless the person has reduced a big game animal to possession and cannot easily retrieve the big game animal. In that case, a motor-driven vehicle may be used to retrieve the big game animal, except in areas where more restrictive regulations apply or where the landowner has not granted permission. After the retrieval, the motor-driven vehicle must be returned to an established road or trail by the shortest possible route. For purposes of safety and allowing normal travel, a motor-driven vehicle may be parked on the roadside or directly adjacent to a road or trail.

(c) drive through any retired cropland, brush area, slough area, timber area, open prairie, or unharvested or harvested cropland, except upon an established road or trail, unless written permission has been given by the landowner and is in possession of the hunter.

(3) The restrictions in subsection (2) on motor-driven vehicle use off an established road or trail apply only to hunting on state or private land and not to hunting on federal land unless the federal agency specifically requests or approves state enforcement.

(4) A person convicted of a violation of this section shall be fined not less than $50 or more than $1,000 or be imprisoned in the county detention center for not more than 6 months, or both. In addition, the person, upon conviction or forfeiture of bond or bail, may be subject to forfeiture of any current hunting, fishing, or trapping license issued by this state and the privilege to hunt, fish, or trap in this state or to use state lands, as defined in 77-1-101, for recreational purposes for a period of time set by the court"; and made minor changes in style. Amendment effective October 1, 2015.

Chapter 449 in (1) and (2) substituted "87-2-803" for "87-2-803(4)" (amendment in (2) rendered void by Ch. 408). Amendment effective March 1, 2016.

*Saving Clause:* Section 4, Ch. 408, L. 2015, was a saving clause.

## 87-6-406. Failure to retain evidence of sex.

### Compiler's Comments

*2019 Amendment:* Chapter 272 substituted current (1)(a) for former (1) that read: "(1) A person who kills a big game animal in this state may not destroy evidence of the sex of the big game animal so as to make the determination of the sex of the big game animal uncertain"; inserted (1)(b) regarding game animal harvested using a license with which either sex may be taken; inserted (2) regarding a hunting district where the harvest is limited by the animal's antler point or horn size; inserted (3) regarding evidence of sex and species for game birds, game fish, and furbearers; and made minor changes in style. Amendment effective March 1, 2020.

## 87-6-407. Unlawful transfer of harvested game.

### Compiler's Comments

*Effective Date:* This section is effective October 1, 2019.

## 87-6-411. Game animal tagging offenses.

### Compiler's Comments

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 3, Ch. 316, L. 2023. Amendment effective May 1, 2023.

*2019 Amendment:* Chapter 238 in (3) near end inserted "transferred to another person pursuant to 87-3-310"; and made minor changes in style. Amendment effective October 1, 2019.

*2017 Amendment:* Chapter 75 in (2) after "the person shall" inserted "before the carcass is removed from or the person leaves the site of the kill"; inserted (2)(a) concerning electronically validating a license or tag; in (2)(b) after "to the animal" deleted "before the carcass is removed from or the person leaves the site of the kill" and near end inserted "that is not electronically validated"; in (3) after "proper license or tag" inserted "is electronically validated or"; in (4) at end inserted "unless the license or tag was electronically validated"; in (5) inserted "or electronically validate"; and made minor changes in style. Amendment effective March 15, 2017.

*2015 Amendment:* Chapter 149 in (1) after "tags" deleted "coupons, or markers as"; in (2) in introductory clause after "person shall" substituted current text concerning taking physical possession of game animal and attaching license or tag for "immediately cut out from the tag, coupon, or other marker the date the animal was killed and attach the tag, coupon, or other marker to the animal" and inserted "The license or tag must be"; in (2)(a) substituted "license or tag" for "tag, coupon, or other marker. The tag, coupon, or other marker must be"; deleted former (2) that read: "(2) A person who kills any game animal by authority of any license issued for the killing of the game animal may not fail or neglect to cut out the day and month of the kill or provide any other information that is required and attach the tag, coupon, or other marker provided with the license issued to the carcass of the game animal or portion of the game animal"; in (3) and (4) substituted "license or tag" for "tag, coupon, or other marker"; in (5) before "tag restricted" inserted "license or"; in (6) in first sentence inserted "or who forfeits bond or bail after being charged with" and in last sentence after "fish" substituted "and" for "or"; and made minor changes in style. Amendment effective July 1, 2015.

**Case Notes**

*Failure to Keep Tag Attached to Animal Hide — Continuous Offense:* Defendant argued that the statute of limitations on the misdemeanor offense of failing to keep a tag attached to a hide is 1 year under 45-1-205. However, the language of 87-2-509 (now repealed, but see 87-6-411) indicates that the offense continues as long as any considerable portion of the hide remains unconsumed, which in this case was interpreted to mean as long as the bear hide remained in preparation for taxidermy. St. v. Earl, 242 M 279, 790 P2d 464, 47 St. Rep. 691 (1990).

*Sufficient Evidence of Failure to Keep Tag on Bear Hide:* In the freezer of a taxidermy shop, fish and game inspectors found a frozen bear hide without a tag attached. Defendant was cited for failure to keep a tag attached to the hide but argued that the state failed to prove she was in possession of the hide at any time when it was not tagged. However, a rational jury could have found possession beyond a reasonable doubt, based on defendant's testimony that she knew where the hide was at all times and had not given it away or abandoned control over it. St. v. Earl, 242 M 279, 790 P2d 464, 47 St. Rep. 691 (1990).

*Tagging Game Killed by Another:* Under statute requiring tagging, the word "take" does not mean that one can tag animal someone else has killed, so if one person illegally killed elk, another person cannot gain ownership by tagging it and ownership of elk remains in state. State ex rel. Visser v. St. Fish & Game Comm'n, 150 M 525, 437 P2d 373 (1968).

*Seizure and Confiscation of Untagged Carcass:* In a case which arose while section 26-205, R.C.M. 1947 (subsequently repealed), was in effect, it was held that when plaintiff lawfully killed a deer but failed to fill out the tag attached to his hunting license and attach it to the carcass, the deer was not unlawfully possessed and the Game Warden was without authority to seize and confiscate the carcass when he arrested plaintiff for failure to attach the tag. Shipman v. Todd, 131 M 365, 310 P2d 300 (1957).

## 87-6-412. Turkey tagging offenses.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 4, Ch. 316, L. 2023. Amendment effective May 1, 2023.

*2021 Amendment:* Chapter 552 inserted (1)(d) relating to turkey tags or electronic validation of a license or tag; and made minor changes in style. Amendment effective May 15, 2021.

*2017 Amendment:* Chapter 75 in (1)(a) inserted "or to electronically validate the tag in accordance with rules adopted pursuant to 87-2-119"; and in (1)(b) and (1)(c) inserted references to electronic validation of tags. Amendment effective March 15, 2017.

*2015 Amendment:* Chapter 149 in (1)(a) after "to the turkey" inserted text concerning compliance with tag instructions; deleted former (2) that read: "(2) A person who takes or kills a turkey must immediately attach to the turkey's leg a valid tag in compliance with instructions on the tag"; in (2) in first sentence inserted "or who forfeits bond or bail after being charged with" and in last sentence after "fish" substituted "and" for "or"; and made minor changes in style. Amendment effective July 1, 2015.

## 87-6-413. Hunting or killing over limit.

### Case Notes

*Questioning at Game Check Station Not Custodial Arrest — Miranda Warning Not Required:* The defendant was stopped at a game check station with a deer he harvested. After some questioning, the defendant eventually made numerous admissions, including that he had used his daughter's tag on the animal and that he had illegally shot two additional deer. The defendant was charged with several crimes relating to illegal hunting. The defendant moved to suppress the evidence, arguing that he had not been issued a Miranda warning at the game check station. The Justice Court denied the motion, finding that the defendant was not subject to custodial interrogation and thus not required to receive Miranda warnings. The Supreme Court subsequently affirmed, holding that based on the totality of the circumstances, the roadside game inspection was not a custodial interrogation, was temporary in nature, and never exceeded the scope of a wildlife crime investigation. As such, the Supreme Court found the defendant made his admissions voluntarily. St. v. Maile, 2017 MT 154, 388 Mont. 33, 396 P.3d 1270.

## 87-6-414. Failure to wear hunter orange while big game hunting.

### Compiler's Comments

*2013 Amendments — Composite Section:* Chapter 13 inserted (3)(b) regarding wolves outside general season; and made minor changes in style. Amendment effective February 13, 2013.

Chapter 297 inserted (3)(b) regarding wolves outside general season; and made minor changes in style. Amendment effective April 25, 2013.

*Severability:* Section 8, Ch. 297, L. 2013, was a severability clause.

## 87-6-415. Failure to obtain landowner's permission for hunting.

### Compiler's Comments

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 18, Ch. 166, L. 2023. Amendment effective October 1, 2023.

*2021 Amendment:* Chapter 92 in (1) at beginning substituted "A person may not hunt or attempt to hunt furbearers" for "A resident or nonresident shall obtain permission of the landowner, the lessee, or their agents before taking or attempting to take", after "wolves" deleted "while hunting", and after "private property" inserted "without first obtaining permission of the landowner, the lessee, or their agents"; in (2) at end substituted "fined not less than $135 or more than $500" for "fined $135"; in (3) in middle substituted "second or subsequent offense" for "second offense"; in (4)(a) at beginning substituted "shall forfeit" for "may be subject to forfeiture of" and at end substituted "not less than 12 months or more than 3 years from the date of conviction or forfeiture" for "a period of time set by the court"; inserted (5) defining hunt; and made minor changes in style. Amendment effective March 26, 2021.

*2021 Code Commissioner Correction:* In (4)(a) near the end the code commissioner inserted the bracketed language "of bond or bail" for clarity.

*Applicability:* Section 3, Ch. 92, L. 2021, provided: "[This act] applies to violations of [section 1] [87-6-415] charged on or after [the effective date of this act]." Effective March 26, 2021.

*2015 Amendment:* Chapter 92 in (1) inserted "migratory game birds" and "upland game birds"; and made minor changes in style. Amendment effective October 1, 2015.

*2013 Amendment:* Chapter 338 in (1) substituted "predatory animals, game animals, or wolves while" for "or predatory animals or"; in (2) at beginning deleted "Except as provided in subsection (3)" and substituted "$135" for "an amount not to exceed $25"; in (3) substituted "second offense of hunting" for "violation of this section for hunting a big game animal", after "landowner" inserted "within 5 years", and substituted "$500 or more than $1,000" for "$50 or more than $1,000 or be imprisoned in the county detention center for not more than 6 months, or both"; in (4) after "conviction" inserted "under subsection (3)"; inserted (4)(b) concerning restitution; and made minor changes in style. Amendment effective October 1, 2013.

### Case Notes

*Recision of Easement Agreement Based on Material Breach — Award of Attorney Fees and Costs Proper:* The parties were neighbors who had entered into an easement to allow the defendants to cross the plaintiffs' property to access their property. After the defendants exceeded the scope of the easement by hunting on it without permission, the plaintiffs rescinded the agreement. However, the defendants continued to use the easement. The plaintiffs then filed a declaratory judgment action to declare the recision proper. The defendants claimed that provisions in the easement agreement were unconscionable and therefore void. At trial, the District Court held that the defendants had materially breached the agreement and granted the plaintiffs summary judgment and awarded fees and costs. On appeal, the Supreme Court affirmed the grant of summary judgment based on the material breach of the agreement and the fee award. Peters v. Hubbard, 2020 MT 282, 402 Mont. 71, 475 P.3d 730.

*District Court Affirmed — Only Two Elements for Conviction:* The defendant was hunting on public land and, in order to access a different section of public land, had to cross approximately 80 feet of private land. The landowner had installed a trail camera in the area and captured the defendant wearing hunter orange and carrying a rifle crossing their land. The defendant argued that in addition to proving the defendant was on private land without permission and was hunting on that private land that the prosecution had to prove the defendant took or attempted to take a game animal while on private land. The court declined to adopt the third element and the conviction was affirmed. St. v. Cherry, 2020 MT 25, 398 Mont. 429, 457 P.3d 237.

*Hunting Violation of Restrictions for Private Property Enrolled in Block Management Program — Failure to Obtain Landowner Permission:* The defendant harvested a cow elk from a property that was enrolled with the Department of Fish, Wildlife, and Parks in a Block Management Program. The particular property required the hunter to sign in prior to hunting. The defendant claimed that he was unaware of any requirement that he sign in prior to hunting. He was convicted of hunting without landowner permission. On appeal, the defendant argued that the block management statutes and rules implementing them were unconstitutional. The Supreme Court upheld the conviction, holding that a person is on notice that the person is subject to rules relating to management of wildlife and that ignorance of the rules is no defense. St. v. McGregor, 2017 MT 156, 388 Mont. 63, 398 P.3d 241.

### Attorney General's Opinions

*Hunting of Specific Animal — Violation if Other Animal Hunted:* A landowner may refuse permission entirely or give limited permission to hunt at certain times, in certain areas, or for certain kinds of animals. A hunter given explicit permission to hunt only for a specific kind of big game animal who exceeds the permission by hunting another kind of animal may be charged under this section with failure to obtain the landowner's permission. 41 A.G. Op. 65 (1986).

*Hunting Trespass Not Repealed:* Montana's criminal trespass statutes, 45-6-201 and 45-6-203, do not repeal or affect 87-3-304 (now repealed, but see 87-6-415), which makes it unlawful to hunt big game animals on private property without permission, because the statutes do not relate to the same conduct. 37 A.G. Op. 144 (1978).

## 87-6-420. Prohibition on carcass imports.

### Compiler's Comments

*Effective Date:* Section 3, Ch. 293, L. 2017, provided: "[This act] is effective January 1, 2018."

## Part 6
## Trapping Offenses

## 87-6-601. Trapping and snaring offenses.

### Compiler's Comments

*2021 Amendment:* Chapter 96 in (1) throughout subsection in four places substituted reference to a trap or snare for reference to a snare trap and in middle of introductory clause after "purpose of" inserted "trapping or"; in (1)(a) substituted current text concerning tagging of trap or snare and providing exceptions for former text that read: "(a) the snare trap is tagged with a numbered metal device identifying the owner's name, address, and telephone number"; deleted former (1)(b) that read: "(b) the consent of the landowner has been obtained for a set on private property"; deleted former (2) that read: "(2) A person trapping fur-bearing animals, predatory animals, or any other animals shall fasten a metal tag to all traps bearing in legible English the name and address or wildlife conservation license number of the trapper, except that a tag is not required on traps used by landowners trapping on their own land or on an irrigation ditch right-of-way contiguous to the land"; in (2) substituted current text prohibiting trapping or snaring fur-bearing animals, predatory animals, or nongame species on private property without obtaining permission from the landowner for former text that read: "A holder of a Class C-2 trapper's license may not trap or snare predatory animals or nongame wildlife on private property without obtaining written permission from the landowner, the lessee, or their agents"; and made minor changes in style. Amendment effective March 26, 2021.

## Part 7
## Commercial Offenses

### 87-6-702. Outfitting without license.

**Compiler's Comments**

*2021 Amendment:* Chapter 281 in (1)(a) at end deleted "or purposely or knowingly violate a licensing rule adopted under Title 37, chapter 47"; and made minor changes in style. Amendment effective April 22, 2021.

*Transition — Applicability:* Section 14, Ch. 281, L. 2021, provided: "Within 60 days of [the effective date of this act] [April 22, 2021], the board membership must reflect [section 1] [2-15-1773]. All terms of all board members appointed under the previous composition of the board terminate 60 days following [the effective date of this act] [April 22, 2021], and all appointments made, and vacancies filled after [the effective date of this act] [April 22, 2021] must be in accordance with [section 1] [2-15-1773]. The appointments must consist of 1, 2, or 3-year terms at the governor's discretion, so the initial terms of the newly composed board members are staggered in accordance with [section 1] [2-15-1773]."

*Severability:* Section 16, Ch. 281, L. 2021, was a severability clause.

*Termination Provision Repealed:* Section 1, Ch. 142, L. 2017, and sec. 5, Ch. 217, L. 2017, repealed sec. 11, Ch. 241, L. 2013, and sec. 1, Ch. 136, L. 2015, which terminated the Ch. 241, L. 2013, amendments to this section December 31, 2017. Effective October 1, 2017.

*Extension of Termination Date:* Section 1, Ch. 136, L. 2015, amended sec. 11, Ch. 241, L. 2013, by extending the termination date imposed by Ch. 241 to December 31, 2017. Effective March 27, 2015.

*2013 Amendments — Composite Section:* Chapter 241 inserted (5)(b)(ii)(B) regarding services provided by outfitter's assistant; and made minor changes in style. Amendment effective September 1, 2013, and terminates August 31, 2015.

Chapter 341 in (5)(b)(i) near end after "licensed guide" deleted "or professional guide"; inserted (5)(b)(ii)(A) concerning services provided under employment of the outfitter; and made minor changes in style. Amendment effective October 1, 2013.

### 87-6-706. Shooting preserve offenses.

**Compiler's Comments**

*2021 Amendment:* Chapter 552 in (2) at end substituted "87-4-522" for "87-4-526". Amendment effective May 15, 2021.

### 87-6-715. Menagerie, sanctuary, and zoo offenses.

**Compiler's Comments**

*2021 Amendment:* Chapter 211 in (1)(c) after "wild animal menagerie" inserted "wildlife sanctuary". Amendment effective October 1, 2021.

## Part 9
## Additional Sentencing Provisions

### 87-6-906. Restitution for illegal killing, possession, or waste of certain wildlife.

**Case Notes**

*Felony Convictions for Unlawful Possession of Game Animals Affirmed — Jury Instructions Proper:* The jury found that Norman illegally possessed two buck mule deer, one antelope, and one bull elk in 2007, one cow elk and one buck mule deer in November 2004, and one antelope and one bull elk in 2003, in violation of either 87-1-111 or 87-1-115 (now repealed, but see 87-6-906 and 87-6-907). Under each count, the jury found that the value of the animals either individually or in the aggregate exceeded $1,000. Norman argued on appeal that the District Court improperly instructed the jury by not specifically instructing on the element of value. Norman also argued that, pursuant to the first count, the animals were not part of the "same transaction" under 87-3-111 (now repealed) because they were killed on different dates. Norman also objected to a special instruction that indicated that the jury needed to find Norman guilty of only one offense under each count. The Supreme Court affirmed. The court was not "firmly convinced" that its failure to review the instructions would result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the trial or proceedings, or compromise the integrity of the judicial process. In addition, the prosecutor's grouping of the animals as part of the "same transaction," which allowed the value of the animals to be aggregated, was not improper, and

Norman did not object at trial to the special instruction provided to the jury. St. v. Norman, 2010 MT 253, 358 Mont. 252, 244 P.3d 737.

## 87-6-907. Restitution for illegal killing, possession, or waste of trophy wildlife.

### Case Notes

*Felony Convictions for Unlawful Possession of Game Animals Affirmed — Jury Instructions Proper:* The jury found that Norman illegally possessed two buck mule deer, one antelope, and one bull elk in 2007, one cow elk and one buck mule deer in November 2004, and one antelope and one bull elk in 2003, in violation of either 87-1-111 or 87-1-115 (now repealed, but see 87-6-906 and 87-6-907). Under each count, the jury found that the value of the animals either individually or in the aggregate exceeded $1,000. Norman argued on appeal that the District Court improperly instructed the jury by not specifically instructing on the element of value. Norman also argued that, pursuant to the first count, the animals were not part of the "same transaction" under 87-3-111 (now repealed) because they were killed on different dates. Norman also objected to a special instruction that indicated that the jury needed to find Norman guilty of only one offense under each count. The Supreme Court affirmed. The court was not "firmly convinced" that its failure to review the instructions would result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the trial or proceedings, or compromise the integrity of the judicial process. In addition, the prosecutor's grouping of the animals as part of the "same transaction," which allowed the value of the animals to be aggregated, was not improper, and Norman did not object at trial to the special instruction provided to the jury. St. v. Norman, 2010 MT 253, 358 Mont. 252, 244 P.3d 737.

## 87-6-921. Revocation of exception.

### Compiler's Comments

*2015 Amendment:* Chapter 449 near end after "87-2-803" inserted "and 87-2-816 and 87-2-817". Amendment effective March 1, 2016.

Norman did not object at trial to the special instruction provided to the jury. St. v. Norman, 2010 MT 253, 358 Mont. 252, 244 P.3d 737.

**87-6-907. Restitution for illegal killing, possession, or waste of trophy wildlife.**

**Case Notes**

*Felony Convictions for Unlawful Possession of Game Animals Affirmed — Jury Instructions Proper:* The jury found that Norman illegally possessed two buck mule deer, one antelope, and one bull elk in 2007, one cow elk and one buck mule deer in November 2004, and one antelope and one bull elk in 2003, in violation of either 87-1-111 or 87-1-115 (now repealed, but see 87-6-906 and 87-6-907). Under each count, the jury found that the value of the animals either individually or in the aggregate exceeded $1,000. Norman argued on appeal that the District Court improperly instructed the jury by not specifically instructing on the element of value. Norman also argued that, pursuant to the first count, the animals were not part of the "same transaction" under 87-3-111 (now repealed) because they were killed on different dates. Norman also objected to a special instruction that indicated that the jury needed to find Norman guilty of only one offense under each count. The Supreme Court affirmed. The court was not "firmly convinced" that its failure to review the instructions would result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the trial or proceedings, or compromise the integrity of the judicial process. In addition, the prosecutor's grouping of the animals as part of the "same transaction," which allowed the value of the animals to be aggregated, was not improper, and Norman did not object at trial to the special instruction provided to the jury. St. v. Norman, 2010 MT 253, 358 Mont. 252, 244 P.3d 737.

**87-6-921. Revocation of exception.**

**Compiler's Comments**

*2015 Amendment:* Chapter 449 near end after "87-2-803" inserted "and 87-2-816 and 87-2-817". Amendment effective March 1, 2016.

# TITLES 88 AND 89
## RESERVED

# TITLE 90
# PLANNING, RESEARCH, AND DEVELOPMENT

## CHAPTER 1
## DEVELOPMENT COORDINATION

### Part 1
### Planning and Economic Development

**Part Collateral References**

Montana Index of Environmental Permits, Environmental Quality Council (2018).

#### 90-1-101. Declaration of necessity and public policy.

**Compiler's Comments**

*2019 Amendment:* Chapter 363 in (1) in last sentence near middle inserted "without leaving behind those who remain in rural areas" and near end inserted "retain quality of life for rural Montana"; and made minor changes in style. Amendment effective October 1, 2019.

*1983 Amendment:* Inserted (2) referring to consistency and continuity of environmental rules; and at end of (3) after "provisions of" changed "this part" to "90-1-102 through 90-1-109".

*1981 Amendment:* Substituted "department of commerce" for "department of community affairs" in (2).

*Interim Study Committee Bill:* Chapter 679, L. 1983 (HB 228) was introduced by request of the Joint Subcommittee on Business. See subcommittee report, Montana Legislative Council, 1982.

*Section Not Codified:* Section 82-3701, R.C.M. 1947, a short title clause, was not codified in the MCA because it was not applicable. The clause has not been repealed and is still valid law. Citation may be made to sec. 1, Ch. 19, L. 1967, as amended by sec. 81, Ch. 348, L. 1974.

#### 90-1-102. Functions of department of commerce — state planning.

**Compiler's Comments**

*1993 Amendment:* Chapter 148 deleted former (1) that read: "(1) develop and adopt a comprehensive plan for the physical development of the state"; and made minor changes in style.

*1981 Amendment:* Substituted "department of commerce" for "department of community affairs" in the section introductory clause.

#### 90-1-103. Functions of department of commerce — community development.

**Compiler's Comments**

*2001 Amendment:* Chapter 348 inserted (2) requiring department by January 1, 2003, to have developed and published examples of subdivision regulations that provide incentives for and remove disincentives for cluster development, requiring department to seek advice of interested parties, and requiring department to provide technical assistance to local governments developing cluster development regulations; and made minor changes in style. Amendment effective April 21, 2001.

*Preamble:* The preamble attached to Ch. 348, L. 2001, provided: "WHEREAS, agricultural land is increasingly being taken out of production for development and becoming unavailable for production of food; and

WHEREAS, farmers and ranchers are often forced to sell their land to generate sufficient income to retire; and

WHEREAS, cluster development can facilitate the preservation of Montana's unique landscape; and

WHEREAS, cluster development can reduce local government costs for infrastructure and provision of services by concentrating building sites on smaller lots so that services and utilities can be concentrated in a smaller area; and

WHEREAS, the Montana Department of Commerce is charged with providing technical assistance and information related to community development; and

WHEREAS, local governments need mechanisms to encourage development approaches that minimize costs to local citizens and that promote effective and efficient provision of public services."

*1993 Amendment:* Chapter 148 in second sentence of (4), after "analyses", inserted "and in providing technical assistance to communities" and before "problems" inserted "planning and financing of public facilities and to the"; and made minor changes in style.

*1985 Amendment:* Inserted (5) referring to federal community development block grant program.

*Statement of Intent:* The statement of intent attached to Ch. 230, L. 1985, provided: "A statement of intent is required for this bill because it authorizes the department of commerce to adopt administrative rules necessary to administer the federal community development block grant (CDBG) program.

The purpose of this bill is to formalize within the context of the Montana Administrative Procedure Act the department's promulgation of policies, guidelines, ranking criteria, and requirements governing the CDBG program which the department has administered since it was authorized to do so by the November 1981 special session of the legislature. It is not the intention of this bill, however, to add unnecessarily to the cost or complexity of administering the program.

Currently the department's requirements for the program are contained in the publications described below:

1. The Montana Community Development Block Grant Program Application Guidelines describe the policies governing the program, the threshold requirements for CDBG applicants, and the procedure and criteria for evaluating applications.

2. The Montana Community Development Block Grant Program — Grant Administration Manual describes the administrative procedures for local project start up, environmental review of project activities, procurement of goods and services, financial management, protection of civil rights, assuring fair wages for labor, and acquisition of property and relocation of persons displaced thereby. It also discusses special administrative considerations peculiar to public facilities, housing rehabilitation, and economic development projects.

3. The Montana Community Development Block Grant Program — Requirements Notebook is a compilation of the federal and state statutes, regulations, and other standards which govern the CDBG program but which have been promulgated by agencies other than the department.

Because the conversion of these three lengthy publications to a rule format and their inclusion in the Montana Administrative Register or the Administrative Rules of Montana would be unduly cumbersome, expensive, and inexpedient, the legislature contemplates that the rules promulgated pursuant to this bill would be adopted by reference to the publications themselves as is authorized by section 2-4-307, MCA."

*1981 Amendment:* Substituted "department of commerce" for "department of community affairs" in the section introductory clause.

**Administrative Rules**

Title 8, chapter 94, subchapter 37, ARM Rules for administering federal community development block grant (CDBG) program.

### 90-1-104. Functions of department of commerce — recreational development.

**Compiler's Comments**

*2009 Amendment:* Chapter 164 in (3) near end substituted "state director" for "coordinator". Amendment effective April 6, 2009.

*2007 Amendment:* Chapter 30 deleted former (3) that read: "(3) serve as an ombudsman for the tourism industry and recreationists in all matters concerning the management and regulation of the level of Flathead Lake"; and made minor changes in style. Amendment effective March 22, 2007.

*1991 Amendment:* Inserted (4) requiring coordination of promotion of Indian tourism activities; and made minor changes in style.

*1987 Amendment:* Inserted (3) referring to the management and regulation of level of Flathead Lake.

*Preamble:* The preamble to Ch. 452, L. 1987, provided: "WHEREAS, Flathead Lake is an outstanding natural, scenic resource that attracts large numbers of vacationers, tourists, and recreationists and that supports a tourism industry that is important to Montana's economy; and

WHEREAS, the accessibility of Flathead Lake for recreational purposes is dependent on the level of the lake in relation to marina and other recreational facilities; and

WHEREAS, Flathead Lake is managed for a variety of purposes, including electric power generation, flood control, maintenance of wildlife and fisheries habitat, recreation, and irrigation; and

WHEREAS, management of the level of Flathead Lake is the continuing subject of numerous studies and meetings that include representatives of federal, regional, and state government agencies, the Montana Power Company, and other affected organizations but do not consistently include representatives of the tourism industry and recreationists."

*1981 Amendment:* Substituted "department of commerce" for "department of community affairs" in the section introductory clause.

## 90-1-105. Functions of department of commerce — economic development.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 2, Ch. 594, L. 2023. Amendment effective July 1, 2023.

*2021 Amendment:* See 2021 Session Law for amendment made by sec. 131, Ch. 261, L. 2021. Amendment effective April 20, 2021.

*2019 Amendments — Composite Section:* Chapter 363 in (1) near middle inserted "within the state, nationally, and internationally"; and in (5)(a) after "Montana products" inserted "within the state, nationally, and globally". Amendment effective October 1, 2019.

Chapter 474 inserted (7) concerning decennial reports on economic contributions and impacts of Indian reservations; and made minor changes in style. Amendment effective July 1, 2019.

*Termination Provision Repealed:* Section 3, Ch. 453, L. 2007, repealed sec. 19, Ch. 512, L. 1999, sec. 5, Ch. 69, L. 2001, and secs. 3 and 4, Ch. 460, L. 2005, which terminated the 1999 amendments to this section June 30, 2009. Effective July 1, 2007.

*2005 Amendment:* Chapter 248 in (3) substituted "an official state liaison" for "the state's official liaison"; inserted (5)(b) requiring the department of commerce to provide training and assistance for Montana small businesses and entrepreneurs to expand markets for made-in-Montana products; and made minor changes in style. Amendment effective October 1, 2005.

*Extension of Termination Date:* Sections 3 and 4, Ch. 460, L. 2005, amended sec. 19, Ch. 512, L. 1999, and sec. 5, Ch. 69, L. 2001, by extending the termination date imposed by Ch. 512 to June 30, 2009. Effective April 28, 2005.

*Extension of Termination Date:* Section 5, Ch. 69, L. 2001, amended sec. 19, Ch. 512, L. 1999, by extending the termination date imposed by Ch. 512 to June 30, 2005. Effective March 19, 2001.

*1999 Amendment:* Chapter 512 inserted (8) concerning assistance to the state-tribal economic development commission. Amendment effective April 28, 1999, and terminates June 30, 2001.

*Severability:* Section 15, Ch. 512, L. 1999, was a severability clause.

*1991 Amendment:* In (1), (3), and (4) inserted "and Indian tribal governments"; and inserted (7) requiring Department to explore the use of cooperative agreements for promotion of reservation economic opportunities.

*1981 Amendment:* Substituted "department of commerce" for "department of community affairs" in the section introductory clause.

## 90-1-106. Functions of department of commerce — housing.

**Compiler's Comments**

*Severability Clause:* Section 28, Ch. 461, L. 1975, was a severability section.

**Attorney General's Opinions**

*Department of Commerce Authorized to Administer Housing Assistance Payments Program — No Restriction in Area Served by Municipal Housing Authority:* The Montana Department of Commerce fits the description of a public housing authority under regulations of the United States Department of Housing and Urban Development (HUD) and is authorized to contract with HUD to administer HUD's Housing Assistance Payments Program, including federal Section 8 certificate and voucher programs. The restriction in 7-15-4414 applies only to municipal housing authorities operating in the same geographic location and therefore does not restrict the administration of federal Section 8 housing programs in the same area by an authorized state agency. 44 A.G. Op. 23 (1992).

**Collateral References**

State of Montana Annual Action Plan: April 1, 2021 through March 31, 2022, Montana Department of Commerce (2021).

State of Montana Analysis of Impediments to Fair Housing Choice: April 1, 2015 through March 31, 2020, Montana Department of Commerce (2015).

State of Montana Consolidated Plan for Housing and Community Development: April 1, 2020 through March 31, 2025, Montana Department of Commerce (2021).

### 90-1-107. Contracts and agreements for projects and programs — cooperation with other agencies.

**Compiler's Comments**

*1981 Amendment:* Substituted "department of commerce" for "department of community affairs" in (1).

### 90-1-109. State census and economic information center.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 7, Ch. 233, L. 2023. Amendment effective July 1, 2023.

*Applicability:* Section 11, Ch. 233, L. 2023, provided: "[This act] applies to local election districts based on population whose boundaries are created or altered on or after the date when the redistricting data for the 2030 census is available."

*Severability:* Section 9, Ch. 233, L. 2023, was a severability clause.

*1983 Amendment:* Substituted language referring to state, federal, and local agencies and a central depository of information for "The department of administration shall, in cooperation with other state agencies and local governments, establish and maintain a central depository of statistical, graphic, library, and other information, including computer-retrievable files, concerning the significant characteristics of the state, its people, economy, land, and physical characteristics. The department shall analyze and disseminate such information to state and local agencies and the general public."

**Collateral References**

Census and Economic Center, https://ceic.mt.gov.

### 90-1-112. Policy — purpose.

**Compiler's Comments**

*2019 Amendment:* Chapter 363 in (1)(b)(ii) inserted "taking into account both rural and urban demands and the availability of entrepreneurs who, due to lack of economic development resources, might benefit from this policy"; and made minor changes in style. Amendment effective October 1, 2019.

*2009 Amendment:* Chapter 309 in (2) near middle after "90-1-114" deleted "and Title 90, chapter 10"; and made minor changes in style. Amendment effective April 18, 2009.

*2005 Amendment:* Chapter 537 in (2) after "90-1-114" inserted "and Title 90, chapter 10"; and made minor changes in style. Amendment effective July 1, 2005.

*Severability:* Section 21, Ch. 537, L. 2005, was a severability clause.

*Effective Date:* Section 222, Ch. 483, L. 2001, provided that this section is effective July 1, 2001.

### 90-1-113. Cooperation of state agencies.

**Compiler's Comments**

*2015 Amendment:* Chapter 76 inserted (2) regarding written request from the department of commerce to the department of revenue for information about debt assignment; and made minor changes in style. Amendment effective February 27, 2015.

*Effective Date:* Section 222, Ch. 483, L. 2001, provided that this section is effective July 1, 2001.

### 90-1-114. Rulemaking authority.

**Compiler's Comments**

*2003 Amendment:* Chapter 190 in (1) in first sentence substituted "may" for "shall". Amendment effective April 1, 2003.

*Effective Date:* Section 222, Ch. 483, L. 2001, provided that this section is effective July 1, 2001.

### 90-1-115. Department of commerce Lewis and Clark bicentennial account — Montana historical society Lewis and Clark bicentennial account.

**Compiler's Comments**

*Effective Date:* Section 13(1), Ch. 223, L. 2005, provided that this section is effective December 31, 2006.

**90-1-116. State matching funds program for economic development — distribution of proceeds — criteria for grants — local economic development matching funds.**

**Compiler's Comments**

*2019 Amendment:* Chapter 471 deleted former (1)(b) that read: "(b) "Council" means the economic development advisory council established in 2-15-1820"; and made minor changes in style. Amendment effective October 1, 2019.

*2003 Amendment:* Chapter 351 in (1)(a) substituted definition of certified regional development corporation for former definition of certified community lead organization that read: ""Certified community lead organization" means the entity that has been endorsed by resolution of a local governing body or a tribal government, as defined in 90-6-701(3)(e), and that meets and maintains requirements for certification established by the department"; inserted (1)(b) defining council; inserted (1)(d) defining treasure community; in (2) at end of first sentence substituted "up to 12 certified regional development corporations" for "the certified communities program" and deleted former last sentence and former (2)(a) through (2)(c) that read: "The department shall distribute the funds in the following manner:

(a) 91% to certified community lead organizations, in the form of assistance grants;

(b) 8% to the department for administration of the certified communities program; and

(c) 1% to the department for certification assistance for noncertified communities. If there are no requests for certification assistance, the 1% allocation may be used by the department for administration of the certified communities program"; in (3) near beginning of first sentence after "certified" substituted "regional development corporation will be made based on rules adopted by the department for the state matching funds program" for "community lead organization is based on an annual per capita payment for the area served by the organization, according to its population in the last completed federal census. The grant may not exceed $75,000 and may not be less than $3,000 a year" and inserted last sentence and (3)(a) through (3)(d) outlining rules for distribution of funds; in (4) in introductory clause after "certified" substituted "regional development corporation" for "community lead organization"; in (4)(a) after "designated as the" substituted "certified regional development corporation by the department" for "lead organization by the local governing body"; inserted (4)(d) requiring the corporation to administer the treasure community designation; inserted (4)(e) requiring the corporation to encourage and organize full participation in regional economic development activities, meetings, projects, and planning by the treasure communities in the region; in (4)(f) after "shall" substituted "deliver services and resources to the citizens, businesses, and treasure communities throughout the region" for "participate in regional meetings of certified communities"; in (5) near middle after "certified" inserted "regional development corporations and the treasure" and after "communities" inserted "in the region"; deleted former (6) that read: "(6) The department shall use its portion of the proceeds to:

(a) administer the certified communities program;

(b) assist noncertified communities in seeking certification; and

(c) organize and conduct regional meetings of certified communities"; and made minor changes in style. Amendment effective April 16, 2003.

*1999 Amendment:* Chapter 268 in (1) in definition of certified community lead organization inserted "or a tribal government, as defined in 90-6-701(3)(e)". Amendment effective October 1, 1999.

*Effective Date:* Section 2, Ch. 531, L. 1993, provided: "[This act] is effective on passage and approval." Approved April 24, 1993.

**Administrative Rules**

Title 8, chapter 99, subchapter 3, ARM Certified regional development corporation program.

**90-1-117. Small business state matching grant program — purpose.**

**Compiler's Comments**

*Effective Date:* Section 6, Ch. 215, L. 2009, provided that this section is effective July 1, 2009.

**90-1-118. Small business eligibility criteria.**

**Compiler's Comments**

*2015 Amendment:* Chapter 440 inserted (2) relating to manufacturing ammunition components; and made minor changes in style. Amendment effective May 6, 2015.

*Severability:* Section 13, Ch. 440, L. 2015, was a severability clause.

*Applicability:* Section 15, Ch. 440, L. 2015, provided: "[This act] applies to tax years beginning after December 31, 2015."

*Effective Date:* Section 6, Ch. 215, L. 2009, provided that this section is effective July 1, 2009.

## 90-1-119. Grant award guidelines.

**Compiler's Comments**

*Effective Date:* Section 6, Ch. 215, L. 2009, provided that this section is effective July 1, 2009.

## 90-1-120. Trade activities.

**Compiler's Comments**

*2021 Amendment:* Chapter 167 in (2) after "extension center" deleted "the Montana board of research and commercialization technology"; and made minor changes in style. Amendment effective April 8, 2021.

*Effective Date:* This section is effective October 1, 2019.

## 90-1-121. Gap financing program — interest and investment.

**Compiler's Comments**

*Effective Date:* Section 3, Ch. 16, L. 2023, provided: "[This act] is effective on passage and approval." Approved February 23, 2023.

## 90-1-122. Lodging facility use tax allocation — allowable uses — unspent fund redistribution — rulemaking — fees.

**Compiler's Comments**

*Effective Date:* This section is effective October 1, 2023.

## 90-1-130. Short title.

**Compiler's Comments**

*Termination Provision Repealed:* Section 3, Ch. 453, L. 2007, repealed sec. 19, Ch. 512, L. 1999, sec. 5, Ch. 69, L. 2001, and secs. 3 and 4, Ch. 460, L. 2005, which terminated this section June 30, 2009. Effective July 1, 2007.

*Extension of Termination Date:* Sections 3 and 4, Ch. 460, L. 2005, amended sec. 19, Ch. 512, L. 1999, and sec. 5, Ch. 69, L. 2001, by extending the termination date imposed by Ch. 512 to June 30, 2009. Effective April 28, 2005.

*Extension of Termination Date:* Section 5, Ch. 69, L. 2001, amended sec. 19, Ch. 512, L. 1999, by extending the termination date imposed by Ch. 512 to June 30, 2005. Effective March 19, 2001.

*Preamble:* The preamble attached to Ch. 512, L. 1999, provided: "WHEREAS, Indians comprise approximately 7% of Montana's population, and tribal lands comprise about 9% of the total land area of the state; and

WHEREAS, the seven federally recognized tribes in Montana do not receive an equitable proportion of certain categories of federal funds disbursed to Montana; and

WHEREAS, state law requires the Department of Commerce to assist Indian communities and tribal governments in efforts to expand business activity and economic development on the seven Indian reservations in Montana; and

WHEREAS, the Governor and certain state agencies could, if provided with guidance and suitable resources from the Legislature, more actively seek federal assistance that would directly benefit tribal communities and the state; and

WHEREAS, the efforts expended by the Agricultural Development Council and other state boards and commissions intended to help boost the Montana economy will be enhanced by Indian representation; and

WHEREAS, certain Montana statutes and state programs, including loan programs, fail to include tribal entities and thereby fail to maximize the benefit of the existing network of tribal business information centers and other economic development opportunities in Indian communities across the state; and

WHEREAS, Indians who are citizens of Montana are both entitled to and deserving of a more vigorous effort on the part of the state, in cooperation with tribal governments, to foster economic development on the reservations in the state; and

WHEREAS, each of the tribal governments and their respective reservation communities will benefit from closer cooperation with new and existing boards, commissions, and agencies of the state, especially those most directly related to economic development."

*Severability:* Section 15, Ch. 512, L. 1999, was a severability clause.

*Effective Date:* Section 18, Ch. 512, L. 1999, provided that this section was effective April 28, 1999.

*Termination:* Section 19, Ch. 512, L. 1999, provided that this section terminates June 30, 2001.

### 90-1-131. State-tribal economic development commission — composition — compensation for members.

**Compiler's Comments**

*2021 Amendment:* Chapter 240 in (2)(d) near beginning substituted "federally recognized Indian tribes in Montana" for "seven federally recognized tribes in Montana and one member from the Little Shell band of Chippewa Indians"; and made minor changes in style. Amendment effective April 19, 2021.

*2009 Amendment:* Chapter 164 in (2)(a) after "state" substituted "director" for "coordinator". Amendment effective April 6, 2009.

*2007 Amendment:* Chapter 453 in (1) near end after "attached to the" substituted "department of commerce" for "office of the governor"; in (2) near beginning of introductory clause increased number of commission members from 10 to 11; inserted (2)(c) requiring membership of one member from the governor's office of economic development; and made minor changes in style. Amendment effective July 1, 2007.

*Termination Provision Repealed:* Section 3, Ch. 453, L. 2007, repealed sec. 19, Ch. 512, L. 1999, sec. 5, Ch. 69, L. 2001, and secs. 3 and 4, Ch. 460, L. 2005, which terminated this section June 30, 2009. Effective July 1, 2007.

*2005 Amendment:* Chapter 460 in (4) at beginning substituted "Six" for "Seven"; and made minor changes in style. Amendment effective April 28, 2005.

*Extension of Termination Date:* Sections 3 and 4, Ch. 460, L. 2005, amended sec. 19, Ch. 512, L. 1999, and sec. 5, Ch. 69, L. 2001, by extending the termination date imposed by Ch. 512 to June 30, 2009. Effective April 28, 2005.

*2001 Amendment:* Chapter 69 in (2) in opening clause increased membership from 9 to 10; in (2)(c) added a member from the Little Shell band of Chippewa and inserted first two full sentences providing that a tribal government may advertise for persons who want to serve on the commission and choose a nominee to recommend to the governor from an applicant list or may select an elected tribal official to recommend for membership; deleted former (3) allowing members to be reappointed; in (4) increased quorum from six to seven; and made minor changes in style. Amendment effective March 19, 2001.

*Extension of Termination Date:* Section 5, Ch. 69, L. 2001, amended sec. 19, Ch. 512, L. 1999, by extending the termination date imposed by Ch. 512 to June 30, 2005. Effective March 19, 2001.

*Preamble:* The preamble attached to Ch. 512, L. 1999, provided: "WHEREAS, Indians comprise approximately 7% of Montana's population, and tribal lands comprise about 9% of the total land area of the state; and

WHEREAS, the seven federally recognized tribes in Montana do not receive an equitable proportion of certain categories of federal funds disbursed to Montana; and

WHEREAS, state law requires the Department of Commerce to assist Indian communities and tribal governments in efforts to expand business activity and economic development on the seven Indian reservations in Montana; and

WHEREAS, the Governor and certain state agencies could, if provided with guidance and suitable resources from the Legislature, more actively seek federal assistance that would directly benefit tribal communities and the state; and

WHEREAS, the efforts expended by the Agricultural Development Council and other state boards and commissions intended to help boost the Montana economy will be enhanced by Indian representation; and

WHEREAS, certain Montana statutes and state programs, including loan programs, fail to include tribal entities and thereby fail to maximize the benefit of the existing network of tribal business information centers and other economic development opportunities in Indian communities across the state; and

WHEREAS, Indians who are citizens of Montana are both entitled to and deserving of a more vigorous effort on the part of the state, in cooperation with tribal governments, to foster economic development on the reservations in the state; and

WHEREAS, each of the tribal governments and their respective reservation communities will benefit from closer cooperation with new and existing boards, commissions, and agencies of the state, especially those most directly related to economic development."

*Severability:* Section 15, Ch. 512, L. 1999, was a severability clause.

*Effective Date:* Section 18, Ch. 512, L. 1999, provided that this section was effective April 28, 1999.

*Termination:* Section 19, Ch. 512, L. 1999, provided that this section terminates June 30, 2001.

**Collateral References**

State Tribal Economic Development Commission, https://tribalnations.mt.gov/econodevo.

### 90-1-132. Commission purposes — duties and responsibilities.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 3, Ch. 594, L. 2023. Amendment effective July 1, 2023.

*2021 Amendment:* See 2021 Session Law for amendment made by sec. 132, Ch. 261, L. 2021. Amendment effective April 20, 2021.

*2017 Amendment:* Chapter 405 inserted (2)(a) directing the commission to oversee the use of proceeds to expand tourism activities and visitation in the Indian tourism region; in (2)(j) inserted "the state-tribal relations committee"; and made minor changes in style. Amendment effective July 1, 2017.

*2009 Amendment:* Chapter 164 in (1) in introductory clause before "commission" inserted "state-tribal economic development"; in (2)(a) near middle, in (2)(f), and in (2)(h) substituted reference to state director of Indian affairs for reference to coordinator of Indian affairs. Amendment effective April 6, 2009.

*Termination Provision Repealed:* Section 3, Ch. 453, L. 2007, repealed sec. 19, Ch. 512, L. 1999, sec. 5, Ch. 69, L. 2001, and secs. 3 and 4, Ch. 460, L. 2005, which terminated this section June 30, 2009. Effective July 1, 2007.

*Extension of Termination Date:* Sections 3 and 4, Ch. 460, L. 2005, amended sec. 19, Ch. 512, L. 1999, and sec. 5, Ch. 69, L. 2001, by extending the termination date imposed by Ch. 512 to June 30, 2009. Effective April 28, 2005.

*Extension of Termination Date:* Section 5, Ch. 69, L. 2001, amended sec. 19, Ch. 512, L. 1999, by extending the termination date imposed by Ch. 512 to June 30, 2005. Effective March 19, 2001.

*Preamble:* The preamble attached to Ch. 512, L. 1999, provided: "WHEREAS, Indians comprise approximately 7% of Montana's population, and tribal lands comprise about 9% of the total land area of the state; and

WHEREAS, the seven federally recognized tribes in Montana do not receive an equitable proportion of certain categories of federal funds disbursed to Montana; and

WHEREAS, state law requires the Department of Commerce to assist Indian communities and tribal governments in efforts to expand business activity and economic development on the seven Indian reservations in Montana; and

WHEREAS, the Governor and certain state agencies could, if provided with guidance and suitable resources from the Legislature, more actively seek federal assistance that would directly benefit tribal communities and the state; and

WHEREAS, the efforts expended by the Agricultural Development Council and other state boards and commissions intended to help boost the Montana economy will be enhanced by Indian representation; and

WHEREAS, certain Montana statutes and state programs, including loan programs, fail to include tribal entities and thereby fail to maximize the benefit of the existing network of tribal business information centers and other economic development opportunities in Indian communities across the state; and

WHEREAS, Indians who are citizens of Montana are both entitled to and deserving of a more vigorous effort on the part of the state, in cooperation with tribal governments, to foster economic development on the reservations in the state; and

WHEREAS, each of the tribal governments and their respective reservation communities will benefit from closer cooperation with new and existing boards, commissions, and agencies of the state, especially those most directly related to economic development."

*Severability:* Section 15, Ch. 512, L. 1999, was a severability clause.

*Effective Date:* Section 18, Ch. 512, L. 1999, provided that this section was effective April 28, 1999.

*Termination:* Section 19, Ch. 512, L. 1999, provided that this section terminates June 30, 2001.

**Collateral References**

State Tribal Economic Development Commission Biennial Report, State Tribal Economic Development Commission (2020).

### 90-1-134. No waiver of tribal sovereignty.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 4, Ch. 594, L. 2023. Amendment effective July 1, 2023.

*Termination Provision Repealed:* Section 3, Ch. 453, L. 2007, repealed sec. 19, Ch. 512, L. 1999, sec. 5, Ch. 69, L. 2001, and secs. 3 and 4, Ch. 460, L. 2005, which terminated this section June 30, 2009. Effective July 1, 2007.

*Extension of Termination Date:* Sections 3 and 4, Ch. 460, L. 2005, amended sec. 19, Ch. 512, L. 1999, and sec. 5, Ch. 69, L. 2001, by extending the termination date imposed by Ch. 512 to June 30, 2009. Effective April 28, 2005.

*Extension of Termination Date:* Section 5, Ch. 69, L. 2001, amended sec. 19, Ch. 512, L. 1999, by extending the termination date imposed by Ch. 512 to June 30, 2005. Effective March 19, 2001.

*Preamble:* The preamble attached to Ch. 512, L. 1999, provided: "WHEREAS, Indians comprise approximately 7% of Montana's population, and tribal lands comprise about 9% of the total land area of the state; and

WHEREAS, the seven federally recognized tribes in Montana do not receive an equitable proportion of certain categories of federal funds disbursed to Montana; and

WHEREAS, state law requires the Department of Commerce to assist Indian communities and tribal governments in efforts to expand business activity and economic development on the seven Indian reservations in Montana; and

WHEREAS, the Governor and certain state agencies could, if provided with guidance and suitable resources from the Legislature, more actively seek federal assistance that would directly benefit tribal communities and the state; and

WHEREAS, the efforts expended by the Agricultural Development Council and other state boards and commissions intended to help boost the Montana economy will be enhanced by Indian representation; and

WHEREAS, certain Montana statutes and state programs, including loan programs, fail to include tribal entities and thereby fail to maximize the benefit of the existing network of tribal business information centers and other economic development opportunities in Indian communities across the state; and

WHEREAS, Indians who are citizens of Montana are both entitled to and deserving of a more vigorous effort on the part of the state, in cooperation with tribal governments, to foster economic development on the reservations in the state; and

WHEREAS, each of the tribal governments and their respective reservation communities will benefit from closer cooperation with new and existing boards, commissions, and agencies of the state, especially those most directly related to economic development."

*Severability:* Section 15, Ch. 512, L. 1999, was a severability clause.

*Effective Date:* Section 18, Ch. 512, L. 1999, provided that this section was effective April 28, 1999.

*Termination:* Section 19, Ch. 512, L. 1999, provided that this section terminates June 30, 2001.

### 90-1-135. Special revenue accounts.

**Compiler's Comments**

*2023 Amendment — Purported Amendment:* See 2023 Session Law for amendment made by sec. 5, Ch. 594, L. 2023. Amendment effective July 1, 2023.

Section 6, Ch. 758, L. 2023, purported to amend this section by changing a subsection reference to 15-65-121. Section 5, Ch. 594, L. 2023, amended 15-65-121 so that the change to the subsection reference in this section was unnecessary and the section remains unchanged by Ch. 758.

*2019 Amendment:* Chapter 356 in (2) near middle substituted "15-65-121(2)(g)" for "15-65-121(2)(f)". Amendment effective July 1, 2019.

*2017 Amendment:* Chapter 405 in (1) before the first "account" inserted "state special revenue" and before the second "account" inserted "federal special revenue"; inserted (2) requiring certain proceeds be used for activities for the Indian tourism region; in (3) at beginning inserted exception clause; in (4) after "subsection (2)" inserted "or (3)"; and made minor changes in style. Amendment effective July 1, 2017.

*2007 Amendment:* Chapter 453 deleted former (5) that read: "(5) Money in the accounts that is not expended by June 30, 2005, must remain in the accounts for the commission's use." Amendment effective July 1, 2007.

*Termination Provision Repealed:* Section 3, Ch. 453, L. 2007, repealed sec. 19, Ch. 512, L. 1999, sec. 5, Ch. 69, L. 2001, and secs. 3 and 4, Ch. 460, L. 2005, which terminated this section June 30, 2009. Effective July 1, 2007.

*Extension of Termination Date:* Sections 3 and 4, Ch. 460, L. 2005, amended sec. 19, Ch. 512, L. 1999, and sec. 5, Ch. 69, L. 2001, by extending the termination date imposed by Ch. 512 to June 30, 2009. Effective April 28, 2005.

*2001 Amendment:* Chapter 69 in (5) substituted "2005" for "2001". Amendment effective March 19, 2001.

*Extension of Termination Date:* Section 5, Ch. 69, L. 2001, amended sec. 19, Ch. 512, L. 1999, by extending the termination date imposed by Ch. 512 to June 30, 2005. Effective March 19, 2001.

*Preamble:* The preamble attached to Ch. 512, L. 1999, provided: "WHEREAS, Indians comprise approximately 7% of Montana's population, and tribal lands comprise about 9% of the total land area of the state; and

WHEREAS, the seven federally recognized tribes in Montana do not receive an equitable proportion of certain categories of federal funds disbursed to Montana; and

WHEREAS, state law requires the Department of Commerce to assist Indian communities and tribal governments in efforts to expand business activity and economic development on the seven Indian reservations in Montana; and

WHEREAS, the Governor and certain state agencies could, if provided with guidance and suitable resources from the Legislature, more actively seek federal assistance that would directly benefit tribal communities and the state; and

WHEREAS, the efforts expended by the Agricultural Development Council and other state boards and commissions intended to help boost the Montana economy will be enhanced by Indian representation; and

WHEREAS, certain Montana statutes and state programs, including loan programs, fail to include tribal entities and thereby fail to maximize the benefit of the existing network of tribal business information centers and other economic development opportunities in Indian communities across the state; and

WHEREAS, Indians who are citizens of Montana are both entitled to and deserving of a more vigorous effort on the part of the state, in cooperation with tribal governments, to foster economic development on the reservations in the state; and

WHEREAS, each of the tribal governments and their respective reservation communities will benefit from closer cooperation with new and existing boards, commissions, and agencies of the state, especially those most directly related to economic development."

*Severability:* Section 15, Ch. 512, L. 1999, was a severability clause.

*Effective Date:* Section 18, Ch. 512, L. 1999, provided that this section was effective April 28, 1999.

*Termination:* Section 19, Ch. 512, L. 1999, provided that this section terminates June 30, 2001.

## 90-1-141. Short title.

**Compiler's Comments**

*Effective Date:* Section 15, Ch. 307, L. 2001, provided that this section is effective July 1, 2001.

## 90-1-142. Purposes.

**Compiler's Comments**

*Effective Date:* Section 15, Ch. 307, L. 2001, provided that this section is effective July 1, 2001.

## 90-1-143. Definitions.

**Compiler's Comments**

*Effective Date:* Section 15, Ch. 307, L. 2001, provided that this section is effective July 1, 2001.

## 90-1-144. Financial assistance center — department responsibilities.

**Compiler's Comments**

*2019 Amendment:* Chapter 363 inserted (5) concerning assisting rural-based, veteran-owned, minority-owned, and women-owned businesses with economic development. Amendment effective October 1, 2019.

*Effective Date:* Section 15, Ch. 307, L. 2001, provided that this section is effective July 1, 2001.

**Collateral References**

Montana Finance Information Center, http://mtfinanceonline.com.

**90-1-145. Cooperation between state agencies and department — dissemination of information.**

**Compiler's Comments**

*Effective Date:* Section 15, Ch. 307, L. 2001, provided that this section is effective July 1, 2001.

**90-1-146. Information coordination.**

**Compiler's Comments**

*Effective Date:* Section 15, Ch. 307, L. 2001, provided that this section is effective July 1, 2001.

**90-1-147. Rulemaking.**

**Compiler's Comments**

*2009 Amendment:* Chapter 215 in (4) inserted "90-1-117 through 90-1-119 and". Amendment effective July 1, 2009.

*Effective Date:* Section 15, Ch. 307, L. 2001, provided that this section is effective July 1, 2001.

**90-1-151. Main street program — establishment — purpose — rulemaking.**

**Compiler's Comments**

*Effective Date:* Section 3, Ch. 181, L. 2005, provided that this section is effective July 1, 2005.

**Collateral References**

Montana Main Street Program, https://comdev.mt.gov/Programs-and-Boards/Montana-Main-Street-Program.

**90-1-160. Purpose.**

**Compiler's Comments**

*Effective Date:* Section 15, Ch. 217, L. 2007, provided: "[This act] is effective July 1, 2007."

**90-1-161. Definitions.**

**Compiler's Comments**

*Effective Date:* Section 15, Ch. 217, L. 2007, provided: "[This act] is effective July 1, 2007."

**90-1-162. Heritage preservation and cultural tourism commissions.**

**Compiler's Comments**

*Effective Date:* Section 15, Ch. 217, L. 2007, provided: "[This act] is effective July 1, 2007."

**Collateral References**

Havre/Hill County Historic Preservation Commission, www.havrehillpreservation.org.

**90-1-163. Commission duties.**

**Compiler's Comments**

*Effective Date:* Section 15, Ch. 217, L. 2007, provided: "[This act] is effective July 1, 2007."

**90-1-164. Heritage and cultural tourism promotion and development plan.**

**Compiler's Comments**

*Effective Date:* Section 15, Ch. 217, L. 2007, provided: "[This act] is effective July 1, 2007."

**90-1-167. Cultural treasures — coordination.**

**Compiler's Comments**

*Effective Date:* Section 15, Ch. 217, L. 2007, provided: "[This act] is effective July 1, 2007."

**90-1-168. Certified local governments.**

**Compiler's Comments**

*Effective Date:* Section 15, Ch. 217, L. 2007, provided: "[This act] is effective July 1, 2007."

**90-1-169. Highway signs.**

**Compiler's Comments**

*Effective Date:* Section 15, Ch. 217, L. 2007, provided: "[This act] is effective July 1, 2007."

**90-1-175. Rulemaking.**

**Compiler's Comments**

*Effective Date:* Section 80, Ch. 489, L. 2009, provided: "[This act] is effective on passage and approval." Approved May 14, 2009.

**90-1-181. Functions of department of commerce — socioeconomic advocacy.**

**Compiler's Comments**

*Preamble:* The preamble attached to Ch. 245, L. 2011, provided: "WHEREAS, the Department of Commerce has a responsibility to maintain and advance the socioeconomic health of Montana communities; and

WHEREAS, Montana communities often lack the resources to quickly analyze and comment on federal land management proposals that may impact their communities; and

WHEREAS, the lack of regularity regarding federal land management proposals affecting Montana communities complicates responses by local governments and additionally means there is little need for a separate state program while still a need to respond in a timely manner."

*Effective Date:* This section is effective October 1, 2011.

**Collateral References**

Federal Land Management Biennial Legislative Report, Department of Commerce (2019).

**90-1-182. State assistance to local governments in review of and comment on federal land management proposals — rulemaking.**

**Compiler's Comments**

*2021 Amendment:* See 2021 Session Law for amendment made by sec. 133, Ch. 261, L. 2021. Amendment effective April 20, 2021.

*Preamble:* The preamble attached to Ch. 245, L. 2011, provided: "WHEREAS, the Department of Commerce has a responsibility to maintain and advance the socioeconomic health of Montana communities; and

WHEREAS, Montana communities often lack the resources to quickly analyze and comment on federal land management proposals that may impact their communities; and

WHEREAS, the lack of regularity regarding federal land management proposals affecting Montana communities complicates responses by local governments and additionally means there is little need for a separate state program while still a need to respond in a timely manner."

*Effective Date:* This section is effective October 1, 2011.

## Part 2
## Big Sky Economic Development Program

**Part Compiler's Comments**

*Fund Transfer:* Section 8, Ch. 588, L. 2005, provided: "On July 1, 2005, the amount of $20 million is transferred from the coal severance tax permanent fund to the big sky economic development fund established in 17-5-703."

*Effective Date:* Section 10, Ch. 588, L. 2005, provided: "[This act] is effective July 1, 2005."

**Part Administrative Rules**

Title 8, chapter 99, subchapter 9, ARM Big Sky economic development program.

**90-1-201. Big sky economic development program — definitions.**

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 5, Ch. 636, L. 2023. Amendment effective July 1, 2023.

*2021 Amendment:* Chapter 240 in (2)(g) before "federally recognized" deleted "seven"; and after "tribal governments of Montana" deleted "and the Little Shell band of Chippewa Indians"; and made minor changes in style. Amendment effective April 19, 2021.

*2019 Amendment:* Chapter 375 in (2) in definition of high-poverty county substituted "county in this state that has a poverty rate greater than Montana's average poverty rate" for "county in this state in which 14% or more of people of all ages are in poverty". Amendment effective July 1, 2019.

*2013 Amendment:* Chapter 23 inserted (2)(d) defining employee benefits; and made minor changes in style. Amendment effective February 18, 2013.

*2009 Amendment:* Chapter 460 in (2) in definition of local government near beginning following "means a" deleted "tribal government"; inserted definition of tribal government; and made minor changes in style. Amendment effective October 1, 2009.

*2007 Amendment:* Chapter 104 in (2) inserted definition of high-poverty county; and made minor changes in style. Amendment effective July 1, 2007.

## 90-1-202. Purpose.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 6, Ch. 636, L. 2023. Amendment effective July 1, 2023.

*2015 Amendment:* Chapter 440 inserted (2) relating to manufacturing ammunition components; and made minor changes in style. Amendment effective May 6, 2015.

*Severability:* Section 13, Ch. 440, L. 2015, was a severability clause.

*Applicability:* Section 15, Ch. 440, L. 2015, provided: "[This act] applies to tax years beginning after December 31, 2015."

*2009 Amendment:* Chapter 460 in (4) near middle following "local governments" inserted "tribal governments". Amendment effective October 1, 2009.

*2007 Amendment:* Chapter 104 inserted (7) related to workforce development in high-poverty counties; and made minor changes in style. Amendment effective July 1, 2007.

## 90-1-203. Types of financial assistance available.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 7, Ch. 636, L. 2023. Amendment effective July 1, 2023.

*2009 Amendment:* Chapter 460 in (1) near middle following "local governments" inserted "and tribal governments". Amendment effective October 1, 2009.

**Administrative Rules**

Title 8, chapter 99, subchapter 9, ARM Big Sky economic development program.

## 90-1-204. Priorities for funding — rulemaking.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 8, Ch. 636, L. 2023. Amendment effective July 1, 2023.

*2021 Amendment:* Chapter 330 in (2)(a) in second sentence substituted "Montana coal endowment program" for "treasure state endowment program". Amendment effective October 1, 2021.

*2013 Amendment:* Chapter 23 in (1) at beginning inserted "Under the big sky economic development program provided for in 90-1-201"; in (2)(g) near beginning after "A grant or loan" inserted "under the big sky economic development program", following "meets or exceeds the" inserted "lesser of 170% of Montana's current minimum wage or the", and inserted second sentence allowing the department to consider the value of employee benefits in determining wage requirements; inserted (2)(h) clarifying that (2)(g) does not exempt an employer from minimum wage requirements; and made minor changes in style. Amendment effective February 18, 2013.

*2009 Amendments — Composite Section:* Chapter 460 in (1) at end of first sentence inserted "and tribal governments" and in third sentence near middle following "organization" inserted "or with an applicant tribal government"; in (2)(c)(i) near beginning following "local governments" inserted "and tribal governments"; in (2)(c)(ii) near end following "corporation" inserted "or a tribal government"; in (2)(d)(i) in first sentence at end inserted "and tribal governments". Amendment effective October 1, 2009.

Chapter 489 in (2)(d)(i), (2)(d)(ii), (2)(d)(iii), (2)(e), (2)(f), and (2)(g) at beginning inserted exception clause; and made minor changes in style. Amendment effective May 14, 2009, and terminates June 30, 2011.

*2007 Amendment:* Chapter 104 in (2)(a) in last sentence inserted exception clause; inserted (2)(b) related to high-poverty counties; in (2)(d)(ii) and (2)(d)(iii) at end inserted exception clause; inserted (2)(e) related to rules for high-poverty counties; and made minor changes in style. Amendment effective July 1, 2007.

**Administrative Rules**

Title 8, chapter 99, subchapter 9, ARM Big Sky economic development program.

**Collateral References**

Big Sky Economic Development Trust Fund — Job Creation and Planning Projects Application Guidelines, Montana Office of Tourism and Business Development, https://business.mt.gov/Business-Assistance/Big-Sky-Economic-Development-Trust-Fund-Program/Job-Creation.

### 90-1-205. Economic development special revenue account.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 9, Ch. 636, L. 2023. Amendment effective July 1, 2023.

*2021 Amendments — Composite Section:* Chapters 558 and 563 in (2) in second sentence after "not used for administrative expenses" inserted "or for other economic development purposes". Amendments effective July 1, 2021.

*2017 Special Session Amendment:* Chapter 6 in (1) at beginning of third sentence inserted "Subject to legislative fund transfer"; and made minor changes in style. Amendment effective December 15, 2017, and terminates June 30, 2019.

*Severability:* Section 26, Ch. 6, Sp. L. November 2017, was a severability clause.

*2009 Amendment:* Chapter 460 in (2)(a) near end following "local governments" inserted "and tribal governments"; in (2)(b) near beginning following "must be" substituted "allocated for distribution" for "distributed" and at end inserted "and tribal governments"; and made minor changes in style. Amendment effective October 1, 2009.

**Administrative Rules**

Title 8, chapter 99, subchapter 9, ARM Big Sky economic development program.

## Part 4
## Montana Geospatial Information Act

**Part Compiler's Comments**

*Effective Date:* Section 16, Ch. 135, L. 2005, provided that this part is effective July 1, 2005.

### 90-1-401. Short title.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 3, Ch. 110, L. 2023. Amendment effective July 1, 2023.

### 90-1-402. Purpose.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 4, Ch. 110, L. 2023. Amendment effective July 1, 2023.

### 90-1-403. Definitions.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 5, Ch. 110, L. 2023. Amendment effective July 1, 2023.

*2013 Amendment:* Chapter 175 deleted definition that read ""Department" means the department of administration provided for in 2-15-1001"; inserted definitions of state librarian and state library; and made minor changes in style. Amendment effective July 1, 2013.

### 90-1-404. Geospatial information — management — duties of state library.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 6, Ch. 110, L. 2023. Amendment effective July 1, 2023.

*2013 Amendment:* Chapter 175 in (1), (1)(k), and (2) substituted references to state library for references to department; and in (1)(h) substituted "geographic information system" for "technological". Amendment effective July 1, 2013.

*2007 Amendment:* Chapter 352 inserted (1)(m) regarding implementation of conservation easements; and made minor changes in style. Amendment effective April 27, 2007.

**Administrative Rules**

Title 10, chapter 102, subchapter 91, ARM Montana Land Information Act.

**Collateral References**

Montana Land Information Plan, Montana State Library (2021).

### 90-1-405. Geospatial information advisory council — appointments — terms — vacancies — compensation.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 7, Ch. 110, L. 2023. Amendment effective July 1, 2023.

*2013 Amendment:* Chapter 175 in (2)(a) substituted "state librarian or the state librarian's designee" for "director of the department or the director's designee"; in (2)(b) substituted current language concerning chief information officer for "the state librarian or the state librarian's designee"; and made minor changes in style. Amendment effective July 1, 2013.

**90-1-406. Geospatial information advisory council — duties — advisory only.**

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 8, Ch. 110, L. 2023. Amendment effective July 1, 2023.

*2013 Amendment:* Chapter 175 in (1)(a), (1)(b), (1)(c), (1)(d), and (1)(e) substituted "state library" for "department". Amendment effective July 1, 2013.

**90-1-409. Montana geospatial information account.**

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 9, Ch. 110, L. 2023. Amendment effective July 1, 2023.

**90-1-410. Montana geospatial information account — distribution of funds.**

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 10, Ch. 110, L. 2023. Amendment effective July 1, 2023.

*2013 Amendment:* Chapter 175 in (1) in two places, in (2), and in (3) in two places substituted references to state library for references to department. Amendment effective July 1, 2013.

**90-1-411. Montana geospatial information account — use of funds — action by state library — hearing.**

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 11, Ch. 110, L. 2023. Amendment effective July 1, 2023.

*2013 Amendment:* Chapter 175 throughout section substituted "state library" for "department". Amendment effective July 1, 2013.

**90-1-412. Geospatial information — grants.**

**Compiler's Comments**

*Effective Date:* Section 21, Ch. 110, L. 2023, provided: "[This act] is effective July 1, 2023."

**90-1-413. Rulemaking.**

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 13, Ch. 110, L. 2023. Amendment effective July 1, 2023.

*2013 Amendment:* Chapter 175 in (1) and (2) substituted "state library" for "department"; and in (1)(d) substituted "geographic information system" for "technological". Amendment effective July 1, 2013.

## Part 5

## Distressed Wood Products Industry Revolving Loan Program

**Part Compiler's Comments**

*Effective Date:* Section 9, Ch. 484, L. 2009, provided: "[This act] is effective on passage and approval." Chapter 484, L. 2009, was enacted into law without the governor's signature on May 9, 2009.

**Part Collateral References**

State Wood Products Revolving Loan Fund, https://business.mt.gov/Business-Assistance/Wood-Products-Revolving-Loan-Fund.

**90-1-501. Revolving loan program for distressed wood products industry — finding.**

**Compiler's Comments**

*2013 Amendment:* Chapter 205 in (3)(b) substituted "must" for "may" and substituted "and are subject to the provisions of subsections (5) through (7)" for "or for primary sector businesses statewide and are not subject to the provisions of this section"; in (4) in second sentence at beginning deleted "Except as provided in subsection (3)(b)"; and made minor changes in style. Amendment effective October 1, 2013.

**90-1-503. Outcome measures.**

**Collateral References**

Wood Products Revolving Loan Fund, Montana Department of Commerce (2020).

## Part 6
## ConnectMT Act

**Part Compiler's Comments**

*Effective Date:* Section 12, Ch. 449, L. 2021, provided: "[This act] is effective on passage and approval." Approved May 10, 2021.

**90-1-602. Definitions.**

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 1, Ch. 696, L. 2023. Amendment effective May 19, 2023.

*Saving Clause:* Section 10, Ch. 696, L. 2023, was a saving clause.

*Coordination:* Section 40(1), Ch. 401, L. 2021, a coordination section, substituted current definition of underserved area for definition that read: ""Underserved area" means an area where any of the delivery points have no access to broadband service offered with a download speed range of less than 100 megabits per second and an upload speed of 20 megabits per second or less with low latency."

**90-1-603. Establishment of commission and program — administration and funding.**

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 2, Ch. 696, L. 2023. Amendment effective May 19, 2023.

*Saving Clause:* Section 10, Ch. 696, L. 2023, was a saving clause.

**90-1-604. Eligible projects.**

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 3, Ch. 696, L. 2023. Amendment effective May 19, 2023.

*Saving Clause:* Section 10, Ch. 696, L. 2023, was a saving clause.

**90-1-605. Eligible proposals.**

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 4, Ch. 696, L. 2023. Amendment effective May 19, 2023.

*Saving Clause:* Section 10, Ch. 696, L. 2023, was a saving clause.

**90-1-606. Proposals.**

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 5, Ch. 696, L. 2023. Amendment effective May 19, 2023.

*Saving Clause:* Section 10, Ch. 696, L. 2023, was a saving clause.

**90-1-607. Review of proposal challenges — approval.**

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 6, Ch. 696, L. 2023. Amendment effective May 19, 2023.

*Saving Clause:* Section 10, Ch. 696, L. 2023, was a saving clause.

*Coordination:* Section 40(2), Ch. 401, L. 2021, a coordination section, inserted (5)(n) concerning broadband service providers who have broadband service infrastructure already deployed in the project area.

**90-1-608. Implementation.**

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 7, Ch. 696, L. 2023. Amendment effective May 19, 2023.

*Saving Clause:* Section 10, Ch. 696, L. 2023, was a saving clause.

**90-1-609. Montana broadband infrastructure accounts.**

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 8, Ch. 696, L. 2023. Amendment effective May 19, 2023.

*Saving Clause:* Section 10, Ch. 696, L. 2023, was a saving clause.

# CHAPTER 2
# RESOURCE DEVELOPMENT AND RECLAMATION

**Chapter Administrative Rules**

Title 36, chapter 19, ARM Reclamation and development grants program.

## Part 2
## Investigation Programs

**90-2-201. Hydrocarbon and geology investigation program — purpose — grants.**

**Compiler's Comments**

*Effective Date:* Section 10, Ch. 553, L. 2021, provided: "[This act] is effective July 1, 2021."

*Retroactive Applicability:* Section 13, Ch. 553, L. 2021, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to certificates issued on or after January 1, 1976."

*Severability:* Section 11, Ch. 553, L. 2021, was a severability clause.

**90-2-202. Coal ash markets investigation program.**

**Compiler's Comments**

*Effective Date:* Section 10, Ch. 553, L. 2021, provided: "[This act] is effective July 1, 2021."

*Retroactive Applicability:* Section 13, Ch. 553, L. 2021, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to certificates issued on or after January 1, 1976."

*Severability:* Section 11, Ch. 553, L. 2021, was a severability clause.

## Part 11
## Reclamation and Development Grants Program

**Part Compiler's Comments**

*Saving Clause:* Section 20, Ch. 418, L. 1987, was a saving clause.

*Severability:* Section 19, Ch. 418, L. 1987, was a severability section.

**Part Administrative Rules**

ARM 36.17.614 Projects eligible for categorical exclusion from Montana Environmental Policy Act (MEPA) review.

Title 36, chapter 19, ARM Reclamation and development grants program.

**90-2-1103. Definitions.**

**Compiler's Comments**

*2007 Amendment:* Chapter 432 deleted definition of reclamation and development grants account that read: ""Reclamation and development grants account" means the reclamation and development grants special revenue account established in 90-2-1104"; and made minor changes in style. Amendment effective July 1, 2007.

*1993 Amendment:* Chapter 478 deleted definition of Board as Board of Natural Resources and Conservation. Amendment effective July 1, 1993.

**Administrative Rules**

ARM 36.19.101 Definitions.

**90-2-1105. Adoption of rules.**

**Compiler's Comments**

*1993 Amendment:* Chapter 478 at beginning substituted "department" for "board". Amendment effective July 1, 1993.

*1987 Statement of Intent:* The statement of intent attached to Ch. 418, L. 1987, read: "A statement of intent is required for this bill because it delegates rulemaking authority in section 9 [90-2-1105] to the board of natural resources and conservation [now department of natural resources and conservation] for the establishment and administration of the reclamation and development grants program.

The intent is to provide the board with the authority to adopt rules necessary to administer the reclamation and development grants program. The authority as described in section 9 [90-2-1105] includes establishing rules:

(1) prescribing the form and content of applications for grants;

(2) describing the terms and conditions of making grants;

(3) prescribing a monitoring program to evaluate the effectiveness of funded projects and activities; and

(4) developing any procedures necessary to accomplish the objectives of the reclamation and development grants program."

## 90-2-1111. State and local grants.

### Compiler's Comments

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

*2007 Amendment:* Chapter 432 in (1) and (4) substituted references to the natural resources projects state special revenue account established in 15-38-302 for references to the reclamation and development grants account; and made minor changes in style. Amendment effective July 1, 2007.

## 90-2-1112. Eligibility requirements.

### Compiler's Comments

*1999 Amendment:* Chapter 552 in (2) near beginning after "If" deleted "sufficient eligible and qualified applications satisfying the mineral development objectives provided for in subsection (1) are not received or if", after "crucial state need" inserted "to protect Montana's environment", and after "funding for projects" substituted "in addition to those described in subsection (1)" for "that:

(a) enhance Montana's economy through the development of natural resources; or

(b) develop, promote, protect, or further Montana's total environment and public interest, including the general health, safety, welfare, and public resources of Montana citizens and communities". Amendment effective July 1, 1999.

*Coordination Instruction:* The coordination instruction in sec. 18, Ch. 418, L. 1987, provided for the deletion of 90-2-1112(1)(d) if House Bill 777, amending 15-38-202, was passed and approved. It was so enacted as Ch. 408, L. 1987, but sec. 5, Ch. 555, L. 1987, was a coordination instruction to replace sec. 18, Ch. 418. The replacement coordination instruction made no reference to deleting material in 90-2-1112.

## 90-2-1113. Evaluation criteria — priority.

### Compiler's Comments

*2015 Amendment:* Chapter 413 in (1) substituted "subsection (2)" for "subsections (2) and (3)"; deleted former (2) that read: "(2) (a) Subject to the conditions of this part, the department shall give priority to grant requests, not to exceed a total of $600,000 for the biennium, from the board of oil and gas conservation beginning on July 1, 2015. The board of oil and gas conservation shall use a grant that received priority under this subsection (2)(a) for oil and gas reclamation projects. The board may use a maximum of 2.5% of the amount of a grant for administrative costs associated with implementing the projects covered in the grant.

(b) Any unobligated fund balance of a grant that received priority under subsection (2)(a) remaining at the end of the current biennium must be included as part of the $600,000 limitation for the next biennium.

(c) The priority given to the board of oil and gas conservation under subsection (2)(a) does not preclude the board of oil and gas conservation from submitting additional grant requests. The department shall evaluate additional grant requests from the board of oil and gas conservation in accordance with the provisions of subsection (1)"; and made minor changes in style. Amendment effective July 1, 2015.

*2013 Amendment:* Chapter 168 in (2)(a) at end of first sentence inserted "beginning on July 1, 2015". Amendment effective July 1, 2013.

*Severability:* Section 7, Ch. 168, L. 2013, was a severability clause.

*2003 Amendment:* Chapter 239 in (1) in exception clause deleted reference to subsection (3); in (2)(a) near middle of first sentence after "total of" substituted "$200,000" for "$600,000"; deleted former (3) that read: "(3) Subject to the conditions of this part, the department shall give priority to grant requests not to exceed a total of $800,000 for the biennium for abandoned mine reclamation projects. A grant may not be used for personnel costs or general operating expenses"; and made minor changes in style. Amendment effective April 7, 2003, and terminates June 30, 2005.

*1999 Amendments — Composite Section:* Chapter 59 in (2)(a) substituted third sentence authorizing board to use maximum of 2.5% of grant amount for administrative costs associated with implementing grant projects for "A grant may not be used for personnel costs or general operating expenses of the board of oil and gas conservation"; and made minor changes in style. Amendment effective July 1, 1999.

Chapter 552 in (1) near beginning substituted "subsections (2) and (3)" for "subsection (2)"; inserted (3) regarding grant requests for abandoned mine reclamation projects; and made minor changes in style. Amendment effective July 1, 1999.

*1993 Amendment:* Chapter 430 in (1), at beginning, inserted exception clause; inserted (2) concerning priority for grants for oil and gas reclamation projects; and made minor changes in style. Amendment effective July 1, 1993.

### 90-2-1121. Prohibited compensation to public officers or employees — penalty.

**Compiler's Comments**

*2007 Amendment:* Chapter 432 in (2) at end substituted "natural resources projects state special revenue account established in 15-38-302" for "reclamation and development grants account". Amendment effective July 1, 2007.

*1997 Amendment:* Chapter 42 in (1), in two places before "officer", deleted reference to member and before "the department" deleted "the board or"; and made minor changes in style. Amendment effective March 12, 1997.

### 90-2-1122. Exemption from environmental review.

**Compiler's Comments**

*Effective Date:* This section is effective October 1, 2023.

## CHAPTER 3
## RESEARCH AND COMMERCIALIZATION

### Part 13
### Geothermal Research

**Part Compiler's Comments**

*Preamble:* The preamble attached to Ch. 383, L. 2009, provided: "WHEREAS, Montana has unique geological features that include significant geothermal resources; and

WHEREAS, other states in the region are actively exploring and developing these resources for energy production purposes; and

WHEREAS, existing data and analyses of these resources is now largely outdated, and advances in technology, increased energy prices, and increased interest in low-carbon energy sources has increased interest by electric utilities and independent power producers in the state's geothermal resources."

*Effective Date:* Section 4, Ch. 383, L. 2009, provided: "[This act] is effective July 1, 2009."

### 90-3-1301. Geothermal research.

**Compiler's Comments**

*2021 Amendment:* See 2021 Session Law for amendment made by sec. 134, Ch. 261, L. 2021. Amendment effective April 20, 2021.

*2011 Amendment:* Chapter 19 deleted former (6)(a) and (6)(b) that read: "[(a) a ranking of the top five locations in Montana that offer the best opportunity for near-term development of geothermal energy; and

(b) an estimate of the cost associated with development of each site.]" Amendment effective October 1, 2011.

*2009 Code Commissioner Correction:* The bracketed material in (6) was erroneously retained during engrossing in the enactment of this section.

# CHAPTER 4
# ENERGY DEVELOPMENT AND CONSERVATION

**Chapter Attorney General's Opinions**

*Alternative Renewable Energy Source Grants to Religious Organizations:* Alternative renewable energy source grants may not be awarded to any church or to any school, academy, seminary, college, university, or other literary or scientific institution controlled in whole or in part by any church, sect, or denomination. Other religious organizations may be awarded grants if a substantial portion of their functions are secular and grants will only be used for such functions. 37 A.G. Op. 165 (1978).

**Chapter Law Review Articles**

Are Ocean Wind Turbines Like Homesteads and Gold Mines and Railroads: A Public Lands Policy Question for the Climate Change Era, Jensen, Reimer, & Caplan, 34 Pub. Land & Resources L. Rev. 93 (2013).

Coal's Plateau and Energy Horizon?, Kalen, 34 Pub. Land & Resources L. Rev. 145 (2013).

Energy Transmission Across Wild and Scenic Rivers: Balancing Increased Access to Nontraditional Power Sources With Environmental Protection Policies, Glicksman, 34 Pub. Land & Resources L. Rev. 1 (2013).

## Part 2
## Home Weatherization Programs

**Part Administrative Rules**

Title 37, chapter 71, ARM Low-income weatherization assistance program.

### 90-4-201. Weatherization money sources — consolidation.

**Compiler's Comments**

*2009 Amendment:* Chapter 10 in (1) near end after "coordinated and are" substituted "available for appropriation" for "appropriated". Amendment effective October 1, 2009.

*1995 Amendment:* Chapter 546 at end of (1) and beginning of (2) substituted "department of public health and human services" for "department of social and rehabilitation services". Amendment effective July 1, 1995.

*Saving Clause:* Section 571, Ch. 546, L. 1995, was a saving clause.

*Appropriation for Low-Income Home Weatherization:* Section 5, Ch. 597, L. 1989, provided an appropriation of $900,000 for use in the program created under this section. See 1989 Session Law for text of the appropriation.

*1985 Amendment:* In (1) near beginning, after "provisions of the", substituted "U.S. department of energy" for "community services administration's emergency energy conservation program, the federal energy administration's", and after "weatherization assistance program", inserted "the U.S. department of health and human services low-income home energy assistance program"; and inserted (2) requiring minimum allocation of 5% of federal funds.

*1981 Amendment:* Substituted "department of social and rehabilitation services" for "department of community affairs".

*Federal Statute:* Title XX of the Social Security Act referred to in this section is codified at 42 U.S.C. §§ 1397 through 1397f.

**Administrative Rules**

Title 37, chapter 71, ARM Low-income weatherization assistance program.

### 90-4-202. Allocation formula.

**Compiler's Comments**

*1995 Amendment:* Chapter 546 throughout section substituted "department of public health and human services" for "department of social and rehabilitation services". Amendment effective July 1, 1995.

*Saving Clause:* Section 571, Ch. 546, L. 1995, was a saving clause.

*1985 Amendment:* Throughout section substituted "human resource development councils or other public or nonprofit entities" for "governor's substate planning districts"; and in (2), after "households in", substituted "its geographic area" for "the district".

*1981 Amendment:* Throughout section, substituted "department of social and rehabilitation services" for "department of community affairs".

**Administrative Rules**

Title 37, chapter 71, ARM Low-income weatherization assistance program.

**90-4-210. Policy.**

**Compiler's Comments**

*Appropriation of Oil Overcharge Money for State Programs:* Chapter 49, L. 1999, appropriated certain oil overcharge money to various state programs as an implementation of the policy stated in this section. The text of Ch. 49 provided: "Section 1. Policy. [Sections 1 through 13] [not codified] implement the policy stated in 90-4-210.

Section 2. Definitions. As used in [sections 1 through 13] [not codified], the following definitions apply:

(1) "Carryover" means unspent oil overcharge funds previously appropriated and incorporated into an approved program plan for one of the federal energy conservation programs, but not included in unspent project funds as defined in subsection (8).

(2) "Cities service payments" means the oil overcharge payments made to the U.S. treasury for distribution to the state of Montana pursuant to the consent agreement between cities service oil and gas and the U.S. department of energy, as affirmed by the federal energy regulatory commission, and any interest accrued on the payments.

(3) "Diamond shamrock payments" means the oil overcharge payments made to the U.S. treasury for distribution to the state of Montana as the result of the final settlement agreement in the U.S. district court for the southern district of Ohio eastern division in civil action No. C2-84-1432 and any interest accrued on the payments.

(4) "Exxon payments" means the oil overcharge payments made by the exxon corporation to the U.S. treasury for distribution to the state of Montana pursuant to the order of the U.S. district court for the District of Columbia in civil action No. 78-1035 and any interest accrued on the payments.

(5) "Getty oil payments" means the oil overcharge payments made to the U.S. treasury for distribution to the state of Montana pursuant to the order of disbursement issued in civil action No. 77-347 (MMS) in the U.S. district court for the district of Delaware and any interest accrued on the payments.

(6) "Stripper well payments" means the oil overcharge payments made to the U.S. treasury for distribution to the state of Montana as the result of the final settlement agreement in the U.S. district court for the district of Kansas, Cause No. M.D.L. 378, and any interest accrued on the payments. The term also includes but is not limited to cities service payments, as defined in subsection (2), getty oil payments, as defined in subsection (5), texaco payments, as defined in subsection (7), and any unspent project funds, as defined in subsection (8).

(7) "Texaco payments" means the oil overcharge payments made to the U.S. treasury for distribution to the state of Montana pursuant to the texaco final consent order, 53 Fed. Reg. 32929, August 29, 1988, and any interest accrued on the payments.

(8) "Unspent project funds" means stripper well payments that were not expended or otherwise legally obligated during the 1999 biennium but were appropriated for the 1999 biennium in Chapter 526, Laws of 1997, in:

(a) section 4;
(b) section 5;
(c) section 6;
(d) section 7;
(e) section 8;
(f) section 9;
(g) section 10;
(h) section 11;
(i) section 12; and
(j) section 13.

Section 3. Deposit of oil overcharge revenue. All funds from stripper well and exxon payments must be deposited by the state treasurer in the federal special revenue fund. All interest earned on any of these funds or payments also must be deposited in the federal special revenue fund.

Section 4. Matching funds for low-income energy assistance — appropriation. (1) There is appropriated $300,000 from the stripper well payments contained in the federal special revenue fund to the department of public health and human services for the purpose described in subsection (2) and under the restrictions contained in subsection (3).

(2) The department of public health and human services shall match private contributions to energy share, inc. to be used to address home heating emergencies encountered by households with incomes between 0% and 150% of federal poverty guidelines who are not eligible for federal low-income energy assistance or who have not received federal low-income energy assistance in the current program year. All of the funds appropriated to the department for this purpose under subsection (1) must be used for clients' emergency energy needs.

(3) In the event a combination of the oil overcharge funds appropriated in subsection (1) and universal system benefits funds designated to energy share, inc. exceeds $400,000 in fiscal year 2000 or in fiscal year 2001, the excess amount must be subtracted from the appropriation of oil overcharge funds provided in subsection (1) for that fiscal year and a like amount shall be added to the oil overcharge funds appropriated in [section 5] [not codified] for low-income home weatherization, except that the biennial appropriation for low-income home weatherization provided in [section 5] [not codified] shall not exceed under any condition.

Section 5. Low-income home weatherization — appropriation. There is appropriated $500,000 from the stripper well payments contained in the federal special revenue fund to the department of public health and human services for use in the home weatherization program created in 90-4-201.

Section 6. Affordable, efficient housing plan book — appropriation. There is appropriated $40,000 from the stripper well payments contained in the federal special revenue fund to the department of environmental quality to assist in the preparation, production, and distribution of a plan book containing affordable, energy-efficient house designs developed in cooperation with the Montana building industries association, the department of commerce, local building code officials, and other entities.

Section 7. Food bank network transportation — appropriation. There is appropriated $15,000 from the stripper well payments contained in the federal special revenue fund to the department of public health and human services for use in assisting the Montana food bank network with coordinated energy-efficient transportation of food to drop sites and local food banks statewide.

Section 8. Transportation to nutrition sites — appropriation. There is appropriated $11,000 from the stripper well payments contained in the federal special revenue fund to the department of public health and human services for grants to the area agencies on aging to provide transportation for seniors to nutrition sites. The area agencies on aging shall apply to the department of public health and human services for these funds.

Section 9. Low-income weatherization — appropriation. In addition to the appropriations in [sections 4 and 5] [not codified], there is appropriated $200,000 from the stripper well payments contained in the federal special revenue fund to the department of public health and human services for use in the home weatherization program created in 90-4-201.

Section 10. Montana public and private organizations becoming consortium partners — appropriation. There is appropriated $50,000 from the stripper well payments contained in the federal special revenue fund to the department of environmental quality to provide a grant to the national center for appropriate technology to initiate the formation of a Montana advanced transportation technologies consortium focusing on vehicles traditionally powered by two-stroke engines. The national center for appropriate technology will integrate its transportation technology development services with other western regional consortium and national programs, as recommended by the western governors' association and the western interstate energy board, to provide specialized business assistance, to attract development financing and production capital, and to promote regional industrial growth for the clean transportation technologies fostered by the consortium.

Section 11. Carryover — reappropriations. There is reappropriated $28,000 from the stripper well payments, $51,000 from the exxon payments, and $66,000 from the diamond shamrock payments contained in the federal special revenue fund to the department of environmental quality to fund the state energy program administered by the department pursuant to 10 CFR 420. There is reappropriated up to $40,000 of stripper well payments contained in the federal special revenue fund at the department of administration to help establish a refueling infrastructure that will support the use of ethanol-fueled vehicles.

Section 12. Conditions applied to appropriations. (1) The appropriations made in [sections 4 through 10] [not codified] are biennial appropriations. One-half of the total amount appropriated to each program in [sections 4 through 10] [not codified] is appropriated in fiscal year 2000, and the remainder is appropriated in fiscal year 2001. As biennial appropriations, the unexpended funds appropriated in fiscal year 2000 may be carried forward within each program to fiscal year 2001, subject to the specific conditions governing each appropriation.

(2) The appropriations in [section 11] [not codified] are limited to available funds. Expenditures of carryover funds for the state energy program may not exceed the actual amount of unspent funds available at the department of environmental quality. Total expenditures of stripper well funds to help establish a refueling infrastructure that will support the use of ethanol-fueled vehicles may not exceed $70,000 for

Section 13. Appropriations prioritized. (1) The appropriations in [sections 4 through 10] [not codified] are approved in order of priority as they appear in [sections 4 through 10] [not codified], with the appropriation in [section 4] [not codified] having the highest priority and the appropriation in [section 10] [not codified] having the lowest priority. If the U.S. department of energy does not approve one or more of the programs that are funded by [sections 4 through 10] [not codified], any stripper well payments that are not used to fund the higher priority program must be provided to the lower-ranked program up to the amounts appropriated in [sections 4 through 10] [not codified].

(2) If stripper well payments are insufficient to fully fund the appropriations made in [sections 4 through 10] [not codified], allocations to the lowest ranking program must be reduced until the deficiency is eliminated. If the deficiency is in excess of the appropriation to the lowest ranking program, the next lowest ranking program must have its appropriation reduced until the deficiency is eliminated and so forth as the programs are prioritized. These priorities must be applied to one-half of the total amount appropriated in [sections 4 through 10] [not codified] for fiscal year 2000 and to the remaining appropriation for fiscal year 2001.

(3) In order to provide continuity for the programs when establishing the appropriations for each fiscal year of the 2001 biennium, anticipated stripper well payments that will be received under terms of the stripper well agreement during the biennium may be considered as available to fund the activities.

(4) The expenditure of money appropriated by [sections 4 through 10] [not codified] may not exceed the amount of the stripper well payments available in the biennium."

*Coordination:* Section 14, Ch. 49, L. 1999, provided: "If House Bill No. 12 is passed and approved, the stripper well payments appropriated in House Bill No. 12 have a higher priority than any appropriation of stripper well payments in [sections 4 through 11] [not codified]." House Bill No. 12 was approved as Ch. 50, L. 1999.

*Effective Date.* Section 15, Ch. 49, L. 1999, provided: "[This act] is effective July 1, 1999."

*Appropriation of Oil Overcharge Money for State Programs:* Chapter 526, L. 1997, appropriated certain oil overcharge money to various state programs as an implementation of the policy stated in this section. The text of Ch. 526 provided:

"Section 1. Policy. [Sections 1 through 15] [not codified] implement the policy stated in 90-4-210.

Section 2. Definitions. As used in [sections 1 through 15] [not codified], the following definitions apply:

(1) "Amoco payments" means the oil overcharge payments made to the U.S. treasury for distribution to the state of Montana pursuant to the decision and order of the U.S. department of energy in Case No. HQF-0588 and any interest accrued on the payments.

(2) "Carryover" means unspent oil overcharge funds previously appropriated and incorporated into an approved program plan for one of the federal energy conservation programs, but not included in unspent project funds as defined in subsection (9).

(3) "Cities service payments" means the oil overcharge payments made to the U.S. treasury for distribution to the state of Montana pursuant to the consent agreement between cities service oil and gas and the U.S. department of energy, as affirmed by the federal energy regulatory commission, and any interest accrued on the payments.

(4) "Diamond shamrock payments" means the oil overcharge payments made to the U.S. treasury for distribution to the state of Montana as the result of the final settlement agreement in the U.S. district court for the southern district of Ohio eastern division in Civil Action No. C2-84-1432 and any interest accrued on the payments.

(5) "Exxon payments" means the oil overcharge payments made by the exxon corporation to the U.S. treasury for distribution to the state of Montana pursuant to the order of the U.S. district court for the District of Columbia in Civil Action No. 78-1035 and any interest accrued on the payments.

(6) "Getty oil payments" means the oil overcharge payments made to the U.S. treasury for distribution to the state of Montana pursuant to the order of disbursement issued in Civil Action No. 77-347 (MMS) in the U.S. district court for the district of Delaware and any interest accrued on the payments.

(7) "Stripper well payments" means the oil overcharge payments made to the U.S. treasury for distribution to the state of Montana as the result of the final settlement agreement in the U.S. district court for the district of Kansas, Cause No. M.D.L. 378, and any interest accrued on the payments. The term also includes but is not limited to cities service payments, as defined in subsection (3), getty oil payments, as defined in subsection (6), texaco payments, as defined in subsection (8), and any unspent project funds, as defined in subsection (9).

(8) "Texaco payments" means the oil overcharge payments made to the U.S. treasury for distribution to the state of Montana pursuant to the texaco final consent order, 53 Fed. Reg. 32929, August 29, 1988, and any interest accrued on the payments.

(9) "Unspent project funds" means stripper well payments that were not expended or otherwise legally obligated during the 1997 biennium but were appropriated for the 1997 biennium in Chapter 63, Laws of 1995, in:

(a) section 4;
(b) section 5;
(c) section 6;
(d) section 7; and
(e) section 8.

Section 3. Deposit of oil overcharge revenue. All funds from stripper well, amoco, and exxon payments must be deposited by the state treasurer in the federal special revenue fund. All interest earned on any of these funds or payments also must be deposited in the federal special revenue fund.

Section 4. Matching funds for low-income energy assistance — appropriation. (1) There is appropriated $180,000 from the stripper well payments contained in the federal special revenue fund to the department of public health and human services for the purpose described in subsection (2).

(2) The department of public health and human services shall use the funds appropriated in subsection (1) to match private contributions to energy share, inc., to be used to provide emergency energy assistance to residents with incomes between 125% and 150% of poverty guidelines who are not eligible for federal low-income energy assistance. All of the funds appropriated to the department for this purpose under subsection (1) must be used for clients' fuel bills or other emergency energy needs.

Section 5. Low-income home weatherization — appropriation. There is appropriated $230,000 from the stripper well payments contained in the federal special revenue fund to the department of public health and human services for use in the home weatherization program created in 90-4-201.

Section 6. Recommissioning state-owned buildings — appropriation. (1) There is appropriated $80,000 from the stripper well payments contained in the federal special revenue fund to the department of environmental quality to identify and implement low-cost maintenance activities and modifications to equipment and procedures that will enable state building systems to operate at their designed efficiencies, reducing energy consumption in buildings by 5% to 10%.

(2) Although the aggregate energy cost savings realized from this program could be significant, the amount of savings realized by individual agencies is not likely to be substantial. Therefore, it is the intent of the legislature that agencies be allowed to keep and use any energy cost savings realized as an incentive to participate in this program. The department of environmental quality shall report the amount of savings to the 1999 legislature, at which time this policy may be reevaluated.

Section 7. Infrastructure to support purchase and use of ethanol-fueled vehicles — appropriation. There is appropriated $70,000 from the stripper well payments contained in the federal special revenue fund to the department of environmental quality to help establish a refueling infrastructure that will support the use of ethanol-fueled (E-85) vehicles. A one-time investment of oil overcharge dollars will be used to leverage private sector funds to provide pilot alternative refueling stations to supply alternative-fueled vehicles.

Section 8. Reduce petroleum use in Yellowstone region — appropriation. There is appropriated $25,000 from the stripper well payments contained in the federal special revenue fund to the department of environmental quality to promote expanded use of alternative fuels within Yellowstone park and neighboring Montana communities.

Section 9. Small business and tribal environmental compliance loan fund program — appropriation. There is appropriated $180,000 from the stripper well payments contained in the federal special revenue fund to the department of environmental quality to provide a grant to the department of commerce microbusiness finance program to offer loans to small businesses and tribal communities for pollution control equipment, petroleum-based chemical product substitution, equipment replacement, pollution prevention, energy conservation, and waste minimization.

Section 10. Recycling for mercury-containing lamps — appropriation. There is appropriated $36,000 from the stripper well payments contained in the federal special revenue fund to the department of environmental quality to reduce disposal costs and enhance energy savings from lighting retrofits by providing equipment and training to establish a self-sustaining lamp recycling program.

Section 11. Low-income home weatherization — appropriation. There is appropriated another $295,000 from the stripper well payments contained in the federal special revenue fund to the department of public health and human services for use in the home weatherization program created in 90-4-201.

Section 12. Food bank network transportation — appropriation. There is appropriated $5,000 from the stripper well payments contained in the federal special revenue fund to the department of public health and human services for use in assisting the Montana food bank network with coordinated energy-efficient transportation of food to drop sites and local food banks statewide.

Section 13. Carryover — reappropriations. There is reappropriated $25,000 from the stripper well payments, $50,000 from the exxon payments, $57,000 from the diamond shamrock payments, and $1,500 from the amoco payments contained in the federal special revenue fund to the department of environmental quality to fund the state energy program administered by the department pursuant to 10 CFR 420.

Section 14. Conditions applied to appropriations. (1) The appropriations made in [sections 4 through 13] [not codified] are biennial appropriations.

(2) One-half of the total amount appropriated to each program in [sections 4 through 13] [not codified] is appropriated in fiscal year 1998 and the remainder is appropriated in fiscal year 1999. As biennial appropriations, the unexpended funds appropriated in fiscal year 1998 may be carried forward within each program to fiscal year 1999.

(3) The appropriations in [section 13] [not codified] are limited to available funds. Expenditures of carryover funds may not exceed the actual amount of unspent funds available.

Section 15. Appropriations prioritized. (1) The appropriations in [sections 4 through 12] [not codified] are approved in order of priority as they appear in [sections 4 through 12] [not codified], with the appropriation in [section 4] [not codified] having the highest priority and the appropriation in [section 12] [not codified] having the lowest priority. If the U.S. department of energy does not approve one or more of the programs that are funded by [sections 4 through 12] [not codified], any stripper well payments that are not used to fund the higher-priority program must be provided to the lower-ranked program up to the amounts appropriated in [sections 4 through 12] [not codified].

(2) If stripper well payments are insufficient to fully fund the appropriations made in [sections 4 through 12] [not codified], allocations to the lowest-ranking program must be reduced until the deficiency is eliminated. If the deficiency is in excess of the appropriation to the lowest-ranking program, the next lowest-ranking program must have its appropriation reduced until the deficiency is eliminated and so forth as the programs are prioritized. These priorities must be applied to one-half of the total amount appropriated in [sections 4 through 12] [not codified] for fiscal year 1998 and to the remaining appropriation for fiscal year 1999.

(3) In order to provide continuity for the programs when establishing the appropriations for each fiscal year of the 1999 biennium, anticipated stripper well payments that will be received under terms of the stripper well agreement during the biennium may be considered as available to fund the activities.

(4) The expenditure of money appropriated by [sections 4 through 12] [not codified] may not exceed the amount of the stripper well payments available in the biennium."

*Coordination:* Section 16, Ch. 526, provided: "If House Bill No. 12 is passed and approved, the stripper well payments appropriated in House Bill No. 12 have a higher priority than any appropriation of stripper well payments in [sections 4 through 12] [not codified]." House Bill No. 12 was approved as Ch. 81, L. 1997.

*Effective date:* Section 17, Ch. 526, L. 1997, provided: "[This act] is effective July 1, 1997."

*Policy:* Section 1, Ch. 63, L. 1995, provided: "[Sections 1 through 10] [not codified] implement the policy stated in 90-4-210."

*Definitions:* Section 2, Ch. 63, L. 1995, provided: "As used in [sections 1 through 10] [not codified], the following definitions apply:

(1) "Amoco payments" means the oil overcharge payments made to the U.S. treasury for distribution to the state of Montana pursuant to the decision and order of the U.S. department of energy in Case No. HQF-0588 and includes any interest accrued on the payments.

(2) "Carryover" means unspent oil overcharge funds previously appropriated and incorporated into an approved program plan for one of the federal energy conservation programs, but not included in unspent project funds as defined in subsection (9).

(3) "Cities service payments" means the oil overcharge payments made to the U.S. treasury for distribution to the state of Montana pursuant to the consent agreement between cities service oil and gas and the U.S. department of energy, as affirmed by the federal energy regulatory commission, and includes any interest accrued on the payments.

(4) "Diamond shamrock payments" means the oil overcharge payments made to the U.S. treasury for distribution to the state of Montana as the result of the final settlement agreement in the U.S. district court for the southern district of Ohio eastern division in Civil Action No. C2-84-1432 and includes any interest accrued on the payments.

(5) "Exxon payments" means the oil overcharge payments made by the exxon corporation to the U.S. treasury for distribution to the state of Montana pursuant to the order of the U.S. district court for the District of Columbia in Civil Action No. 78-1035 and includes any interest accrued on the payments.

(6) "Getty oil payments" means the oil overcharge payments made to the U.S. treasury for distribution to the state of Montana pursuant to the order of disbursement issued in Civil Action No. 77-347 (MMS) in the U.S. district court for the district of Delaware and includes any interest accrued on the payments.

(7) "Stripper well payments" means the oil overcharge payments made to the U.S. treasury for distribution to the state of Montana as the result of the final settlement agreement in the U.S. district court for the district of Kansas, Cause No. M.D.L. 378, and includes any interest accrued on the payments. The term also includes but is not limited to cities service payments, as defined in subsection (3), Getty oil payments, as defined in subsection (6), texaco payments, as defined in subsection (8), and any unspent project funds, as defined in subsection (9).

(8) "Texaco payments" means the oil overcharge payments made to the U.S. treasury for distribution to the state of Montana pursuant to the texaco final consent order, 53 Fed. Reg. 32929, August 29, 1988, and includes any interest accrued on the payments.

(9) "Unspent project funds" means stripper well payments that were not expended or otherwise legally obligated during the 1995 biennium but that were appropriated for the 1995 biennium in Chapter 496, Laws of 1993, in:

(a) section 5(1);
(b) section 6;
(c) section 7;
(d) section 8; and
(e) section 9.

(10) "Warner payments" means the oil overcharge payments made to the U.S. treasury for distribution to the state of Montana pursuant to the Warner amendment (section 155 of P.L. 97-377) and includes any interest accrued on the payments."

*Deposit of Oil Overcharge Revenue:* Section 3, Ch. 63, L. 1995, provided: "All funds from stripper well, amoco, Warner, and exxon payments must be deposited by the state treasurer in the federal special revenue fund. All interest earned on any of these funds or payments must also be deposited in the federal special revenue fund."

*Matching Funds for Low-Income Energy Assistance — Appropriation:* Section 4, Ch. 63, L. 1995, provided: "(1) There is appropriated $50,000 from the stripper well payments contained in the federal special revenue fund to the department of social and rehabilitation services [functions now transferred to department of public health and human services] for the purpose described in subsection (2).

(2) The department of social and rehabilitation services [functions now transferred to department of public health and human services] shall match private contributions to energy share, inc., to be used to assist persons not eligible for federal low-income energy assistance whose income is less than 150% of the federal poverty threshold published by the U.S. bureau of the census in the most recent edition of its publication, *Poverty in the United States*. All of the funds appropriated to the department for this purpose under subsection (1) must be used for clients' fuel bills or other energy needs."

*Petroleum Substitutes From Agricultural Products — Appropriation:* Section 5, Ch. 63, L. 1995, provided: "There is appropriated $10,000 from the stripper well payments contained in the federal special revenue fund to the department of natural resources and conservation to foster expanded use of alternative transportation fuels derived from agricultural products that may reduce petroleum consumption, produce environmental benefits to Montana, and result in potential new cash crops for Montana farmers. Money expended under this appropriation must be matched at least dollar for dollar with private or federal revenue, or both."

*Institutional Conservation Program — Appropriation:* Section 6, Ch. 63, L. 1995, provided: "There is appropriated $200,000 from the stripper well payments contained in the federal special revenue fund to the department of natural resources and conservation to fund the institutional conservation program for schools and hospitals administered by the department pursuant to 10 CFR 455."

*Northern Montana College Tractor Resource Center (Now Montana State University-Northern) — Appropriation:* Section 7, Ch. 63, L. 1995, provided: "There is appropriated $125,000 from the stripper well payments contained in the federal special revenue fund to northern Montana college [now Montana state university-northern] to support the ongoing activities of the northern Montana college [now Montana state university-northern] tractor resource center."

*Carryover — Reappropriations:* Section 8, Ch. 63, L. 1995, provided: "(1) There is reappropriated $20,000 from the stripper well payments, $5,000 from the exxon payments, $60,000 from the diamond shamrock payments, and $1,500 from the amoco payments contained in the federal special revenue fund to the department of natural resources and conservation to fund the state energy conservation program administered by the department pursuant to 10 CFR 420.

(2) There is reappropriated $100,000 from the stripper well payments, $5,000 from the exxon payments, and $800 from the Warner payments contained in the federal special revenue fund to the department of natural resources and conservation to fund the institutional conservation program for schools and hospitals administered by the department pursuant to 10 CFR 455."

*Conditions Applied to Appropriations:* Section 9, Ch. 63, L. 1995, provided: "The appropriations made in [sections 4 through 8] [not codified] are biennial appropriations.

(1) One-half of the total amount appropriated to each program in [sections 4 through 7] [not codified] is appropriated in fiscal year 1996, and the remainder is appropriated in fiscal year 1997. As biennial appropriations, the unexpended funds appropriated in fiscal year 1996 may be carried forward within each program to fiscal year 1997.

(2) The appropriations in [section 8] [not codified] are limited to available funds. Expenditures of carryover funds may not exceed the actual amount of unspent funds available."

*Appropriations Prioritized:* Section 10, Ch. 63, L. 1995, provided: "(1) The appropriations in [sections 4 through 7] [not codified] are approved in order of priority as they appear in [sections 4 through 7] [not codified]. If the U.S. department of energy does not approve one or more of the programs that are funded by [sections 4 through 7] [not codified], any stripper well payments that are not used to fund the higher priority program must be provided to the lower ranked program up to the amounts appropriated in [sections 4 through 7] [not codified].

(2) If stripper well payments are insufficient to fully fund the appropriations made in [sections 4 through 7] [not codified], allocations to the lowest ranking program must be reduced until the deficiency is eliminated. If the deficiency is in excess of the appropriation to the lowest ranking program, the next lowest ranking program must have its appropriation reduced until the deficiency is eliminated. These priorities must be applied to one-half of the total amount appropriated in [sections 4 through 7] [not codified] for fiscal year 1996 and to the remaining appropriation for fiscal year 1997.

(3) In order to provide continuity for the programs when establishing the appropriations for each fiscal year of the 1997 biennium, anticipated stripper well payments that will be received under terms of the stripper well agreements during the biennium may be considered as available to fund the activities.

(4) The expenditure of money appropriated by [sections 4 through 7] [not codified] may not exceed the amount of the stripper well payments available in the biennium."

*Coordination Instruction:* Section 11, Ch. 63, L. 1995, provided: "If House Bill No. 12 is passed and approved, the stripper well payments appropriated in House Bill No. 12 have a higher priority than any appropriation of stripper well payments in [sections 4 through 7] [not codified]." House Bill No. 12 was passed and approved as Ch. 61, L. 1995.

*Effective Date:* Section 12, Ch. 63, L. 1995, provided: "[This act] is effective July 1, 1995."

*Effective Date:* Section 16, Ch. 496, L. 1993, provided: "[This act] is effective July 1, 1993."

*Policy Restated:* Section 1, Ch. 597, L. 1989, was a policy statement on distribution of oil overcharge money. Although not enacted as an amendment to 90-4-210, the text was essentially identical and was not codified. See 1989 Session Law for text of the statement.

*Deposit of Oil Overcharge Revenue:* Section 3, Ch. 597, L. 1989, provided that all funds from stripper well payments must be deposited in the federal special revenue fund and also required the deposit of all interest in the federal special revenue fund.

### 90-4-215. Account established — use.

**Compiler's Comments**

*2007 Amendment:* Chapter 4 in (2) deleted former second and third sentences that read: "However, the department may use the principal of the account only if the federal grants for either of those programs are reduced below the federal fiscal year 1987 level. The department may not use the principal to increase expenditures to either program above the level of the federal grant for that program for federal fiscal year 1987"; and made minor changes in style. Amendment effective February 5, 2007.

*1999 Amendment:* Chapter 389 in (2) in first sentence after "account" substituted "may be used by" for "are statutorily appropriated, as provided in 17-7-502, to"; and made minor changes in style. Amendment effective July 1, 1999.

*1995 Amendment:* Chapter 546 in (2) substituted "department of public health and human services" for "department of social and rehabilitation services"; and made minor changes in style. Amendment effective July 1, 1995.

*Saving Clause:* Section 571, Ch. 546, L. 1995, was a saving clause.

## Part 3
## Energy Supply Emergency Powers

**Part Compiler's Comments**

*Repealer:* Section 1, Ch. 29, L. 1991, repealed sec. 21, Ch. 473, L. 1979, that provided that Title 90, ch. 4, part 3, remained in effect until July 1, 1985.

*Retroactive Applicability:* Section 2, Ch. 29, L. 1991, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to occurrences after June 30, 1985."

*Severability:* Section 20, Ch. 473, L. 1979, was a severability clause.

*Period of Effectiveness:* Section 21, Ch. 473, L. 1979, provided: "This act is effective on passage and approval and remains in effect until July 1, 1985." Approved April 9, 1979.

**Part Administrative Rules**

Title 14, chapter 8, ARM Energy shortages.

### 90-4-301. Legislative findings and intent.

**Compiler's Comments**

*1981 Amendment:* Inserted "regularly monitor energy supplies and demand" in the middle of the first sentence of (1); and inserted (2)(b) referring to regular monitoring of energy supplies and demand and prohibiting authorization of an independent state energy forecasting program.

*Interim Study Committee Bill:* Chapter 204, L. 1981 (HB 16), was introduced at the request of the Study Committee on Energy Forecasting. See committee report, Legislative Council, 1980.

*Severability:* Section 4, Ch. 204, L. 1981, was a severability section.

### 90-4-302. Definitions.

**Compiler's Comments**

*2007 Amendment:* Chapter 182 in definition of energy emergency in (a) near beginning after "energy" deleted "or a price of energy" and inserted (b) outlining a price of energy that will constitute an energy emergency; in definition of energy supply alert near middle after "supplies" deleted "or the price of energy"; and made minor changes in style. Amendment effective October 1, 2007.

*2001 Amendment:* Chapter 593 in definition of energy emergency near beginning after "shortage of energy" inserted "or a price of energy" and at end inserted "or to increase the available supply of energy"; and in definition of energy supply alert near middle after "supplies" inserted "or the price of energy" and at end inserted "or action is taken to increase the supply of energy". Amendment effective May 5, 2001.

*1995 Amendment:* Chapter 545 deleted definition of committee that read: ""Committee" means the energy policy committee established in 90-4-303"; and made minor changes in style. Amendment effective July 1, 1995.

*1995 Transition:* Section 81, Ch. 545, L. 1995 provided: "(1) The members of the legislative council, as provided in 5-11-101, the members of the legislative finance committee, as provided in 5-12-202, the members of the legislative audit committee, as provided in 5-13-202, and the members of the environmental quality council, as provided in 5-16-101, must be appointed as soon as possible following [the effective date of this section] [effective April 27, 1995].

(2) To implement the changes provided in [this act], the office of the legislative council, the office of budget and program planning, and the department of administration shall establish all necessary authorizations during the accounting preparation process known as the "turnaround" process, beginning in April or May 1995, to administer the several appropriations made by any means to programs of the legislative branch agencies consolidated under [sections 3 and 4] [5-2-503 and 5-2-504] for fiscal year 1996 or 1997 or the biennium ending June 30, 1997, as appropriations to a single legislative agency while maintaining the specific identification, legislative intent, and purpose for which the appropriations were made. During this transition, the executive director may authenticate documents as required to accomplish the purposes of [this act]. Appropriate changes on the statewide budgeting and accounting system and the payroll, personnel, and position control system must also be made and authorized as required to accomplish the purposes of [this act].

(3) Personnel and property of the environmental quality council are transferred to the legislative services division effective July 1, 1995."

*1981 Amendment:* Inserted definitions of petroleum products, refinery, refiner, prime petroleum supplier, petroleum pipeline company, and bulk pipeline terminal.

*Interim Study Committee Bill:* Chapter 204, L. 1981 (HB 16), was introduced at the request of the Study Committee on Energy Forecasting. See committee report, Legislative Council, 1980.

*Severability:* Section 4, Ch. 204, L. 1981, was a severability section.

### 90-4-304. Supply of vital public services during an energy supply alert and energy emergency.

#### Administrative Rules

Title 14, chapter 8, subchapter 4, ARM Energy supply monitoring and emergency management.

### 90-4-305. Information obtainable by governor.

#### Compiler's Comments

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

*1995 Amendment:* Chapter 545 in (1), in first sentence after "necessary for the governor", deleted "with advice of the committee"; deleted (7) that read: "(7) The governor shall forward to the committee such information collected under this section as the committee may request and shall advise the committee of the progress of the information gathering process"; and made minor changes in style. Amendment effective July 1, 1995.

*1995 Transition:* Section 81, Ch. 545, L. 1995 provided: "(1) The members of the legislative council, as provided in 5-11-101, the members of the legislative finance committee, as provided in 5-12-202, the members of the legislative audit committee, as provided in 5-13-202, and the members of the environmental quality council, as provided in 5-16-101, must be appointed as soon as possible following [the effective date of this section] [effective April 27, 1995].

(2) To implement the changes provided in [this act], the office of the legislative council, the office of budget and program planning, and the department of administration shall establish all necessary authorizations during the accounting preparation process known as the "turnaround" process, beginning in April or May 1995, to administer the several appropriations made by any means to programs of the legislative branch agencies consolidated under [sections 3 and 4] [5-2-503 and 5-2-504] for fiscal year 1996 or 1997 or the biennium ending June 30, 1997, as appropriations to a single legislative agency while maintaining the specific identification, legislative intent, and purpose for which the appropriations were made. During this transition, the executive director may authenticate documents as required to accomplish the purposes of [this act]. Appropriate changes on the statewide budgeting and accounting system and the payroll, personnel, and position control system must also be made and authorized as required to accomplish the purposes of [this act].

(3) Personnel and property of the environmental quality council are transferred to the legislative services division effective July 1, 1995."

*1981 Amendment:* Added "on a regular basis" after "The governor may obtain information" at the beginning of (1); added "other than for petroleum products" at the end of (1)(a); inserted (2) listing monthly reports to be submitted to the Governor; substituted "subsections (1) and (2)" for "subsection (1)" near the beginning of (3); deleted "seek to" before "avoid" at the beginning of (4)(a); inserted "Except as provided in subsection (2)" at the beginning of (5); and inserted (6) establishing restrictions on information in monthly reports.

*Commissioner Correction:* The 1981 amendment, which added subsection (6), incorrectly referred to the functions of the Legislative Auditor "under Title 5, chapter 3" in (6)(b). Because Title 5, chapter 3, contains no functions of the Legislative Auditor, the Code Commissioner corrected the reference to read "Title 5, chapter 13", which is "The Legislative Audit Act".

*Interim Study Committee Bill:* Chapter 204, L. 1981 (HB 16), was introduced at the request of the Study Committee on Energy Forecasting. See committee report, Legislative Council, 1980.

*Severability:* Section 4, Ch. 204, L. 1981, was a severability section.

### Administrative Rules

Title 14, chapter 8, ARM Energy shortages.

## 90-4-307. Submission and approval of curtailment plans.

### Compiler's Comments

*1995 Amendment:* Chapter 545 deleted (2)(f) that read: "(f) the advice of the committee"; and made minor changes in style. Amendment effective July 1, 1995.

*1995 Transition:* Section 81, Ch. 545, L. 1995 provided: "(1) The members of the legislative council, as provided in 5-11-101, the members of the legislative finance committee, as provided in 5-12-202, the members of the legislative audit committee, as provided in 5-13-202, and the members of the environmental quality council, as provided in 5-16-101, must be appointed as soon as possible following [the effective date of this section] [effective April 27, 1995].

(2) To implement the changes provided in [this act], the office of the legislative council, the office of budget and program planning, and the department of administration shall establish all necessary authorizations during the accounting preparation process known as the "turnaround" process, beginning in April or May 1995, to administer the several appropriations made by any means to programs of the legislative branch agencies consolidated under [sections 3 and 4] [5-2-503 and 5-2-504] for fiscal year 1996 or 1997 or the biennium ending June 30, 1997, as appropriations to a single legislative agency while maintaining the specific identification, legislative intent, and purpose for which the appropriations were made. During this transition, the executive director may authenticate documents as required to accomplish the purposes of [this act]. Appropriate changes on the statewide budgeting and accounting system and the payroll, personnel, and position control system must also be made and authorized as required to accomplish the purposes of [this act].

(3) Personnel and property of the environmental quality council are transferred to the legislative services division effective July 1, 1995."

## 90-4-308. Governor's considerations.

### Compiler's Comments

*1995 Amendment:* Chapter 545 deleted former (5) that read "(5) the advice of the committee"; and made minor changes in style. Amendment effective July 1, 1995.

*1995 Transition:* Section 81, Ch. 545, L. 1995 provided: "(1) The members of the legislative council, as provided in 5-11-101, the members of the legislative finance committee, as provided in 5-12-202, the members of the legislative audit committee, as provided in 5-13-202, and the members of the environmental quality council, as provided in 5-16-101, must be appointed as soon as possible following [the effective date of this section] [effective April 27, 1995].

(2) To implement the changes provided in [this act], the office of the legislative council, the office of budget and program planning, and the department of administration shall establish all necessary authorizations during the accounting preparation process known as the "turnaround" process, beginning in April or May 1995, to administer the several appropriations made by any means to programs of the legislative branch agencies consolidated under [sections 3 and 4] [5-2-503 and 5-2-504] for fiscal year 1996 or 1997 or the biennium ending June 30, 1997, as appropriations to a single legislative agency while maintaining the specific identification, legislative intent, and purpose for which the appropriations were made. During this transition, the executive director may authenticate documents as required to accomplish the purposes of [this act]. Appropriate changes on the statewide budgeting and accounting system and the payroll, personnel, and position control system must also be made and authorized as required to accomplish the purposes of [this act].

(3) Personnel and property of the environmental quality council are transferred to the legislative services division effective July 1, 1995."

**Administrative Rules**

Title 14, chapter 8, subchapter 4, ARM Energy supply monitoring and emergency management.

**90-4-309. Energy supply alert.**

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

**Administrative Rules**

Title 14, chapter 8, subchapter 4, ARM Energy supply monitoring and emergency management.

**90-4-310. Energy emergency powers of governor.**

**Compiler's Comments**

*2001 Amendment:* Chapter 593 in (2) increased duration of energy emergency from 45 consecutive days to 90 consecutive days; in (4)(a) in first complete sentence after "governor" substituted "may" for "shall"; at beginning of (5) inserted exception clause; and made minor changes in style. Amendment effective May 5, 2001.

*1995 Amendment:* Chapter 545 in (1), near beginning after "governor", deleted "with the advice of the committee"; in (4), in introductory clause after "governor may", deleted "with the advice of the committee"; in (6), after "Policy Act", deleted "of 1971"; and made minor changes in style. Amendment effective July 1, 1995.

*1995 Transition:* Section 81, Ch. 545, L. 1995 provided: "(1) The members of the legislative council, as provided in 5-11-101, the members of the legislative finance committee, as provided in 5-12-202, the members of the legislative audit committee, as provided in 5-13-202, and the members of the environmental quality council, as provided in 5-16-101, must be appointed as soon as possible following [the effective date of this section] [effective April 27, 1995].

(2) To implement the changes provided in [this act], the office of the legislative council, the office of budget and program planning, and the department of administration shall establish all necessary authorizations during the accounting preparation process known as the "turnaround" process, beginning in April or May 1995, to administer the several appropriations made by any means to programs of the legislative branch agencies consolidated under [sections 3 and 4] [5-2-503 and 5-2-504] for fiscal year 1996 or 1997 or the biennium ending June 30, 1997, as appropriations to a single legislative agency while maintaining the specific identification, legislative intent, and purpose for which the appropriations were made. During this transition, the executive director may authenticate documents as required to accomplish the purposes of [this act]. Appropriate changes on the statewide budgeting and accounting system and the payroll, personnel, and position control system must also be made and authorized as required to accomplish the purposes of [this act].

(3) Personnel and property of the environmental quality council are transferred to the legislative services division effective July 1, 1995."

*1981 Amendment:* Increased the energy emergency condition duration period from 14 to 45 days in (2).

**Administrative Rules**

Title 14, chapter 8, subchapter 4, ARM Energy supply monitoring and emergency management.

**90-4-313. Compliance.**

**Compiler's Comments**

*2001 Amendment:* Chapter 593 inserted second sentence allowing completion of project commenced under energy emergency. Amendment effective May 5, 2001.

*1995 Amendment:* Chapter 545 near middle, after "governor", deleted "with the advice of the committee". Amendment effective July 1, 1995.

*1995 Transition:* Section 81, Ch. 545, L. 1995 provided: "(1) The members of the legislative council, as provided in 5-11-101, the members of the legislative finance committee, as provided in 5-12-202, the members of the legislative audit committee, as provided in 5-13-202, and the members of the environmental quality council, as provided in 5-16-101, must be appointed as soon as possible following [the effective date of this section] [effective April 27, 1995].

(2) To implement the changes provided in [this act], the office of the legislative council, the office of budget and program planning, and the department of administration shall establish all necessary authorizations during the accounting preparation process known as the "turnaround" process, beginning in April or May 1995, to administer the several appropriations made by any means to programs of the legislative branch agencies consolidated under [sections 3 and

4] [5-2-503 and 5-2-504] for fiscal year 1996 or 1997 or the biennium ending June 30, 1997, as appropriations to a single legislative agency while maintaining the specific identification, legislative intent, and purpose for which the appropriations were made. During this transition, the executive director may authenticate documents as required to accomplish the purposes of [this act]. Appropriate changes on the statewide budgeting and accounting system and the payroll, personnel, and position control system must also be made and authorized as required to accomplish the purposes of [this act].

(3) Personnel and property of the environmental quality council are transferred to the legislative services division effective July 1, 1995."

**Administrative Rules**

Title 14, chapter 8, subchapter 4, ARM Energy supply monitoring and emergency management.

### 90-4-314. Orders to distributors.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

**Administrative Rules**

ARM 14.8.402 Declaration of supply alert or emergency.

### 90-4-317. Disaster and emergency laws supplemented.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

## Part 4
## Pacific Northwest Electric Power and Conservation Planning Council

### 90-4-401. Agreement to pacific northwest electric power and conservation planning council.

**Compiler's Comments**

*Federal Statute:* The Pacific Northwest Electric Power Planning and Conservation Act (P.L. 96-501), referred to in this section, is codified at 16 U.S.C. §§ 839 through 839h.

### 90-4-402. Appointment of council members by governor.

**Compiler's Comments**

*2017 Amendment:* Chapter 176 in (1) at beginning inserted "in accordance with subsections (6) through (8)"; in (2)(a) in second sentence substituted "A member appointed by the governor" for "A member so appointed"; in (2)(b) after "member" inserted "in accordance with subsection (2)(a)" and at end inserted "who is subject to confirmation by the senate"; in (3) inserted last sentence requiring senate confirmation of new appointee who replaces member removed by governor; in (4) inserted last sentence requiring senate confirmation for appointee filling a vacancy; inserted (5) regarding timing of confirmation when senate is in regular session; inserted (6) regarding qualifications of potential candidate to be considered by governor; inserted (7) regarding appointment of members with certain experience or education; inserted (8) imposing residency requirement for at least one member appointed to council; deleted former (5) that read: "(5) The governor shall appoint the initial members within 30 days of March 12, 1981"; and made minor changes in style. Amendment effective April 10, 2017.

*Applicability:* Section 4, Ch. 176, L. 2017, provided: "[This act] applies to appointments made on or after [the effective date of this act]." Effective April 10, 2017.

*Federal Statute:* P.L. 96-501 (the Pacific Northwest Electric Power Planning and Conservation Act), referred to in this section, is codified at 16 U.S.C. §§ 839 through 839h.

### 90-4-403. Duties of council members.

**Compiler's Comments**

*2017 Amendment:* Chapter 176 in (1) inserted "including engaging with utilities receiving their power supply from the Bonneville power administration to promote an adequate, economical, and reliable power supply"; in (2) substituted "serve on a full-time basis" for "serve on a full- or part-time basis as determined by the governor"; inserted (3) requiring an annual report, including certain required information, to be provided to the governor, the legislature, and each utility in

Montana receiving its power supply from the Bonneville power administration; and made minor changes in style. Amendment effective April 10, 2017.

*Applicability:* Section 4, Ch. 176, L. 2017, provided: "[This act] applies to appointments made on or after [the effective date of this act]." Effective April 10, 2017.

*1985 Amendment:* Deleted former (3) that read: "submit to the governor and legislature an annual report detailing the council's expenditures, activities, and plans".

*Code Commissioner Correction:* "The council's" was substituted for "its" in (3) to correct an error in the use of that pronoun in the original bill.

*Federal Statute:* P.L. 96-501 (the Pacific Northwest Electric Power Planning and Conservation Act), referred to in this section, is codified at 16 U.S.C. §§ 839 through 839h.

**Collateral References**

Annual Report to Montana Legislature and Electrical Cooperatives, Northwest Power and Conservation Council (2021).

## Part 6

## State Building Energy Conservation Program

**Part Compiler's Comments**

*1989 Statement of Intent:* The statement of intent attached to Ch. 473, L. 1989, provided: "This bill requires a statement by the department of natural resources and conservation that the estimated annual energy savings to be derived from the installation of the energy saving improvements are expected to equal or exceed the annual debt service to be paid on the bonds issued to fund the improvements. In developing this savings statement, the department shall determine which energy improvements yield sufficient return on investment to be included in the financing package. In making this determination, the department should consider the projected savings of the improvement, the impact on project cash flow, the expected useful life of the improvement and the facility, the state's long-range plans for the facility, the potential impacts on the utility system, and any additional monetary and nonmonetary benefits to be derived from the improvement.

The department shall consult with the utility or utilities that serve the facilities on which the improvements are to be made. If a fuel switching measure is proposed, the department must demonstrate that the benefits to the state exceed the costs to the utility and its customers."

*Coordination Instruction:* Section 13, Ch. 473, L. 1989, provided: "If House Bill No. 563 is not passed and approved, [this act] is void." House Bill No. 563 was approved April 20, 1989. See Ch. 597, L. 1989, for text.

*Severability:* Section 14, Ch. 473, L. 1989, was a severability clause.

*Effective Date:* Section 16, Ch. 473, L. 1989, provided: "[This act] is effective on passage and approval." Approved April 8, 1989.

**90-4-602. Definitions.**

**Compiler's Comments**

*2009 Amendment:* Chapter 478 in definition of energy conservation program after "installation of" substituted "alternative energy systems, as defined in 15-32-102, or" for "energy saving" and at end inserted "that save energy or water"; inserted definition of participating state agency; in definition of state agency inserted (c) to include a community college district; and made minor changes in style. Amendment effective May 10, 2009.

*Severability:* Section 22, Ch. 478, L. 2009, was a severability clause.

*2003 Amendment:* Chapter 497 inserted definition of energy cost savings; and made minor changes in style. Amendment July 1, 2003.

*1995 Amendment:* Chapter 418 inserted introductory clause; and in definition of Department substituted "department of environmental quality provided for in 2-15-3501" for "department of natural resources and conservation provided for in 2-15-3301". Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

**90-4-605. Preparation of energy conservation program.**

**Compiler's Comments**

*2011 Amendment:* Chapter 240 at beginning of (3)(b) deleted "If the estimated savings are determined to be greater than the bond payment costs for a particular project" and at end inserted "of each project for which"; inserted (3)(b)(i) and (3)(b)(ii) relating to savings funded from bonds and the general fund; in (3)(c) inserted "or funds from the general fund or the energy conservation capital projects account established in 90-4-617"; and made minor changes in style. Amendment effective July 1, 2011.

*2005 Amendment:* Chapter 310 in (1) near beginning of first sentence after "shall" deleted "work with state agencies to" and inserted second sentence requiring state agencies to provide information upon request. Amendment effective July 1, 2005.

*2001 Amendment:* Chapter 240 deleted former (3) that read: "(3) During the energy analyses, the department shall consult with the utilities that serve the selected facilities to discuss potential impacts on the utilities and their customers of making energy conservation improvements to these facilities"; in (3) in first sentence after "department shall" deleted "submit to the governor its findings and a list of projects recommended for funding under the energy conservation program" and inserted second and third sentences requiring department to notify department of administration of buildings that have a potential for energy savings and requiring department of administration to implement design and construction projects for those buildings; deleted former (5)(d) and (5)(e) that read: "(d) a description of measures taken by the department to address the issues that were raised in the consultation with the affected utilities; and

(e) if a fuel switching measure is proposed, an analysis of the costs to the affected utility and its customers and of the benefits to the state"; inserted (4)(d) requiring report to include additional projects under consideration; deleted former (6) that read: "(6) If a fuel switching measure is proposed, the department shall demonstrate through the analysis required by subsection (5)(e) that the benefits to the state exceed the costs to the utility and its customers"; and made minor changes in style. Amendment effective July 1, 2001.

*1999 Amendment:* Chapter 50 in (1) deleted former first sentence that read: "Before June 30 of each odd-numbered year, the department shall inform, in writing, each state agency of the energy conservation program and request agencies interested in participating in the program to contact the department"; and made minor changes in style. Amendment effective July 1, 1999.

*1995 Amendment:* Chapter 61 substituted present (1) concerning participation in energy conservation program for former language that read: "Before June 30 of each odd-numbered year, state agencies shall submit to the department, on forms provided by the department, a list of any facilities operated by that agency that have a potential for energy savings, based on age, energy use, function, and condition of the building. Agencies may request assistance from the department to identify these facilities"; in (2), after "subsection (1)", inserted "and on the feasibility of leveraging other funds, such as federal and utility energy conservation program money"; in (4), in first sentence before "list", deleted "prioritized" and in second sentence, after "shall", substituted "identify estimated costs and savings" for "rank projects in terms of cost-effectiveness" and at end inserted "based on these analyses"; in (5)(a), after "listing of", substituted "contacts between the department and other" for "all requests submitted by"; in (5)(b), at end, inserted "and a selection of projects for in-depth analysis"; and in (5)(e), at end, deleted "of the fuel switching measure". Amendment effective July 1, 1995.

*1989 Statement of Intent:* The statement of intent attached to Ch. 473, L. 1989, provided: "This bill requires a statement by the department of natural resources and conservation that the estimated annual energy savings to be derived from the installation of the energy saving improvements are expected to equal or exceed the annual debt service to be paid on the bonds issued to fund the improvements. In developing this savings statement, the department shall determine which energy improvements yield sufficient return on investment to be included in the financing package. In making this determination, the department should consider the projected savings of the improvement, the impact on project cash flow, the expected useful life of the improvement and the facility, the state's long-range plans for the facility, the potential impacts on the utility system, and any additional monetary and nonmonetary benefits to be derived from the improvement.

The department shall consult with the utility or utilities that serve the facilities on which the improvements are to be made. If a fuel switching measure is proposed, the department must demonstrate that the benefits to the state exceed the costs to the utility and its customers."

## 90-4-606. Program report and recommendations.

### Compiler's Comments

*2001 Amendment:* Chapter 240 deleted former (2) and (3) that read: "(2) a description of the improvements to be financed;

(3) the estimated cost of each project and the total cost of the program"; and made minor changes in style. Amendment effective July 1, 2001.

*1993 Amendment:* Chapter 349 at beginning of first sentence of introductory clause deleted "During the first week of the regular legislative session", after "submit" deleted "to the legislature for its approval", and at end, after "biennium", inserted "as a part of the budget required by 17-7-123" and substituted introductory portion of second sentence that read: "The governor shall make available, as provided by 17-7-124" for "In his recommendation, the governor shall include"; and made minor changes in style.

## 90-4-607. Duties of department.

**Compiler's Comments**

*1999 Amendment:* Chapter 50 inserted (3)(b) allowing the department to transfer funds and authority regarding cost-effective energy improvements; and made minor changes in style. Amendment effective July 1, 1999.

*1993 Amendment:* Chapter 350 in (3), before "transfer", deleted "administratively" and after "funds" inserted "and authority". Amendment effective April 16, 1993.

## 90-4-611. Authority to issue energy conservation program bonds.

**Compiler's Comments**

*1999 Amendment Void:* The amendment to this section made by sec. 13, Ch. 3, L. 1999, was rendered void by sec. 16, Ch. 3, L. 1999, a contingent voidness section, which provided that if Constitutional Initiative No. 75, enacting Article VIII, section 17, of the Montana constitution, was declared invalid, then [this act] was void. The initiative was declared invalid February 24, 1999.

*Temporary Authorization of Bonds — 1990-91 Biennium:* Section 10, Ch. 473, L. 1989, provided: "(1) At the request of the department, the board may issue and sell bonds of the state in an aggregate principal amount not exceeding $3 million to provide money for the 1990-91 biennium energy conservation program. The bonds are general obligations for which the full faith and credit and taxing powers of the state are pledged for payment of the principal and interest. The bonds must be issued as provided by Title 17, chapter 5, part 8.

(2) The proceeds of the bonds, other than any premiums and accrued interest received, must be deposited in the energy conservation program account. Any premium and accrued interest must be deposited to the debt service fund established in 17-2-102. Proceeds of bonds deposited in the energy conservation program account may be used to pay the costs of issuing the bonds and to pay costs of the energy conservation program, including the funding of the 1990-91 biennium energy conservation projects approved by the legislature. For purposes of 17-5-803 and 17-5-804, the energy conservation program account constitutes a capital projects account. Such proceeds must be available to the department and may be used for the purposes authorized in [sections 1 through 8] [Title 90, ch. 4, part 6] without further budgetary authorization."

## 90-4-612. Form — principal and interest — fiscal agent — deposit of proceeds.

**Compiler's Comments**

*2011 Amendment:* Chapter 240 in (5) at end substituted "the energy conservation program debt service account established in 90-4-625" for "the debt service fund established in 17-2-102". Amendment effective July 1, 2011.

## 90-4-613. Use of energy conservation program account.

**Compiler's Comments**

*Stripper-Well Payments — Reappropriation — Definition — Priority:* Section 3, Ch. 50, L. 1999, provided: "(1) There is reappropriated from the stripper-well payments contained in the federal special revenue fund to the department of environmental quality $100,000 to fulfill duties authorized by 90-4-605 and 90-4-607. The original appropriation was contained in section 9, Chapter 597, Laws of 1989. The reappropriation is a biennial appropriation.

(2) (a) "Stripper-well payments" means the oil overcharge payments made to the United States treasury for distribution to the state of Montana as the result of the final settlement agreement in Cause No. M.D.L. 378, United States district court for the district of Kansas, and any interest accrued on the payments.

(b) The term does not include stripper-well payments that have been expended or legally obligated or that have been incorporated into any of the existing federal energy programs as the result of prior appropriations by the legislature.

(3) The stripper-well payments reappropriated in this section have a higher priority than any other appropriation of stripper-well payments for fiscal years 2000 and 2001." Effective July 1, 1999.

*Appropriations of Bond Proceeds:* Section 4, Ch. 50, L. 1999, provided: "There is appropriated from bond proceeds authorized by Chapter 571, Laws of 1991, Chapter 350, Laws of 1993, Chapter 61, Laws of 1995, Chapter 81, Laws of 1997, and [section 6] [not codified], $450,000 to the department of environmental quality to fulfill duties under 90-4-605 and 90-4-607. This appropriation is a biennial appropriation." Effective July 1, 1999.

*Approval of Energy Conservation Projects — Definition:* Section 5, Ch. 50, L. 1999, provided: "(1) Pursuant to Title 90, chapter 4, part 6, the legislature approves the following energy conservation projects for fiscal years 2000 and 2001.

University of Montana
Science Complex, Missoula
Montana State University
Cowan Hall Remodel, Havre
Special Education Building, Billings
Department of Administration
Justice Building
Department of Transportation
Signal Light Retrofit Project
University of Montana
Grizzly Pool
Department of Military Affairs
Maintenance Shop Building, Helena

(2) In addition to the energy conservation projects listed in subsection (1), the department of environmental quality may expend funds appropriated under [section 6] [not codified] to respond to lost energy saving opportunities. This includes coordination of energy improvement projects with the long-range building program's capital improvement projects.

(3) For purposes of this section, a "lost energy saving opportunity" means an opportunity to improve energy use that would provide significant energy and cost savings to the state and that will be technically infeasible or uneconomical if the department of environmental quality is delayed in providing the necessary funds until specific legislative approval can be obtained.

(4) If the costs of the projects authorized in subsections (1) and (2) are substantially below the bond amount authorized in [section 6] [not codified], the department of environmental quality may fund projects that otherwise would be proposed as part of the state building energy conservation package for fiscal years 2002 and 2003." Effective July 1, 1999.

*Bond Authorization — Appropriation of Bond Proceeds:* Section 6, Ch. 50, L. 1999, provided: "(1) The board of examiners may, pursuant to 90-4-611, issue and sell bonds of the state in an aggregate principal amount not to exceed $3 million for fiscal years 2000 and 2001 for the projects approved in [section 5] [not codified] and to fulfill duties authorized by 90-4-605 and 90-4-607, as provided in [section 4] [not codified]. The bonds are general obligations for which the full faith and credit and taxing powers of the state are pledged for payment of the principal and interest on the bonds. The bonds must be issued as provided by Title 17, chapter 5, part 8.

(2) The proceeds of the bonds, other than any premiums and accrued interest received, must be deposited in the energy conservation program account established by 90-4-612. Premiums and accrued interest must be deposited in the debt service fund established in 17-2-102. Proceeds of bonds deposited in the energy conservation program account may be used to pay the costs of issuing the bonds, to fulfill duties authorized by 90-4-605 and 90-4-607, and to fund the projects approved in [section 5] [not codified]. For purposes of 17-5-803 and 17-5-804, the energy conservation program account constitutes a capital projects account. The bond proceeds must be available to the department of environmental quality and may be used for the purposes authorized in this section without further budgetary authorization." Effective July 1, 1999.

*Requirements for Approval of State Debt:* Section 7, Ch. 50, L. 1999, provided: "Because [section 6] [not codified] authorizes the creation of state debt, Article VIII, section 8, of the Montana constitution requires a vote of two-thirds of the members of each house of the legislature for enactment of [section 6] [not codified]."

*Stripper-Well Payments — Reappropriation — Definition — Priority:* Section 1, Ch. 61, L. 1995, provided: "(1) There is reappropriated from the stripper-well payments contained in the federal special revenue fund to the department of natural resources and conservation $100,000 to fulfill duties authorized by 90-4-605 and 90-4-607. The original appropriation was contained in section 9, Chapter 597, Laws of 1989. The reappropriation is a biennial appropriation.

(2) (a) "Stripper-well payments" means the oil overcharge payments made to the United States treasury for distribution to the state of Montana as the result of the final settlement agreement in Cause No. M.D.L. 378, United States district court for the district of Kansas, and any interest accrued on the payments.

(b) The term does not include stripper-well payments that have been expended or legally obligated or have been incorporated into any of the existing federal energy programs as the result of prior appropriations by the legislature.

(3) The stripper-well payments reappropriated in this section have a higher priority than any other appropriation of stripper-well payments for fiscal years 1996 and 1997." Effective July 1, 1995.

*Approval of Energy Conservation Projects — Definition:* Section 3, Ch. 61, L. 1995, provided: "(1) Pursuant to Title 90, chapter 4, part 6, the legislature approves the following energy conservation projects for fiscal years 1996 and 1997:

FACILITIES
Montana Tech of the University of Montana
Mining Geology Building
Heating Plant Building
Montana State University at Billings
College of Technology Building
Physical Education Building
University of Montana at Missoula
College of Technology Building
Department of Corrections and Human Services [functions now transferred to Department of Public Health and Human Services]
Veterans' Home, Columbia Falls
Department of Military Affairs
Kalispell National Guard Armory
Helena National Guard Headquarters
Department of Administration
Scott Hart Building
State Capitol
Office of Public Instruction Building
Mitchell Building Heating System
Montana State University-Northern

(2) In addition to the energy conservation projects listed in subsection (1), the department of natural resources and conservation may expend funds appropriated under [section 4] [not codified, see 1995 compiler's comment] to respond to lost energy saving opportunities.

(3) For purposes of this section, a "lost energy saving opportunity" means an opportunity to improve energy use that would provide significant energy and cost savings to the state and that will be technically infeasible or uneconomical if the department is delayed in providing the necessary funds until specific legislative approval can be obtained.

(4) If the costs of the projects authorized in subsections (1) and (2) are substantially below the bond amount authorized in [section 4] [not codified, see 1995 compiler's comment], the department of natural resources and conservation may fund projects that otherwise would be proposed as part of the state building energy conservation package for fiscal years 1998 and 1999.

(5) The retrofit of Montana state university-northern must be conducted as a pilot project, using performance contracting. Montana state university-northern shall use state general obligation bonds authorized under [section 4] [not codified, see 1995 compiler's comment] to fund energy efficiency improvements in campus buildings used for instructional purposes. Montana state university-northern may provide financing other than state general obligation bonds for energy efficiency improvements in buildings supported by student fees and revenue. Whenever state general obligation bonds are used, resulting energy cost savings must be transferred to the energy conservation program account as provided in 90-4-614. If funding other than state general obligation bonds is used for improvements in buildings supported by student fees and revenue, a performance contract must be developed jointly by Montana state university-northern, the department of natural resources and conservation, and the department of administration and

any resulting energy cost savings in these buildings in excess of debt service and program costs must remain with the auxiliary services at Montana state university-northern." Effective July 1, 1995.

*Bond Authorization — Appropriation of Bond Proceeds:* Section 4, Ch. 61, L. 1995, provided: "(1) The board of examiners may, pursuant to 90-4-611, issue and sell bonds of the state in an aggregate principal amount not to exceed $5.5 million for fiscal years 1996 and 1997 for the projects approved in [section 3] [not codified, see 1995 compiler's comment] and to fulfill duties authorized by 90-4-605 and 90-4-607 as provided in [section 2] [not codified, see 1995 compiler's comment]. The bonds are general obligations for which the full faith and credit and taxing powers of the state are pledged for payment of the principal and interest on the bonds. The bonds must be issued as provided by Title 17, chapter 5, part 8.

(2) The proceeds of the bonds, other than any premiums and accrued interest received, must be deposited in the energy conservation program account established by 90-4-612. Premiums and accrued interest must be deposited in the debt service fund established in 17-2-102. Proceeds of bonds deposited in the energy conservation program account may be used to pay the costs of issuing the bonds, to fulfill duties authorized by 90-4-605 and 90-4-607, and to fund the projects approved in [section 3] [not codified, see 1995 compiler's comment]. For purposes of 17-5-803 and 17-5-804, the energy conservation program account constitutes a capital projects account. The bond proceeds must be available to the department of natural resources and conservation and may be used for the purposes authorized in this section without further budgetary authorization." Effective July 1, 1995.

*Requirements for Approval of State Debt:* Section 6, Ch. 61, L. 1995, provided: "Because [section 4] [not codified, see 1995 compiler's comment] authorizes the creation of a state debt, a vote of two-thirds of the members of each house is required for enactment of [section 4] [not codified, see 1995 compiler's comment]." Effective July 1, 1995.

*Preamble:* The preamble attached to Ch. 350, L. 1993, provided: "WHEREAS, Chapter 473, Laws of 1989, established the state building energy conservation program; and

WHEREAS, recommended projects for the state building energy conservation program for fiscal years 1994 and 1995 have been analyzed and are submitted to the Legislature as required by Title 90, chapter 4, part 6."

*Temporary Bond Authorization — 1994-95 Biennium:* Section 4, Ch. 350, L. 1993, provided: "(1) The board of examiners may, pursuant to 90-4-611, issue and sell bonds of the state in an aggregate principal amount not to exceed $3 million for the energy conservation and lighting retrofit projects approved in [section 3] [not codified, see 1993 compiler's comment] for fiscal years 1994 and 1995. The bonds are general obligations for which the full faith and credit and taxing powers of the state are pledged for payment of the principal and interest on the bonds. The bonds must be issued as provided by Title 17, chapter 5, part 8.

(2) The proceeds of the bonds, other than any premiums and accrued interest received, must be deposited in the energy conservation program account established by 90-4-612. Premiums and accrued interest must be deposited in the debt service fund established in 17-2-102. Proceeds of bonds deposited in the energy conservation program account may be used to pay the costs of issuing the bonds and to fund the projects approved by the legislature in [section 3] [not codified, see 1993 compiler's comment]. For purposes of 17-5-803 and 17-5-804, the energy conservation program account constitutes a capital projects account. The bond proceeds must be available to the department of natural resources and conservation and may be used for the purposes authorized in this section without further budgetary authorization."

*1991 Amendment:* At end, deleted "This money is statutorily appropriated as provided in 17-7-502". Amendment effective April 23, 1991.

*Preamble:* The preamble attached to Ch. 571, L. 1991, provided: "WHEREAS, Chapter 473, Laws of 1989, established the state building energy conservation program and authorized the issuance of up to $3 million of general obligation bonds to provide money for the state building energy conservation program for fiscal years 1990-91; and

WHEREAS, the Department of Natural Resources and Conservation determined that the issuance of the bonds was not necessary during fiscal years 1990-91 and that portions of the projects identified in section 9, Chapter 473, Laws of 1989, were either funded from other sources or not in the state's best interest at the time; and

WHEREAS, recommended projects for the state building energy conservation program for fiscal years 1992-93 have been identified as required by Title 90, chapter 4, part 6."

*Temporary Bond Authorization — 1992-93 Biennium:* Section 3, Ch. 571, L. 1991, provided: "(1) The board of examiners may, pursuant to 90-4-611, issue and sell bonds of the state in an aggregate principal amount not to exceed $3 million for fiscal years 1992-93. The bonds are general obligations for which the full faith and credit and taxing powers of the state are pledged for payment of the principal and interest on the bonds. The bonds must be issued as provided by Title 17, chapter 5, part 8.

(2) The proceeds of the bonds, other than any premiums and accrued interest received, must be deposited in the energy conservation program account established by 90-4-612. Premiums and accrued interest must be deposited in the debt service fund established in 17-2-102. Proceeds of bonds deposited in the energy conservation program account may be used to pay the costs of issuing the bonds and to fund the projects approved by the legislature in [section 2] [not codified, see 1991 compiler's comment]. For purposes of 17-5-803 and 17-5-804, the energy conservation program account constitutes a capital projects account. The bond proceeds must be available to the department of natural resources and conservation and may be used for the purposes authorized in this section without further budgetary authorization."

*Withdrawal of Authorization for Previously Authorized Bonds:* Section 6, Ch. 571, L. 1991, provided: "The authorization granted by section 10, Chapter 473, Laws of 1989, for the issuance of up to $3 million in bonds to provide money for fiscal years 1990-91 energy conservation program is withdrawn."

## 90-4-614. Appropriation of energy cost savings.

**Compiler's Comments**

*2011 Amendment:* Chapter 240 in (1) near middle inserted "using money from the sale of energy conservation program bonds"; deleted former (1)(b) that read: "(b) a projection of the debt service on energy conservation program bonds that should be apportioned to that agency in each year of the biennium. Debt service is zero after the term of bond repayment"; in (2) at end substituted "energy cost savings to the energy conservation program debt service account established in 90-4-625. These transfers must be made for a period that is equal to the term of the bonds, plus 1 year" for "projected debt service to the energy conservation program account established in 90-4-612"; deleted former (2)(b) that read: "(b) authority for each participating state agency to transfer funds to the long-range building program fund in an amount equal to the difference between the estimated energy cost savings to the agency and the projected debt service apportioned to that agency"; in (3) substituted "each state agency" for "state agencies" and substituted "amount appropriated in subsection (2)" for "sum of the amounts appropriated in subsections (2)(a) and (2)(b)"; and made minor changes in style. Amendment effective July 1, 2011.

*2003 Amendment:* Chapter 497 in (1)(b) at end inserted "Debt service is zero after the term of bond repayment." Amendment effective July 1, 2003.

*Effective Date:* Section 9, Ch. 350, L. 1993, provided: "[This act] is effective on passage and approval." Approved April 16, 1993.

## 90-4-615. Energy conservation repayment account.

**Compiler's Comments**

*2009 Amendment:* Chapter 478 in (2)(a) near beginning after "result of" substituted "energy conservation projects" for "the acquisition, installation, and construction of energy saving equipment, systems, or improvements", near middle substituted "appropriations from the energy conservation capital projects account or the general fund for" for "general fund appropriations to", and at end after "program" deleted "until total payments to the account for a project equal the cost of the project, including the cost of the investment grade energy audit on the project and the design of the project"; inserted (2)(c) requiring deposit of interest earned on the energy conservation capital projects account; inserted (2)(d) requiring deposit of funds transferred to the account by the legislature; inserted (3)(a) through (3)(d) outlining programs available for funding; inserted (4) providing for transfer of unencumbered funds at the end of a biennium; and made minor changes in style. Amendment effective May 10, 2009.

*Severability:* Section 22, Ch. 478, L. 2009, was a severability clause.

*Severability:* Section 25, Ch. 3, Sp. L. May 2007, was a severability clause.

*Effective Date:* Section 26, Ch. 3, Sp. L. May 2007, provided that this section is effective on passage and approval. Approved May 25, 2007.

### 90-4-616. Transfer of energy savings from projects.

**Compiler's Comments**

*Severability:* Section 22, Ch. 478, L. 2009, was a severability clause.

*Effective Date:* Section 23, Ch. 478, L. 2009, provided: "[This act] is effective on passage and approval." Chapter 478, L. 2009, was enacted into law without the governor's signature on May 10, 2009.

### 90-4-617. Energy conservation capital projects account.

**Compiler's Comments**

*2017 Special Session Amendment:* Chapter 6 in (3) at beginning inserted "Subject to legislative transfer"; and made minor changes in style. Amendment effective December 15, 2017, and terminates June 30, 2019.

*Severability:* Section 26, Ch. 6, Sp. L. November 2017, was a severability clause.

*Severability:* Section 22, Ch. 478, L. 2009, was a severability clause.

*Effective Date:* Section 23, Ch. 478, L. 2009, provided: "[This act] is effective on passage and approval." Chapter 478, L. 2009, was enacted into law without the governor's signature on May 10, 2009.

*Applicability:* Section 24, Ch. 478, L. 2009, provided that this section applies retroactively, within the meaning of 1-2-109, to May 2, 2005.

### 90-4-618. Reappropriation of energy conservation projects.

**Compiler's Comments**

*Severability:* Section 22, Ch. 478, L. 2009, was a severability clause.

*Effective Date:* Section 23, Ch. 478, L. 2009, provided: "[This act] is effective on passage and approval." Chapter 478, L. 2009, was enacted into law without the governor's signature on May 10, 2009.

### 90-4-625. Energy conservation program debt service account.

**Compiler's Comments**

*2019 Amendment:* Chapter 469 in (2) before "long-range building program" inserted "major repair". Amendment effective July 1, 2019.

*Severability:* Section 19, Ch. 469, L. 2019, was a severability clause.

*Effective Date:* Section 6, Ch. 240, L. 2011, provided that this section is effective July 1, 2011.

## Part 10
## Alternative Energy and Fuels — Development and Policy

### 90-4-1005. Energy development and demonstration grant program.

**Compiler's Comments**

*2021 Amendments — Composite Section — Coordination:* Chapter 291 in (1)(a) near middle inserted "and green hydrogen storage systems as defined in 15-6-163"; in (1)(b) near end after "compressed air energy" inserted "and green hydrogen"; in (1)(d) at end inserted "and green hydrogen facilities as defined in 15-6-163"; and made minor changes in style. Amendment effective April 28, 2021.

Chapter 542 in (1)(b) after "renewable resources" deleted "as defined in 69-3-2003"; inserted (5) defining eligible renewable resource. Amendment effective May 14, 2021.

The amendment to this section made by sec. 3, Ch. 360, L. 2021, was rendered void by sec. 10, Ch. 542, L. 2021, a coordination section.

*Applicability — Retroactive Applicability:* Section 16, Ch. 291, L. 2021, provided: "[This act] applies to tax years beginning after December 31, 2021."

Section 12, Ch. 542, L. 2021, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to any application pending or commenced before the public service commission prior to [the effective date of this act]." Effective May 14, 2021.

*Saving Clause:* Section 7, Ch. 542, L. 2021, was a saving clause.

*Severability:* Section 14, Ch. 291, L. 2021, was a severability clause.

Section 8, Ch. 542, L. 2021, was a severability clause.

*Effective Date:* Section 80, Ch. 489, L. 2009, provided: "[This act] is effective on passage and approval." Approved May 14, 2009.

### 90-4-1010. Transportation energy policy.

**Compiler's Comments**

*Preamble:* The preamble attached to Ch. 311, L. 1995, provided: "WHEREAS, in section 90-4-1003, MCA, the Legislature adopted a process for the incremental development of a comprehensive state energy policy; and

WHEREAS, under the provisions of that statute, the Department of Natural Resources and Conservation recommended to the Environmental Quality Council the development of a transportation energy policy as one component of a comprehensive state energy policy; and

WHEREAS, the Environmental Quality Council assigned a broad-based working group of stakeholders in the issues relating to development of a transportation energy policy to use a collaborative, consensus process to develop that policy; and

WHEREAS, these stakeholders included the Montana Department of Transportation, members of the Montana Highway Commission [now Transportation Commission], the Department of Natural Resources and Conservation, representatives of state and local governments, highway users, railroad interests, utilities, commercial transportation interests, environmental groups, agricultural producers, bicycle and pedestrian interests, transportation planners, and representatives of petroleum producers; and

WHEREAS, the collaborative working group met regularly over an 8-month period to develop the following transportation energy policy goal statement and to recommend a specific component of a transportation energy policy on alternative fuels, along with implementing guidelines."

### 90-4-1011. Alternative fuels policy — implementing guidelines.

**Compiler's Comments**

*Preamble:* The preamble attached to Ch. 311, L. 1995, provided: "WHEREAS, in section 90-4-1003, MCA, the Legislature adopted a process for the incremental development of a comprehensive state energy policy; and

WHEREAS, under the provisions of that statute, the Department of Natural Resources and Conservation recommended to the Environmental Quality Council the development of a transportation energy policy as one component of a comprehensive state energy policy; and

WHEREAS, the Environmental Quality Council assigned a broad-based working group of stakeholders in the issues relating to development of a transportation energy policy to use a collaborative, consensus process to develop that policy; and

WHEREAS, these stakeholders included the Montana Department of Transportation, members of the Montana Highway Commission [now Transportation Commission], the Department of Natural Resources and Conservation, representatives of state and local governments, highway users, railroad interests, utilities, commercial transportation interests, environmental groups, agricultural producers, bicycle and pedestrian interests, transportation planners, and representatives of petroleum producers; and

WHEREAS, the collaborative working group met regularly over an 8-month period to develop the following transportation energy policy goal statement and to recommend a specific component of a transportation energy policy on alternative fuels, along with implementing guidelines."

## Part 11
## Local Government and State Agency Energy Performance Contracts

**Part Compiler's Comments**

*Effective Date:* Section 14, Ch. 162, L. 2005, provided that this part is effective on passage and approval. Approved April 7, 2005.

### 90-4-1101. Legislative findings and policy.

**Compiler's Comments**

*2015 Amendment:* Chapter 344 in (1)(a) and (2) substituted "public buildings" for "local government and state agency buildings"; in (1)(c) and (2) substituted "governmental entities" for "local government units and state agencies"; and in (1)(c) near middle inserted "economically and expeditiously" and at end deleted "without an initial capital outlay". Amendment effective October 1, 2015.

*Applicability:* Section 14, Ch. 344, L. 2015, provided: "[This act] applies to contracts entered into on or after [the effective date of this act]." Effective October 1, 2015.

*2009 Amendment:* Chapter 439 in (1)(a) and (2) after "government" inserted "and state agency"; and in (1)(c) and (2) after "units" inserted "and state agencies". Amendment effective May 5, 2009.

## 90-4-1102. Definitions.

### Compiler's Comments

*2019 Amendment:* Chapter 311 in (1) in first sentence after "guaranteed cost savings and" deleted "if and to the extent allowed by rules adopted pursuant to 90-4-1110(3)(d)" and at end substituted "is equal to or greater than" for "are equal to or exceed any"; in (1)(a) substituted "the energy performance contract financing repayment obligation, if any" for "financing repayment obligation"; inserted (1)(b) and (1)(c) concerning various calculations involving total project costs; in (2) in first sentence before "facility improvement" deleted "cost-effective"; in (4) before "contract between" inserted "cost-effective", after "service provider for" deleted "evaluation, recommendation, and", and near end after "cost-saving measures" deleted "evaluation of cost-effectiveness"; inserted definition of total project cost; and made minor changes in style. Amendment effective May 7, 2019.

*2015 Amendment:* Chapter 344 inserted definitions of cost-effective, cost-saving measure, finance term, governmental entity, guarantee period, guaranteed cost savings, investment-grade energy audit, measurement and verification, operation and maintenance cost savings, qualified energy service provider, and utility cost savings; deleted definitions that read: ""Conservation measure" means a study, audit, improvement, equipment, alternative energy system, or change in operating practices that is designed to provide energy, water, or operational cost savings at least equivalent to the amount expended by a local government unit or state agency for the study, audit, improvement, or equipment", ""Conservation-related cost savings" means cost savings in the operating budget of a local government unit or state agency that are a direct result of conservation measures implemented pursuant to an energy performance contract", ""Investment grade energy audit" means a comprehensive building energy systems audit, performed by a professional engineer licensed in the state of Montana, for the purpose of identifying and documenting conservation measures, cost savings factors, and estimated conservation-related cost savings from the conservation measures identified", ""Local government unit" means a county, an incorporated city or town, a city-county consolidated government, a school district, a special district, or a community college district", ""Qualified provider" means a person that:

(a) is experienced in the design, implementation, and installation of conservation measures and building improvement measures;

(b) has the technical capabilities to ensure that the conservation measures and building improvement measures generate conservation-related cost savings; and

(c) has the financial ability to guarantee performance", and ""State agency" has the meaning provided in 90-4-602"; in definition of energy performance contract substituted "governmental entity" for "local government unit or a state agency", substituted "qualified energy service provider" for "qualified provider", substituted "cost-saving measures" for "conservation measures", substituted "cost-effectiveness" for "conservation-related cost savings", and substituted "guaranteed cost savings" for "a guarantee of cost savings"; and made minor changes in style. Amendment effective October 1, 2015.

*Applicability:* Section 14, Ch. 344, L. 2015, provided: "[This act] applies to contracts entered into on or after [the effective date of this act]." Effective October 1, 2015.

*2009 Amendment:* Chapter 439 in definitions of conservation measure, conservation-related cost savings, and energy performance contract after "unit" inserted reference to state agency; inserted definition of state agency; and made minor changes in style. Amendment effective May 5, 2009.

## 90-4-1103. Authority to enter into energy performance contracts.

### Compiler's Comments

*2015 Amendment:* Chapter 344 in (1) at beginning and in (2) substituted "governmental entity" for "local government unit or a state agency"; in (1) substituted second sentence referencing the part for "with a qualified provider under the procedures provided in 90-4-1104 or 90-4-1105"; and in (2) substituted "entering into a contract that is not an energy performance contract" for "contracting". Amendment effective October 1, 2015.

*Applicability:* Section 14, Ch. 344, L. 2015, provided: "[This act] applies to contracts entered into on or after [the effective date of this act]." Effective October 1, 2015.

*2009 Amendment:* Chapter 439 in (1) near beginning and in (2) near middle after "unit" inserted "or a state agency". Amendment effective May 5, 2009.

## 90-4-1109. Contracts and agreements not general obligation of governmental entity.

**Compiler's Comments**

*2015 Amendment:* Chapter 344 at beginning inserted exception clause; near beginning substituted "governmental entity" for "local government unit or a state agency"; near middle substituted "governmental entity" for "local government unit or the state"; and near end substituted "guaranteed cost savings" for "conservation-related cost savings". Amendment effective October 1, 2015.

*Applicability:* Section 14, Ch. 344, L. 2015, provided: "[This act] applies to contracts entered into on or after [the effective date of this act]." Effective October 1, 2015.

*2009 Amendment:* Chapter 439 near beginning after "unit" inserted "or a state agency" and near middle after "unit" inserted "or the state". Amendment effective May 5, 2009.

## 90-4-1110. Duties and authority of department.

**Compiler's Comments**

*2019 Amendment:* Chapter 311 in (1)(b) at beginning substituted "develop a process to" for "pursuant to rules adopted by the department"; in (1)(c) in middle substituted "to provide" for "and require qualified energy service providers to contract and provide"; deleted former (1)(d) through (1)(g) (see 2019 Session Law for former text); inserted (1)(e) concerning developing a model energy performance contract and documents; inserted (1)(f) concerning assisting governmental entities interested in pursuing energy performance contracts; deleted former (2) and (3) (see 2019 Session Law for former text); inserted (2) regarding recommended best practices to be developed by the department; inserted (3) regarding adoption of rules by the department; and made minor changes in style. Amendment effective May 7, 2019.

*Effective Date:* This section is effective October 1, 2015.

*Applicability:* Section 14, Ch. 344, L. 2015, provided: "[This act] applies to contracts entered into on or after [the effective date of this act]." Effective October 1, 2015.

## 90-4-1111. List of qualified energy service providers eligible for energy performance contracts.

**Compiler's Comments**

*Effective Date:* This section is effective October 1, 2015.

*Applicability:* Section 14, Ch. 344, L. 2015, provided: "[This act] applies to contracts entered into on or after [the effective date of this act]." Effective October 1, 2015.

## 90-4-1112. Selection of qualified energy service providers.

**Compiler's Comments**

*2019 Amendment:* Chapter 311 in (1) at beginning of first sentence substituted "Before selecting an energy service provider" for "Before entering into an energy performance contract" and in second sentence near beginning substituted "select" for "award the performance contract to". Amendment effective May 7, 2019.

*Effective Date:* This section is effective October 1, 2015.

*Applicability:* Section 14, Ch. 344, L. 2015, provided: "[This act] applies to contracts entered into on or after [the effective date of this act]." Effective October 1, 2015.

## 90-4-1113. Investment-grade energy audits.

**Compiler's Comments**

*2019 Amendment:* Chapter 311 in (1) at beginning substituted "The qualified energy service provider" for "An energy performance contractor". Amendment effective May 7, 2019.

*Effective Date:* This section is effective October 1, 2015.

*Applicability:* Section 14, Ch. 344, L. 2015, provided: "[This act] applies to contracts entered into on or after [the effective date of this act]." Effective October 1, 2015.

## 90-4-1114. Energy performance contracts.

**Compiler's Comments**

*2019 Amendment:* Chapter 311 in (6)(a) at end deleted "allowed pursuant to rules adopted by the department pursuant to 90-4-1110(3)(d)". Amendment effective May 7, 2019.

*Effective Date:* This section is effective October 1, 2015.

*Applicability:* Section 14, Ch. 344, L. 2015, provided: "[This act] applies to contracts entered into on or after [the effective date of this act]." Effective October 1, 2015.

## Part 12
## Montana Clean Renewable Energy Bond Act

**Part Compiler's Comments**

*Preamble:* The preamble attached to Ch. 378, L. 2007, provided: "WHEREAS, the Montana Legislature has previously determined that Montana is blessed with an abundance of diverse renewable resources, that renewable energy production promotes and sustains economic development activity in local communities across the state, that increased use of renewable resources will enhance Montana's energy self-sufficiency, that economic and environmental benefits from renewable energy production accrue to the public at large, and that the expanded development of these resources to meet Montana's electricity demand and stabilize electricity prices should be encouraged and promoted; and

WHEREAS, Congress, pursuant to the Energy Tax Incentives Act of 2005, codified in part as section 54 of the Internal Revenue Code and referred to as the Federal Act, has created a federal tax credit program that would enable qualified issuers to issue clean renewable energy bonds for which the holder would receive a federal tax credit, in lieu of interest, to finance the capital costs of qualified projects as described in the Federal Act; and

WHEREAS, qualified issuers and qualified borrowers under the Federal Act include governmental bodies, which are defined as any state, territory, or possession of the United States, the District of Columbia, an Indian tribal government, or any political subdivision of those entities; and

WHEREAS, the Legislature, in enacting the Montana Renewable Power Production and Rural Economic Development Act, has required Montana public utilities to establish graduated renewable energy standards and to purchase renewable energy from the community renewable energy projects and has allowed Montana political subdivisions or governmental bodies to be owners of community renewable energy projects; and

WHEREAS, several Montana cities, towns, and counties have expressed a desire to issue clean renewable energy bonds and to acquire and construct qualified projects under the Federal Act that would provide the energy for their own needs at a stable price and have applied to the Internal Revenue Service for allocations under the Federal Act; and

WHEREAS, the purpose of this legislation is to authorize Montana local governmental bodies and Indian tribal governments to participate as qualified issuers or qualified borrowers under the Federal Act and to enable governmental bodies and Indian tribal governments to better access financial investments for community renewable energy projects or alternative renewable energy sources."

*Effective Date:* Section 23(1), Ch. 378, L. 2007, provided that this part is effective on passage and approval. Approved May 3, 2007.

### 90-4-1202. Definitions.

**Compiler's Comments**

*2021 Amendment — Coordination:* Chapter 542 in definition of ancillary services substituted current definition for "has the meaning provided in 69-3-2003"; inserted definitions of common ownership, community renewable energy project, local owners, and total calculated nameplate capacity; in definition of project in (b) after "project as defined in" substituted "subsection (6)" for "69-3-2003(4)(a)"; and made minor changes in style. Amendment effective May 14, 2021.

The amendment to this section made by sec. 5, Ch. 375, L. 2021, was rendered void by sec. 9, Ch. 542, L. 2021, a coordination section.

*Retroactive Applicability:* Section 12, Ch. 542, L. 2021, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to any application pending or commenced before the public service commission prior to [the effective date of this act]." Effective May 14, 2021.

*Saving Clause:* Section 7, Ch. 542, L. 2021, was a saving clause.

*Severability:* Section 8, Ch. 542, L. 2021, was a severability clause.

*2009 Amendment:* Chapter 232 in definition of project in (b) substituted "69-3-2003(4)(a)" for "69-3-2003". Amendment effective April 16, 2009.

*Retroactive Applicability:* Section 6, Ch. 232, L. 2009, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to the compliance year beginning January 1, 2009."

*Code Commissioner Correction:* In (1) and (9)(b) the code commissioner substituted "69-3-2003" for "69-8-1003" to reflect the directions to the code commissioner in Ch. 220, L. 2007.

## Part 13
## Commercial Property-Assessed Capital Enhancements Act

**Part Compiler's Comments**

*Effective Date:* Section 13, Ch. 444, L. 2021, provided: "[This act] is effective January 1, 2022."

# CHAPTER 5
# SECONDARY INDUSTRY AND COMMERCIAL DEVELOPMENT

## Part 1
## Industrial Development Projects

**Part Compiler's Comments**

*Severability Clause:* Section 11, Ch. 51, L. 1965, was a severability section.

**Part Case Notes**

*Special Purpose Law:* This part is designed for a special purpose and prevails over and is not limited by general legislation that county not make lease longer than 10 years (7-8-2231), that county not sell land except at public auction (7-8-2212), or that county not contract for construction except on public bidding (7-5-2301). Fickes v. Missoula County, 155 M 258, 470 P2d 287 (1970).

**Part Attorney General's Opinions**

*Revenue Bonds:* A community college district may enter into an agreement with a city whereby the city would loan the district the proceeds from the sale of an industrial development revenue bond and the district would repay the loan from college revenues. 42 A.G. Op. 78 (1988).

*County Authority to Construct Medical Facility:* A county has no authority under 7-8-2102 or 53-2-321 (now repealed) to construct a medical facility for doctors. A county does have power under 90-5-101, et seq., to construct such facility using industrial revenue bonds or gifts but may not use federal revenue sharing funds or payments in lieu of taxes and may lease the facility to a hospital district in the county. 37 A.G. Op. 61 (1977).

**90-5-101. Definitions.**

**Compiler's Comments**

*2009 Amendment:* Chapter 489 in definition of project inserted (h) concerning facilities used to create or produce intangible items; and made minor changes in style. Amendment effective May 14, 2009.

*2003 Amendment:* Chapter 405 in definition of project near end substituted "15-6-225" for "90-4-102". Amendment effective October 1, 2003.

*2001 Amendments — Composite Section:* Chapter 353 inserted definition of family services providers; in definition of project near end inserted "family services provider facilities"; and made minor changes in style. Amendment effective October 1, 2001.

Chapter 541 inserted definition of electric energy generation facility; in definition of project near end after "higher education facilities" substituted "electric energy generation facilities" for "small-scale hydroelectric production facilities with a capacity of 50 megawatts or less"; and made minor changes in style. Amendment effective May 1, 2001.

Chapter 591 in definition of project near end before "hydroelectric production" deleted "small-scale" (amendment rendered void by Ch. 541) and inserted second to last clause concerning production of energy using alternative renewable energy sources. Amendment effective July 1, 2001.

*Severability:* Section 28, Ch. 591, L. 2001, was a severability clause.

*1995 Amendment — Phrase Change:* Section 21, Ch. 255, L. 1995, directed the Code Commissioner to change references in the MCA to a person who is developmentally disabled or to a developmentally disabled person to a person with developmental disabilities. The change was not to be made to the phrase "seriously developmentally disabled". In this section, the Code Commissioner has made the change in (8).

*1993 Amendment:* Chapter 254 near middle of definition of project inserted "community-based facilities for individuals who are developmentally disabled as defined in 53-20-102"; and made minor changes in style.

*1986 Amendment:* Inserted definitions of higher education facilities and institution of higher education; and near end of definition of project after "medical facilities" inserted "higher education facilities".

*1981 Amendments:* Chapter 318 in definition of project inserted "small-scale hydroelectric production facilities with a capacity of 50 megawatts or less".

Chapter 376 inserted definition of bonds.

*Source:* Chapter 318, L. 1981 (SB 138), was introduced at the request of the Environmental Quality Council as a result of an interim study conducted by EQC and the National Conference of State Legislatures. See 1980 report available from Environmental Quality Council.

### 90-5-102. General municipal and county powers.

**Compiler's Comments**

*Composite Section:* This section was amended by Ch. 51 and Ch. 656, L. 1979, and a composite section was prepared by the Code Commissioner, 1979. Chapter 51 was a Code Commissioner bill and was not intended to make substantive changes in the law. Therefore, a conflict of language in subsection (2) between Ch. 51 and Ch. 656 has been resolved in favor of the language in Ch. 656.

**Case Notes**

*Judicial Review:* When project was entirely within county, court would not consider hypothetical conflict between 7-1-2101 and provision in this section allowing project partially outside county. Fickes v. Missoula County, 155 M 258, 470 P2d 287 (1970).

*Constitutionality:* Provision for issuance of revenue bonds under this part does not violate Art. XIII, sec. 1, 1889 Mont. Const. (now Art. VIII, sec. 10, 1972 Mont. Const.), since it is done for a public purpose, despite the fact that certain individual associations or corporations may benefit from the legislation. Fickes v. Missoula County, 155 M 258, 470 P2d 287 (1970).

**Attorney General's Opinions**

*Community College District Statutory Borrowing Authority:* A community college district may enter into an agreement with a city whereby the city would loan the district the proceeds from the sale of an industrial development revenue bond and the district would repay the loan from college revenues. A district may also enter into a promissory note loan agreement with a private lender whereby the district would repay the loan from college revenues. A college district election is not required to approve these construction project financing arrangements; however, a city is required to hold a public hearing prior to issuing industrial development revenue bonds. A district is subject to the election requirement in 20-6-603 when acquiring or constructing sites or buildings. 42 A.G. Op. 78 (1988).

*County Revenue Bonds to Finance Community College District Construction:* Flathead Valley Community College District may use funds that Flathead County raised by issuing revenue bonds for school construction either by borrowing the funds from the county or by leasing the buildings constructed by the county, subject to applicable school law. 42 A.G. Op. 29 (1987).

*Payment Directly to Purchaser Not Considered Interest:* A payment made directly to the purchaser of industrial development revenue bonds by the user-beneficiary of the bond proceeds from the user-beneficiary's own funds need not be considered in applying the interest limitation of 17-5-102. 38 A.G. Op. 78 (1980).

*Sale of Bonds of Less Than Face Value:* The sale of industrial revenue bonds issued pursuant to Title 90, ch. 5, part 1, at a price less than the face value of the bonds does not violate 17-5-102 if the yield of the bonds exceeds 9%. 38 A.G. Op. 78 (1980).

### 90-5-103. Limited obligation bonds — form and contents — sale — negotiability — filing.

**Compiler's Comments**

*2009 Amendment:* Chapter 489 inserted (6) concerning tax credit bonds, recovery zone economic development bonds, or qualified energy conservation bonds. Amendment effective May 14, 2009.

*1995 Amendment:* Chapter 423 in (2) extended term of payment of bonds from 30 years to 40 years; and made minor changes in style. Amendment effective April 13, 1995.

*Applicability:* Section 53, Ch. 423, L. 1995, provided: "[This act] applies to bonds issued under the provisions of [this act] after [the effective date of this act]." Effective April 13, 1995.

*1981 Amendment:* Inserted (5) referring to filing of bonds with Securities Commissioner.

**Case Notes**

*Constitutionality:* This section does not violate Art. XIII, sec. 5, 1889 Mont. Const. (now Art. VIII, sec. 10, 1972 Mont. Const.), since it provides for revenue bonds and does not create debt or liability within the meaning of Art. XIII, sec. 5, 1889 Mont. Const. (now Art. VIII, sec. 10, 1972 Mont. Const.). Fickes v. Missoula County, 155 M 258, 470 P2d 287 (1970).

**Attorney General's Opinions**

*Payment Directly to Purchaser Not Considered Interest:* A payment made directly to the purchaser of industrial development revenue bonds by the user-beneficiary of the bond proceeds from the user-beneficiary's own funds need not be considered in applying the interest limitation of 17-5-102. 38 A.G. Op. 78 (1980).

*Sale of Bonds of Less Than Face Value:* The sale of industrial revenue bonds issued pursuant to Title 90, ch. 5, part 1, at a price less than the face value of the bonds does not violate 17-5-102 if the yield of the bonds exceeds 9%. 38 A.G. Op. 78 (1980).

### 90-5-104. Hearing.

**Compiler's Comments**

*1981 Amendment:* In the first sentence of (1), inserted "to pay the costs of acquiring or improving a project" after "or county"; inserted "or user of the project" after "borrower" near the middle of (1); inserted "to pay the costs of acquiring or improving a project" after "issue the bonds" in the last sentence of (1); and inserted (2) referring to refunding bonds.

**Attorney General's Opinions**

*Revenue Bonds:* A community college district may enter into an agreement whereby the city would loan the district the proceeds from the sale of an industrial development revenue bond and the district would repay the loan from college revenues. However, a city is required to hold a public hearing under this section. 42 A.G. Op. 78 (1988).

### 90-5-106. Determination of costs — terms of lease.

**Attorney General's Opinions**

*Payment Directly to Purchaser Not Considered Interest:* A payment made directly to the purchaser of industrial development revenue bonds by the user-beneficiary of the bond proceeds from the user-beneficiary's own funds need not be considered in applying the interest limitation of 17-5-102. 38 A.G. Op. 78 (1980).

### 90-5-107. Refunding of bonds.

**Compiler's Comments**

*1981 Amendment:* Inserted "including without limitation short-term bonds issued in anticipation of the issuance of long-term bonds" after "any time outstanding" in the first sentence of (1); deleted "unpaid" after "together with any" near the middle of (1); deleted "and 90-5-104" after "90-5-103" near the end of (2); inserted (3) referring to use of principal proceeds from refunding bonds; inserted (4) referring to investment of trust fund money; and inserted (5) referring to limitation on duration of deposit in trust for the retirement of certain bonds.

*Erroneous Reference:* The compiler has substituted the reference to 90-5-106(1) for an apparently erroneous reference to "subsection (5)" in the first subsection.

### 90-5-108. Use of proceeds of bond sales.

**Compiler's Comments**

*2001 Amendment:* Chapter 353 in (1) at end of first sentence and middle of second sentence inserted reference to a family services provider facility; and made minor changes in style. Amendment effective October 1, 2001.

*1986 Amendment:* In (1) in two places after "long-term care facility" inserted "or higher education facility".

**Case Notes**

*Equipment Acquired:* Pollution controls or other equipment useful in industrial project created under this part may be acquired under provisions of this section from the proceeds of bond sales. Fickes v. Missoula County, 155 M 258, 470 P2d 287 (1970).

### 90-5-110. Taxation of projects.

**Compiler's Comments**

*1983 Amendment:* In (2), substituted "warrant for distraint" for "distress warrant".

**Case Notes**

*Constitutionality:* This section does not violate provisions of Art. XII, sec. 2, 1889 Mont. Const. (now Art. VIII, sec. 5, 1972 Mont. Const.), against taxing property of county or municipality, since county or municipality has only trust as opposed to beneficial interest, and taxation is based on use of property. Fickes v. Missoula County, 155 M 258, 470 P2d 287 (1970).

### 90-5-112. Economic development levy.

**Compiler's Comments**

*2001 Amendments — Composite Section:* Chapter 495 in (1)(a) at end substituted "as provided in 15-10-425" for "voting in a city, county, or town election". Amendment effective October 1, 2001.

Chapter 574 in (1) in first sentence after "levy" substituted "a tax upon the taxable value of all taxable property in the city, county, or town" for "up to 1 mill upon the taxable value of all the property in the city, county, or town subject to taxation"; at end of (1)(a) substituted "as provided in 15-10-425" for "voting in a city, county, or town election"; and deleted former (4) that read: "(4) A tax authorized by a vote of the electorate, as provided in subsection (1)(a), may be levied for a period not to exceed 6 years." Amendment effective July 1, 2001.

*1999 Amendment:* Chapter 584 at beginning of (1) inserted reference to 15-10-420; at end of (4) after "years" deleted "and is not subject to the provisions of Title 15, chapter 10, part 4"; and made minor changes in style. Amendment effective May 10, 1999.

*Retroactive Applicability:* Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

*1995 Amendment:* Chapter 279 in (4) increased from 5 years to 6 years the time in which an economic development levy is effective. Amendment effective March 29, 1995.

*Applicability:* Section 2, Ch. 279, L. 1995, provided: "[Section 1] [90-5-112] applies to all levies approved by the electorate after [the effective date of this act] [effective March 29, 1995]."

*1993 Amendment:* Chapter 386 substituted (1) authorizing 1-mill economic development levy by public vote or vote of governing body for former (1) that read: "Upon an affirmative vote of a majority of the qualified voters voting in a city, county, or town on the question of whether the governing body may levy a tax for economic development, the governing body of that city, county, or town is authorized to levy in any one election up to 1 mill upon the taxable value of all the property in the county, city, or town subject to taxation for the purpose of economic development for a period not to exceed 5 years"; and at beginning of (4) substituted language authorizing tax with a public vote for "The authorization to levy up to 1 mill for the purpose of economic development, as provided in subsection (1)".

*1991 Amendment:* At end of (4), after "part 4", deleted "if voter authorization for the levy occurred prior to December 31, 1990". Amendment effective April 16, 1991.

*1989 Special Session Amendment:* Inserted (4) exempting economic development levy from property tax freeze if approval by voters occurs prior to December 31, 1990. Amendment effective July 11, 1989.

### 90-5-113. Advice and information by department of commerce.

**Compiler's Comments**

*1981 Amendment:* Substituted "department of commerce" for "department of community affairs".

### 90-5-114. Preference of Montana labor.

**Compiler's Comments**

*1993 Amendment:* Chapter 464 inserted (2) requiring that a contract contain a statement that the contractor will pay the standard prevailing wage for work on certain projects financed from bond proceeds. Amendment effective April 21, 1993.

*1987 Amendment:* Deleted reference to subsection (4) of 18-2-401.

## Part 2

## Western Interstate Nuclear Compact

## State Nuclear Policy

**Part Collateral References**

Western Interstate Energy Board, https://westernenergyboard.org.

### 90-5-202. Board member appointed by governor — compensation.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

## Part 3
## Employee Ownership Opportunity Act

**Part Compiler's Comments**

*Effective Date:* Section 8, Ch. 671, L. 1989, provided that this part is effective May 16, 1989.

### 90-5-305. Department to offer employee ownership development assistance and counseling.

**Compiler's Comments**

*1999 Amendment:* Chapter 10 at beginning inserted "Upon request by an employee group or organization" and after "department of commerce shall" deleted former (1) through (4) that read: "(1) compile, organize, and make available to the public a library of resources on the subject of employee ownership and participatory management;

(2) research the role of employee ownership in successful state and local economic development programs of other states;

(3) provide public education on the beneficial aspects of employee-owned enterprises;

(4) conduct seminars, workshops, and conferences to increase awareness of the benefits found to be common to employee-owned enterprises. At least one seminar must be held annually for public officials dealing with economic development, business assistance, and business financing programs"; and made minor changes in style. Amendment effective February 16, 1999.

# CHAPTER 6
# COMMUNITY IMPACT — PLANNING AND ABATEMENT

## Part 1
## Financing of Housing

**Part Administrative Rules**

Title 8, chapter 111, ARM Board of Housing.

**Part Case Notes**

*Constitutionality:* Title 90, ch. 6, part 1, withstood constitutional challenges under Art. V, sec. 1; Art. V, sec. 11(5); Art. VI, sec. 9; and Art. VIII, sec. 1, 8, and 12 through 14, and the challenge that it conflicts with 32-1-412. Huber v. Groff, 171 M 442, 558 P2d 1124 (1976).

**Part Attorney General's Opinions**

*Buyer's Affidavit and Certification Subject to Public Disclosure:* The buyer's affidavit and certification submitted to the Board of Housing pursuant to the mortgage credit certificate program is subject to public disclosure. 43 A.G. Op. 25 (1989).

**Part Collateral References**

Montana Department of Commerce Housing Division, https://housing.mt.gov.

### 90-6-102. Legislative declaration.

**Administrative Rules**

ARM 8.111.301 Purpose and objective.

### 90-6-103. Definitions.

**Compiler's Comments**

*1997 Amendment:* Chapter 472 in definition of persons and families of lower income, in (f), substituted "disabilities" for "handicaps"; and made minor changes in style.

*1983 Amendments:* Chapter 90 at beginning of definition of housing development, inserted "single-family homes, multifamily projects, housing for the elderly projects, nursing home projects, personal care projects, and"; and substituted "rehabilitating such accommodations" for "rehabilitating dwelling accommodations".

Chapter 359, in definition of bond, inserted "including those on which interest payments are taxable and those on which interest payments are tax exempt".

*1981 Amendment:* Substituted "department of commerce" for "department of administration" in definition of Department; and changed internal references to the Department and the Board.

*Prior Transactions Not Impaired:* Section 2, Ch. 357, L. 1979, provided: "Nothing herein affects or impairs any provision of resolutions, indentures, loans, contracts, bonds, or notes adopted, entered into or issued before the effective date of this act."

### 90-6-104. General powers of the board.

**Compiler's Comments**

*2017 Amendment:* Chapter 51 in (3) after "including" inserted "but not limited to" and after "mortgage" inserted "loan servicing"; in (6) near beginning before "sponsors" inserted "housing" and at end inserted "or of loans serviced by the board"; substituted (9) and (10) for former (9) that read: "(9) acquire real or personal property or any right, interest, or easement therein by gift, purchase, transfer, foreclosure, lease, or otherwise; hold, sell, assign, lease, encumber, mortgage, or otherwise dispose thereof; hold, sell, assign, or otherwise dispose of any mortgage or loan owned by it or in its control or custody; release or relinquish any right, title, claim, interest, easement, or demand, however acquired, including any equity or right of redemption; do any of the foregoing by public or private sale, with or without public bidding; commence any action to protect or enforce any right conferred upon it by any law, mortgage, contract, or other agreement; bid for and purchase property at any foreclosure or other sale or acquire or take possession of it in lieu of foreclosure; and operate, manage, lease, dispose of, and otherwise deal with such property in any manner necessary or desirable to protect its interests and the holders of its bonds or notes and consistent with any agreement with such holders"; in (11) inserted "or receive payment" and at end inserted "secured by property in Montana"; in (16) at end inserted "or other third parties"; in (18) in middle substituted "with mortgages, mortgage loans, property, or other programs under this part" for "with its mortgages and mortgage loans and other assets or property"; and made minor changes in style. Amendment effective March 1, 2017, and terminates June 30, 2021.

*1991 Amendment:* Deleted (21) concerning lending money to Board of Investments to establish Montana economic development guaranty fund; and made minor changes in style. Amendment effective July 1, 1991.

*Saving Clause:* Section 20, Ch. 589, L. 1991, was a saving clause.

*Severability:* Section 21, Ch. 589, L. 1991, was a severability clause.

*1987 Amendment:* In (21), referring to Montana economic development guaranty fund, changed "economic development board" to "board of investments".

*1983 Amendments:* Chapter 249, at end of (13), substituted "housing authority enterprise fund" for "housing finance account".

Chapters 686 and 701 inserted (21) referring to the Montana economic development guaranty fund. Both Ch. 686, L. 1983, and Ch. 701, L. 1983, inserted the subsection in identical form. The Code Commissioner combined the amendments pursuant to sec. 32, Ch. 686, L. 1983, which provided for coordination.

**Administrative Rules**

Title 8, chapter 111, subchapter 3, ARM Program rules.

Title 8, chapter 111, subchapter 4, ARM Reverse Annuity Mortgage Act.

Title 8, chapter 111, subchapter 6, ARM Low-income housing tax credit.

Title 8, chapter 111, subchapter 7, ARM Montana Veterans' Home Loan Act.

**Attorney General's Opinions**

*Legislative Authority to Direct Board of Housing Funds Not Pledged to Trust Indenture:* The Legislature has clear authority to direct the placement of state funds under the Housing Act of 1975 and has given the Board of Housing explicit direction in the placement and use of funds under Board control. Therefore, Board of Housing funds not specifically pledged under a trust indenture must be deposited in the housing authority enterprise fund and invested in accordance with the unified investment program as provided in 90-6-107 and this section. 44 A.G. Op. 42 (1992).

*Conflicts of Interest:* Although no conflicts of interest were found, Board of Housing members (who were also bank officers) would be in conflict of interest if the Board were to contract with the institutions with which the members were associated. 37 A.G. Op. 2 (1977).

### 90-6-105. Meetings and acts of the board.

**Administrative Rules**

ARM 8.111.202 Meetings of the Board.

**Collateral References**

Montana Board of Housing Meetings and Minutes, https://housing.mt.gov/Meetings-Events-Training/Montana-Board-of-Housing.

## 90-6-106. Adoption of rules.

**Administrative Rules**

Title 8, chapter 111, ARM Board of Housing.
Title 8, chapter 111, subchapter 3, ARM Program rules.
Title 8, chapter 111, subchapter 4, ARM Reverse Annuity Mortgage Act.
Title 8, chapter 111, subchapter 7, ARM Montana Veterans' Home Loan Act.

## 90-6-107. Deposit and expenditure of funds.

**Compiler's Comments**

*2007 Amendment:* Chapter 426 in (1) at end of second sentence after "fund" deleted "except as otherwise provided by law". Amendment effective October 1, 2007.

*2001 Amendment:* Chapter 34 in (1) at end of first sentence substituted "17-2-102(2)" for "17-2-102(1)(b)"; and made minor changes in style. Amendment effective July 1, 2001.

*1992 Special Session Amendment:* Chapter 11, Sp. L. July 1992, in (1), near middle, inserted reference to subsection (4); and inserted (4) transferring $500,000 from the housing authority enterprise fund to the general fund. Amendment effective August 6, 1992, and terminates September 2, 1992.

*Severability:* Section 7, Ch. 11, Sp. L. July 1992, was a severability clause.

*1983 Amendment:* In (1), in first sentence, substituted reference to housing authority enterprise fund in the proprietary fund type for "There is a housing finance account in the bonds proceeds and insurance clearance fund provided for in 17-2-102(6).", in second and third sentences, substituted "housing authority enterprise fund" for "housing finance account", at end of second sentence, deleted "and except as necessary to maintain the capital reserve and revolving accounts", and in middle of last sentence, inserted "except funds appropriated by the legislature for use of the board in payment of expenses incurred in carrying out this part"; in first sentence of (2), substituted "housing authority enterprise fund provided for in subsection (1)" for "sinking fund provided for in 17-2-102(3)"; and in (3), deleted former first sentence, which read: "There is a revolving account in the revolving fund provided for in 17-2-102(7).", at end of first sentence, changed "revolving account" to "housing authority enterprise fund", and in last sentence after "repaid by the board", deleted "into the revolving account".

**Attorney General's Opinions**

*Legislative Authority to Direct Board of Housing Funds Not Pledged to Trust Indenture:* The Legislature has clear authority to direct the placement of state funds under the Housing Act of 1975 and has given the Board of Housing explicit direction in the placement and use of funds under Board control. Therefore, Board of Housing funds not specifically pledged under a trust indenture must be deposited in the housing authority enterprise fund and invested in accordance with the unified investment program as provided in 90-6-104 and this section. 44 A.G. Op. 42 (1992).

## 90-6-108. Financing programs of the board.

**Administrative Rules**

ARM 8.111.303 Financing programs.
ARM 8.111.304 Conditions of financial assistance.
ARM 8.111.305 Approved lenders.
ARM 8.111.305A Approved loan servicers.

## 90-6-109. Procedure prior to financing of housing developments.

**Compiler's Comments**

*1983 Amendment:* Inserted (2) requiring public hearing.

**Administrative Rules**

ARM 8.111.303 Financing programs.

## 90-6-110. Supervision of housing sponsors.

**Administrative Rules**

ARM 8.111.304 Conditions of financial assistance.
ARM 8.111.306 Housing sponsors.

## 90-6-111. Bonds and notes.

**Compiler's Comments**

*2003 Amendment:* Chapter 89 in (4) in third sentence after "annual" inserted "or semiannual"; at end of first sentence in (5) increased total amount of outstanding notes and bonds from $975 million to $1.5 billion; and made minor changes in style. Amendment effective October 1, 2003.

*1985 Amendment:* In (5) near beginning, after "outstanding at", substituted "any time" for "any one time", raised limit from $675 million to $975 million, and inserted last sentence making issue price of bonds sold at discount countable against statutory ceiling.

*1983 Amendment:* In (4), inserted second to last sentence referring to tax status of bond interest payments; and in (5), deleted former last two sentences, which read: "The rate of interest on bonds or notes issued by the board may not exceed an interest rate equal to 1% less than the interest rate established from time to time by the U.S. department of housing and urban development (HUD), federal housing administration (FHA). The interest rate shall be determined for each issue of bonds or notes according to the HUD/FHA rate in effect 30 days prior to the sale of the bonds or notes."

*1981 Amendments:* Chapter 53, in (5), substituted language tying interest rate limitation to HUD rate for "9% per annum".

Chapter 64 increased the bond debt limit in (5) from $375 million to $675 million.

*Statement of Intent:* The statement of intent attached to SB 91 (Ch. 64, L. 1981) provided: "A statement of intent was requested for this bill by the Senate Committee on Business and Industry.

It is the intent of the legislature that SB 91 not conflict with SB 90 [Ch. 53, L. 1981]. The bills are not in apparent conflict but both amend section 90-6-111. Both bills are effective on passage and approval. It is the intent of the legislature that should both SB 90 and SB 91 be enacted into law, section 90-6-111 should read as follows:

"90-6-111. Bonds and notes. (1) The board may by resolution, from time to time, issue negotiable notes and bonds in a principal amount as the board determines necessary to provide sufficient funds for achieving any of its purposes, including the payment of interest on notes and bonds of the board, establishment of reserves to secure the notes and bonds, including the reserve funds created under 90-6-119, and all other expenditures of the board incident to and necessary or convenient to carry out this part.

(2) The board may by resolution, from time to time, issue notes to renew notes and bonds to pay notes, including interest, and whenever it deems refunding expedient, refund any bonds by the issuance of new bonds, whether the bonds to be refunded have or have not matured, and issue bonds partly to refund bonds outstanding and partly for any of its other purposes.

(3) Except as otherwise expressly provided by resolution of the board, every issue of its notes and bonds shall be obligations of the board payable out of any revenues, assets, or moneys of the board, subject only to agreements with the holders of particular notes or bonds pledging particular revenues, assets, or moneys.

(4) The notes and bonds shall be authorized by resolutions of the board, shall bear a date, and shall mature at times as the resolutions provide. A note shall not mature more than 10 years and a bond shall not mature more than 50 years from the date of its issue. The bonds may be issued as serial bonds payable in annual installments or as term bonds or as a combination thereof. The notes and bonds shall bear interest at a rate, or rates, be in denominations, be in a form, either coupon or registered, carry registration privileges, be executed in a manner, be payable in a medium of payment, at places within or without the state, and be subject to terms of redemption as provided in resolutions. The notes and bonds of the board may be sold at public or private sale at such prices, which may be above or below par, as are determined by the board.

(5) The total amount of notes and bonds outstanding at any one time, except notes or bonds as to which the board's obligation has been satisfied and discharged by refunding or for which reserve for payment or other means of payment have been otherwise provided, may not exceed $675 million. The rate of interest on bonds or notes issued by the board may not exceed an interest rate equal to 1% less than the interest rate established from time to time by the U.S. department of housing and urban development (HUD), federal housing administration (FHA). The interest rate shall be determined for each issue of bonds or notes according to the HUD/FHA rate in effect 30 days prior to the sale of the bonds or notes.""

*Prior Transactions Not Impaired:* Section 2, Ch. 522, L. 1979, provided: "Nothing herein affects or impairs any provision of resolutions, indentures, loans, contracts, bonds, or notes adopted, entered into, or issued before the effective date of this act."

*Saving Clauses:* Section 2, Ch. 518, L. 1979, sec. 2, Ch. 53, L. 1981, and sec. 2, Ch. 64, L. 1981, were saving clauses.

### 90-6-112. Provision of bond resolutions.

**Compiler's Comments**

*1981 Amendment:* Substituted "department of commerce" for "department of administration" in (8).

*Prior Transactions Not Impaired:* Section 4, Ch. 143, L. 1979, provided: "Nothing herein shall affect or impair any provision of resolutions, indentures, loans, contracts, bonds, or notes adopted, entered into, or issued before the effective date of this act."

### 90-6-116. Trust indenture.

**Administrative Rules**

ARM 8.111.303 Financing programs.

**Attorney General's Opinions**

*Legislative Authority to Direct Board of Housing Funds Not Pledged to Trust Indenture:* The Legislature has clear authority to direct the placement of state funds under the Housing Act of 1975 and has given the Board of Housing explicit direction in the placement and use of funds under Board control. Therefore, Board of Housing funds not specifically pledged under a trust indenture must be deposited in the housing authority enterprise fund and invested in accordance with the unified investment program as provided in 90-6-104 and 90-6-107. 44 A.G. Op. 42 (1992).

### 90-6-119. Reserve funds and appropriations.

**Compiler's Comments**

*1983 Amendment:* In (2), in middle of first sentence and near end of second sentence, substituted "debt service payments" for "sinking fund payments"; and in last sentence of (3), substituted "debt service fund" for "sinking fund".

### 90-6-120. Maintenance of capital reserve account.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

### 90-6-124. Annual audit.

**Collateral References**

Montana Board of Housing, Financial-Compliance Audit for the Fiscal Year Ended June 30, 2021, Mont. Leg. Audit Div. (November 2021).

### 90-6-125. Tax exemption of bonds.

**Compiler's Comments**

*2000 Amendment by Referendum:* Chapter 9 at end of first sentence deleted references to inheritance taxes and gift taxes; and made minor changes in style. Amendment effective November 7, 2000.

*Applicability:* Section 38, Ch. 9, Sp. L. May 2000, provided: "This act applies to deaths occurring after December 31, 2000."

### 90-6-126. Pledge of the state.

**Compiler's Comments**

*Prior Transactions Not Impaired:* Section 4, Ch. 143, L. 1979, provided: "Nothing herein shall affect or impair any provision of resolutions, indentures, loans, contracts, bonds, or notes adopted, entered into, or issued before the effective date of this act."

### 90-6-127. Allocation of state limit.

**Compiler's Comments**

*2003 Amendment:* Chapter 114 in (1) and (2) after "Internal Revenue Code" deleted "of 1954"; and made minor changes in style. Amendment effective October 1, 2003.

*1997 Amendment:* Chapter 42 in (1) and (2) inserted parenthetical references to sections of the Internal Revenue Code; in (1) substituted "section 146" for "section 103A(g)"; and in (2) substituted "section 143(j)(3)" for "section 103A(g)". Amendment effective March 12, 1997.

*Statement of Intent:* The statement of intent attached to SB 143 (Ch. 54, L. 1981) provided: "A statement of intent is required for this act as it grants the board of housing authority to adopt standards for determining and designating areas of chronic economic distress. It is the intent of the legislature that the board adopt rules consistent with section 103A(g) [now 143(j)(3)] of the Internal Revenue Code of 1954, as amended."

*Saving Clause:* Section 2, Ch. 54, L. 1981, provided: "Nothing in 90-6-127 affects or impairs any provision of resolution indentures, loans, contracts, bonds, or notes adopted, entered into or issued before March 16, 1981."

**Administrative Rules**

ARM 8.111.307 Areas of chronic economic distress.

### 90-6-131. Legislative declaration.

**Compiler's Comments**

*2007 Amendment:* Chapter 426 in (1) near beginning inserted "escalating land costs" and near end inserted "accessible"; and in (3) in first sentence substituted "the housing Montana fund" for "an affordable housing revolving loan account" and inserted second sentence regarding long-term affordability. Amendment effective October 1, 2007.

*2003 Amendment:* Chapter 455 in (3) near middle substituted "revolving loan account" for "revolving loan fund". Amendment effective July 1, 2003.

*Effective Date:* Section 9, Ch. 312, L. 1999, provided that this section is effective July 1, 1999.

### 90-6-132. Definitions.

**Compiler's Comments**

*2019 Amendment:* Chapter 460 inserted definition of coal tax trust fund; and made minor changes in style. Amendment effective July 1, 2019.

*2007 Amendment:* Chapter 426 inserted definition of fund; deleted definition of loan account that read: ""Loan account" means the affordable housing revolving loan account created in 90-6-133"; and made minor changes in style. Amendment effective October 1, 2007.

*Effective Date:* Section 9, Ch. 312, L. 1999, provided that this section is effective July 1, 1999.

### 90-6-133. Housing Montana fund — administration.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 1, Ch. 577, L. 2023. Amendment effective July 1, 2023.

*2007 Amendment:* Chapter 426 throughout section substituted references to housing Montana fund or fund for references to affordable housing revolving loan account or loan account; inserted (1)(b) establishing percentage of loans to be made in rural areas and to low-income people; in (5) substituted "may" for "must"; and made minor changes in style. Amendment effective October 1, 2007.

*2003 Amendment:* Chapter 455 in (1) at end of first sentence substituted "in the housing authority enterprise fund provided for in 90-6-107" for "in the state special revenue fund in the state treasury"; and in (5), two places in (6), and in (7) substituted "loan account" for references to loan fund. Amendment effective July 1, 2003.

*2001 Amendment:* Chapter 502 in (2)(a) inserted exception clause; and inserted (2)(b) allowing money transferred to the account under Ch. 502 to be used for temporary assistance for needy families. Amendment effective July 1, 2001.

*Fund Transfer:* Section 2, Ch. 502, L. 2001, provided: "The department of public health and human services shall transfer $3,415,928 of the TANF block grant received as federal special revenue to the affordable housing revolving loan account provided for in 90-6-133."

*Effective Date:* Section 9, Ch. 312, L. 1999, provided that this section is effective July 1, 1999.

**Administrative Rules**

Title 8, chapter 111, subchapter 5, ARM Affordable housing revolving loan fund and TANF housing assistance funds.

### 90-6-134. Housing Montana fund — loan capital restricted to interest on principal — eligible applicants.

**Compiler's Comments**

*2007 Amendment:* Chapter 426 throughout section substituted references to housing Montana fund or fund for references to loan account; inserted (3)(e) allowing fund money to be used for acquisition of land for housing developments, land banking and land trusts, and short-term site-based housing vouchers for needy individuals; in (6) added state government or state agencies or programs to list of organizations eligible for loans; and made minor changes in style. Amendment effective October 1, 2007.

*2003 Amendment:* Chapter 455 in (1), at end of (2), in (3), in (5), and in (6) substituted "loan account" for "loan fund". Amendment effective July 1, 2003.

*Effective Date:* Section 9, Ch. 312, L. 1999, provided that this section is effective July 1, 1999.

**Administrative Rules**

Title 8, chapter 111, subchapter 5, ARM Affordable housing revolving loan fund and TANF housing assistance funds.

## 90-6-135. Coordination with other programs.

**Compiler's Comments**

*Effective Date:* Section 9, Ch. 312, L. 1999, provided that this section is effective July 1, 1999.

## 90-6-136. Administrative rules.

**Compiler's Comments**

*2019 Amendment:* Chapter 460 in introductory clause and (6) inserted references to 90-6-137; and made minor changes in style. Amendment effective July 1, 2019.

*Effective Date:* Section 9, Ch. 312, L. 1999, provided that this section is effective July 1, 1999.

## 90-6-137. Alternate funding source for housing loans — use of coal tax trust fund money.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 17, Ch. 774, L. 2023. Amendment effective June 13, 2023.

*Preamble:* The preamble attached to Ch. 774, L. 2023, provided: "WHEREAS, the availability of attainable workforce housing is critical to the well-being of individuals, communities, businesses, and organizations of all sizes, and the economy at large; and

WHEREAS, access to attainable workforce housing provides greater opportunities to realize the American dream, allows for more robust job creation, promotes a stronger economy, and is essential to ensuring our residents and future generations are able to live, work, and raise their families in the state; and

WHEREAS, driven by a shortage of housing supply, the state faces a crisis of attainable workforce housing that poses substantial challenges to hardworking Montanans, employers, communities, and the state's economic health; and

WHEREAS, between 2010 and 2020, the state's population growth of 9.6% outpaced the state's housing unit growth of 6.6%, and a substantial factor contributing to tight housing supply has been underbuilding of entry-level homes, which are in high demand but low supply; and

WHEREAS, it is in the public interest of our state, our communities, and our people to find solutions to the tight supply of attainable workforce housing; and

WHEREAS, the health and stability of the state is directly dependent on the health and stability of local economic regions that are struggling due to an inadequate workforce, which is creating concerns for negative, long-term consequences; and

WHEREAS, a diverse, capable workforce is essential to retain the economic vitality and prosperity of the state within the global marketplace; and

WHEREAS, the Montana Community Reinvestment Plan Act may generate 500 attainable workforce housing dwellings allowing qualified individuals to achieve homeownership."

*Effective Date:* Section 6, Ch. 460, L. 2019, provided: "[This act] is effective July 1, 2019."

**Administrative Rules**

Title 8, chapter 111, subchapter 8, ARM Coal trust multifamily homes (CTMH) program.

## 90-6-138. Coal board fund.

**Compiler's Comments**

*Effective Date:* Section 8, Ch. 717, L. 2023, provided: "[This act] is effective July 1, 2023."

## 90-6-141. Short title.

**Compiler's Comments**

*Effective Date:* Section 25, Ch. 774, L. 2023, provided: "[This act] is effective on passage and approval." Approved June 13, 2023.

*2023 Code Commissioner Correction:* Pursuant to the authority granted in sec. 20, Ch. 166, L. 2023, the Code Commissioner substituted "[sections 1 through 9]" [90-6-141 through 90-6-149] for "[sections 1 through 8]" to correct an erroneous reference. The reference to "[sections 1 through 9]" indicates the complete group of sections codified together in Title 90, chapter 6, part 1, by Ch. 774, L. 2023.

*Preamble:* The preamble attached to Ch. 774, L. 2023, provided: "WHEREAS, the availability of attainable workforce housing is critical to the well-being of individuals, communities, businesses, and organizations of all sizes, and the economy at large; and

WHEREAS, access to attainable workforce housing provides greater opportunities to realize the American dream, allows for more robust job creation, promotes a stronger economy, and is essential to ensuring our residents and future generations are able to live, work, and raise their families in the state; and

WHEREAS, driven by a shortage of housing supply, the state faces a crisis of attainable workforce housing that poses substantial challenges to hardworking Montanans, employers, communities, and the state's economic health; and

WHEREAS, between 2010 and 2020, the state's population growth of 9.6% outpaced the state's housing unit growth of 6.6%, and a substantial factor contributing to tight housing supply has been underbuilding of entry-level homes, which are in high demand but low supply; and

WHEREAS, it is in the public interest of our state, our communities, and our people to find solutions to the tight supply of attainable workforce housing; and

WHEREAS, the health and stability of the state is directly dependent on the health and stability of local economic regions that are struggling due to an inadequate workforce, which is creating concerns for negative, long-term consequences; and

WHEREAS, a diverse, capable workforce is essential to retain the economic vitality and prosperity of the state within the global marketplace; and

WHEREAS, the Montana Community Reinvestment Plan Act may generate 500 attainable workforce housing dwellings allowing qualified individuals to achieve homeownership."

## 90-6-142. Purpose.

### Compiler's Comments

*Effective Date:* Section 25, Ch. 774, L. 2023, provided: "[This act] is effective on passage and approval." Approved June 13, 2023.

*Preamble:* The preamble attached to Ch. 774, L. 2023, provided: "WHEREAS, the availability of attainable workforce housing is critical to the well-being of individuals, communities, businesses, and organizations of all sizes, and the economy at large; and

WHEREAS, access to attainable workforce housing provides greater opportunities to realize the American dream, allows for more robust job creation, promotes a stronger economy, and is essential to ensuring our residents and future generations are able to live, work, and raise their families in the state; and

WHEREAS, driven by a shortage of housing supply, the state faces a crisis of attainable workforce housing that poses substantial challenges to hardworking Montanans, employers, communities, and the state's economic health; and

WHEREAS, between 2010 and 2020, the state's population growth of 9.6% outpaced the state's housing unit growth of 6.6%, and a substantial factor contributing to tight housing supply has been underbuilding of entry-level homes, which are in high demand but low supply; and

WHEREAS, it is in the public interest of our state, our communities, and our people to find solutions to the tight supply of attainable workforce housing; and

WHEREAS, the health and stability of the state is directly dependent on the health and stability of local economic regions that are struggling due to an inadequate workforce, which is creating concerns for negative, long-term consequences; and

WHEREAS, a diverse, capable workforce is essential to retain the economic vitality and prosperity of the state within the global marketplace; and

WHEREAS, the Montana Community Reinvestment Plan Act may generate 500 attainable workforce housing dwellings allowing qualified individuals to achieve homeownership."

## 90-6-143. Definitions.

### Compiler's Comments

*Effective Date:* Section 25, Ch. 774, L. 2023, provided: "[This act] is effective on passage and approval." Approved June 13, 2023.

*2023 Code Commissioner Correction:* Pursuant to the authority granted in sec. 20, Ch. 166, L. 2023, the Code Commissioner near beginning substituted "[sections 1 through 9]" [90-6-141 through 90-6-149] for "[sections 1 through 8]" to correct an erroneous reference. The reference to "[sections 1 through 9]" indicates the complete group of sections codified together in Title 90, chapter 6, part 1, by Ch. 774, L. 2023.

*Preamble:* The preamble attached to Ch. 774, L. 2023, provided: "WHEREAS, the availability of attainable workforce housing is critical to the well-being of individuals, communities, businesses, and organizations of all sizes, and the economy at large; and

WHEREAS, access to attainable workforce housing provides greater opportunities to realize the American dream, allows for more robust job creation, promotes a stronger economy, and is essential to ensuring our residents and future generations are able to live, work, and raise their families in the state; and

WHEREAS, driven by a shortage of housing supply, the state faces a crisis of attainable workforce housing that poses substantial challenges to hardworking Montanans, employers, communities, and the state's economic health; and

WHEREAS, between 2010 and 2020, the state's population growth of 9.6% outpaced the state's housing unit growth of 6.6%, and a substantial factor contributing to tight housing supply has been underbuilding of entry-level homes, which are in high demand but low supply; and

WHEREAS, it is in the public interest of our state, our communities, and our people to find solutions to the tight supply of attainable workforce housing; and

WHEREAS, the health and stability of the state is directly dependent on the health and stability of local economic regions that are struggling due to an inadequate workforce, which is creating concerns for negative, long-term consequences; and

WHEREAS, a diverse, capable workforce is essential to retain the economic vitality and prosperity of the state within the global marketplace; and

WHEREAS, the Montana Community Reinvestment Plan Act may generate 500 attainable workforce housing dwellings allowing qualified individuals to achieve homeownership."

### 90-6-144. Montana community reinvestment plan.

**Compiler's Comments**

*Effective Date:* Section 25, Ch. 774, L. 2023, provided: "[This act] is effective on passage and approval." Approved June 13, 2023.

*Preamble:* The preamble attached to Ch. 774, L. 2023, provided: "WHEREAS, the availability of attainable workforce housing is critical to the well-being of individuals, communities, businesses, and organizations of all sizes, and the economy at large; and

WHEREAS, access to attainable workforce housing provides greater opportunities to realize the American dream, allows for more robust job creation, promotes a stronger economy, and is essential to ensuring our residents and future generations are able to live, work, and raise their families in the state; and

WHEREAS, driven by a shortage of housing supply, the state faces a crisis of attainable workforce housing that poses substantial challenges to hardworking Montanans, employers, communities, and the state's economic health; and

WHEREAS, between 2010 and 2020, the state's population growth of 9.6% outpaced the state's housing unit growth of 6.6%, and a substantial factor contributing to tight housing supply has been underbuilding of entry-level homes, which are in high demand but low supply; and

WHEREAS, it is in the public interest of our state, our communities, and our people to find solutions to the tight supply of attainable workforce housing; and

WHEREAS, the health and stability of the state is directly dependent on the health and stability of local economic regions that are struggling due to an inadequate workforce, which is creating concerns for negative, long-term consequences; and

WHEREAS, a diverse, capable workforce is essential to retain the economic vitality and prosperity of the state within the global marketplace; and

WHEREAS, the Montana Community Reinvestment Plan Act may generate 500 attainable workforce housing dwellings allowing qualified individuals to achieve homeownership."

### 90-6-145. Montana community reinvestment plan account.

**Compiler's Comments**

*Effective Date:* Section 25, Ch. 774, L. 2023, provided: "[This act] is effective on passage and approval." Approved June 13, 2023.

*Preamble:* The preamble attached to Ch. 774, L. 2023, provided: "WHEREAS, the availability of attainable workforce housing is critical to the well-being of individuals, communities, businesses, and organizations of all sizes, and the economy at large; and

WHEREAS, access to attainable workforce housing provides greater opportunities to realize the American dream, allows for more robust job creation, promotes a stronger economy, and is essential to ensuring our residents and future generations are able to live, work, and raise their families in the state; and

WHEREAS, driven by a shortage of housing supply, the state faces a crisis of attainable workforce housing that poses substantial challenges to hardworking Montanans, employers, communities, and the state's economic health; and

WHEREAS, between 2010 and 2020, the state's population growth of 9.6% outpaced the state's housing unit growth of 6.6%, and a substantial factor contributing to tight housing supply has been underbuilding of entry-level homes, which are in high demand but low supply; and

WHEREAS, it is in the public interest of our state, our communities, and our people to find solutions to the tight supply of attainable workforce housing; and

WHEREAS, the health and stability of the state is directly dependent on the health and stability of local economic regions that are struggling due to an inadequate workforce, which is creating concerns for negative, long-term consequences; and

WHEREAS, a diverse, capable workforce is essential to retain the economic vitality and prosperity of the state within the global marketplace; and

WHEREAS, the Montana Community Reinvestment Plan Act may generate 500 attainable workforce housing dwellings allowing qualified individuals to achieve homeownership."

## 90-6-146. Community reinvestment organizations.

### Compiler's Comments

*Effective Date:* Section 25, Ch. 774, L. 2023, provided: "[This act] is effective on passage and approval." Approved June 13, 2023.

*Coordination:* Section 24, Ch. 774, L. 2023, a coordination section, in (7) in two places substituted "chief business development officer" for "chief economic development officer".

*Preamble:* The preamble attached to Ch. 774, L. 2023, provided: "WHEREAS, the availability of attainable workforce housing is critical to the well-being of individuals, communities, businesses, and organizations of all sizes, and the economy at large; and

WHEREAS, access to attainable workforce housing provides greater opportunities to realize the American dream, allows for more robust job creation, promotes a stronger economy, and is essential to ensuring our residents and future generations are able to live, work, and raise their families in the state; and

WHEREAS, driven by a shortage of housing supply, the state faces a crisis of attainable workforce housing that poses substantial challenges to hardworking Montanans, employers, communities, and the state's economic health; and

WHEREAS, between 2010 and 2020, the state's population growth of 9.6% outpaced the state's housing unit growth of 6.6%, and a substantial factor contributing to tight housing supply has been underbuilding of entry-level homes, which are in high demand but low supply; and

WHEREAS, it is in the public interest of our state, our communities, and our people to find solutions to the tight supply of attainable workforce housing; and

WHEREAS, the health and stability of the state is directly dependent on the health and stability of local economic regions that are struggling due to an inadequate workforce, which is creating concerns for negative, long-term consequences; and

WHEREAS, a diverse, capable workforce is essential to retain the economic vitality and prosperity of the state within the global marketplace; and

WHEREAS, the Montana Community Reinvestment Plan Act may generate 500 attainable workforce housing dwellings allowing qualified individuals to achieve homeownership."

## 90-6-147. Community reinvestment organization requirements.

### Compiler's Comments

*Effective Date:* Section 25, Ch. 774, L. 2023, provided: "[This act] is effective on passage and approval." Approved June 13, 2023.

*2023 Code Commissioner Correction:* Pursuant to the authority granted in sec. 20, Ch. 166, L. 2023, the Code Commissioner in (4)(c) substituted "[sections 1 through 9]" [90-6-141 through 90-6-149] for "[sections 1 through 8]" to correct an erroneous reference. The reference to "[sections 1 through 9]" indicates the complete group of sections codified together in Title 90, chapter 6, part 1, by Ch. 774, L. 2023.

*Preamble:* The preamble attached to Ch. 774, L. 2023, provided: "WHEREAS, the availability of attainable workforce housing is critical to the well-being of individuals, communities, businesses, and organizations of all sizes, and the economy at large; and

WHEREAS, access to attainable workforce housing provides greater opportunities to realize the American dream, allows for more robust job creation, promotes a stronger economy, and is essential to ensuring our residents and future generations are able to live, work, and raise their families in the state; and

WHEREAS, driven by a shortage of housing supply, the state faces a crisis of attainable workforce housing that poses substantial challenges to hardworking Montanans, employers, communities, and the state's economic health; and

WHEREAS, between 2010 and 2020, the state's population growth of 9.6% outpaced the state's housing unit growth of 6.6%, and a substantial factor contributing to tight housing supply has been underbuilding of entry-level homes, which are in high demand but low supply; and

WHEREAS, it is in the public interest of our state, our communities, and our people to find solutions to the tight supply of attainable workforce housing; and

WHEREAS, the health and stability of the state is directly dependent on the health and stability of local economic regions that are struggling due to an inadequate workforce, which is creating concerns for negative, long-term consequences; and

WHEREAS, a diverse, capable workforce is essential to retain the economic vitality and prosperity of the state within the global marketplace; and

WHEREAS, the Montana Community Reinvestment Plan Act may generate 500 attainable workforce housing dwellings allowing qualified individuals to achieve homeownership."

### 90-6-148. State workforce housing incentive to community reinvestment organizations.

**Compiler's Comments**

*Effective Date:* Section 25, Ch. 774, L. 2023, provided: "[This act] is effective on passage and approval." Approved June 13, 2023.

*Preamble:* The preamble attached to Ch. 774, L. 2023, provided: "WHEREAS, the availability of attainable workforce housing is critical to the well-being of individuals, communities, businesses, and organizations of all sizes, and the economy at large; and

WHEREAS, access to attainable workforce housing provides greater opportunities to realize the American dream, allows for more robust job creation, promotes a stronger economy, and is essential to ensuring our residents and future generations are able to live, work, and raise their families in the state; and

WHEREAS, driven by a shortage of housing supply, the state faces a crisis of attainable workforce housing that poses substantial challenges to hardworking Montanans, employers, communities, and the state's economic health; and

WHEREAS, between 2010 and 2020, the state's population growth of 9.6% outpaced the state's housing unit growth of 6.6%, and a substantial factor contributing to tight housing supply has been underbuilding of entry-level homes, which are in high demand but low supply; and

WHEREAS, it is in the public interest of our state, our communities, and our people to find solutions to the tight supply of attainable workforce housing; and

WHEREAS, the health and stability of the state is directly dependent on the health and stability of local economic regions that are struggling due to an inadequate workforce, which is creating concerns for negative, long-term consequences; and

WHEREAS, a diverse, capable workforce is essential to retain the economic vitality and prosperity of the state within the global marketplace; and

WHEREAS, the Montana Community Reinvestment Plan Act may generate 500 attainable workforce housing dwellings allowing qualified individuals to achieve homeownership."

### 90-6-149. Use of state trust lands for attainable housing.

**Compiler's Comments**

*Effective Date:* Section 25, Ch. 774, L. 2023, provided: "[This act] is effective on passage and approval." Approved June 13, 2023.

*Preamble:* The preamble attached to Ch. 774, L. 2023, provided: "WHEREAS, the availability of attainable workforce housing is critical to the well-being of individuals, communities, businesses, and organizations of all sizes, and the economy at large; and

WHEREAS, access to attainable workforce housing provides greater opportunities to realize the American dream, allows for more robust job creation, promotes a stronger economy, and is essential to ensuring our residents and future generations are able to live, work, and raise their families in the state; and

WHEREAS, driven by a shortage of housing supply, the state faces a crisis of attainable workforce housing that poses substantial challenges to hardworking Montanans, employers, communities, and the state's economic health; and

WHEREAS, between 2010 and 2020, the state's population growth of 9.6% outpaced the state's housing unit growth of 6.6%, and a substantial factor contributing to tight housing supply has been underbuilding of entry-level homes, which are in high demand but low supply; and

WHEREAS, it is in the public interest of our state, our communities, and our people to find solutions to the tight supply of attainable workforce housing; and

WHEREAS, the health and stability of the state is directly dependent on the health and stability of local economic regions that are struggling due to an inadequate workforce, which is creating concerns for negative, long-term consequences; and

WHEREAS, a diverse, capable workforce is essential to retain the economic vitality and prosperity of the state within the global marketplace; and

WHEREAS, the Montana Community Reinvestment Plan Act may generate 500 attainable workforce housing dwellings allowing qualified individuals to achieve homeownership."

## Part 2
## Coal Impacts — Evaluation and Abatement Funding

**Part Compiler's Comments**

*1981 Appropriations Act — Bona Fide Local Effort — Grants:* Section 19, HB 500 (1981), provided in part: "Coal impact grants may be granted to local government units only to remedy a situation resulting from coal development. The local government unit must be making a bona fide local effort to provide for its own needs through normal financing channels (taxes, service fees, or bonds)." Because HB 500 was an appropriations bill for the biennium ending June 30, 1983, the above-quoted language is likely to have direct authoritative application only to that period.

**Part Administrative Rules**

Title 8, chapter 101, ARM Coal Board.

**Part Collateral References**

Montana Coal Board, https://comdev.mt.gov/Programs-and-Boards/Montana-Coal-Board.

### 90-6-201. Purpose.

**Compiler's Comments**

*1997 Amendment:* Chapter 204 near middle, after "complexes", inserted "or as a consequence of a major decline in coal mining or in the operation of coal-using energy complexes". Amendment effective July 1, 1997.

*1995 Amendment:* Chapter 509 before "support" deleted "invest a portion of the tax revenue from the coal mines in a permanent fund, the income from which shall be used for the"; and made minor changes in style. Amendment effective July 1, 1995.

**Attorney General's Opinions**

*Definition of "Local Governmental Unit":* Counties, incorporated cities and towns, school districts, and consolidated governments are the only "local governmental units" under this section and chapter. 36 A.G. Op. 74 (1976), overruled by 37 A.G. Op. 22 (1977).

### 90-6-202. Account established.

**Compiler's Comments**

*1995 Amendment:* Chapter 509 deleted (1) that read: "(1) There is within the state special revenue fund a local impact account. Moneys are payable into this account under 15-35-108. The state treasurer shall draw warrants from this account upon order of the coal board"; and made minor changes in style. Amendment effective July 1, 1995.

*1989 Special Session Amendment:* Deleted former (3) establishing the education trust fund account. Amendment effective August 11, 1989, and applies retroactively to July 1, 1989.

*1987 Amendment:* In (1), at end of first sentence after "local impact", deleted "and education trust fund"; and inserted (3) referring to education trust fund account.

*Severability:* Section 13, Ch. 662, L. 1987, was a severability section.

*1983 Amendment:* Substituted "state special revenue fund" for "earmarked revenue fund" in two places.

### 90-6-203. Definition of coal board.

**Compiler's Comments**

*1981 Amendment:* Changed internal reference to board.

### 90-6-204. Presiding officer, meetings, compensation, and facilities.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

## 90-6-205. Coal board — general powers.

### Compiler's Comments

*1997 Amendment:* Chapter 204 deleted former (4) that read: "(4) consider applications for loans from available funds for periods and interest rates to be determined by the board"; in (4), in introductory clause after "grants", deleted "and loans"; in (4)(a), after "development", inserted "or a major decline in coal mining or in the operation of coal-using energy complexes" and near end, after "consequence of", inserted "an increase or decrease in" and after "coal development" inserted "or in the consumption of coal by a coal-using energy complex"; and made minor changes in style. Amendment effective July 1, 1997.

*1995 Amendment:* Chapter 509 in (3), (4), and (5) substituted "available funds" for "the local impact account"; and made minor changes in style. Amendment effective July 1, 1995.

*1991 Amendment:* Substituted references to Department of Transportation for references to Department of Highways. Amendment effective July 1, 1991.

*1987 Amendment:* In (3) and (4), after "local impact", deleted "and education trust fund"; in (5), after "90-6-207", substituted "from the local impact account" for "not to exceed in any one year seven-elevenths and after June 30, 1979, seven-fifteenths of the revenue paid into the local impact and education trust fund account"; and deleted former (5)(c) that read: "(c) provided that as used in this subsection (5), "revenue paid" does not include interest income from the account reinvested in the account in trust for the public schools and the university system. Grants and loans may be from current allocations only, and no part of the principal or income of the trust referred to in 90-6-211 may be used for this purpose. The money derived from loan repayments, including the interest thereon, must be deposited to the credit of the local impact fund referred to in 90-6-202."

*Severability:* Section 13, Ch. 662, L. 1987, was a severability section.

*1986 Amendments:* Chapter 5 in (5) at end of introductory clause of temporary version inserted "less the appropriation provided in section 1, Chapter 5, Special Laws of June 1986".

Chapter 19 in (5) in introductory clause of temporary version substituted "after June 30, 1987, the board may not exceed in any one year seven-fifteenths of the revenue paid into the local impact and education trust fund account. The board may award grants and loans" for "(5) award grants and loans, subject to 90-6-207, not to exceed in any one year seven-elevenths and after June 30, 1979, and before July 1, 1985, seven-fifteenths and after June 30, 1985, 23.08% of the revenue paid into the local impact and education trust fund account, less the appropriation provided in section 1, Chapter 733, Laws of 1985".

*Effective Dates:* Chapter 5 was effective June 30, 1986.

Chapter 19 was effective July 10, 1986, and applies to coal mined after April 1, 1986.

*1985 Amendments:* Chapter 619 inserted (5)(b) referring to loans to Department of Highways; and at beginning of (5)(c), made minor changes in phraseology due to subsection rearrangement.

Chapter 715 in (5) of temporary version near beginning inserted "and before July 1, 1985" and inserted "and after June 30, 1985, 23.08%". Amendment effective May 10, 1985, applicable to coal mined on or after April 1, 1985, and terminates July 1, 1987 (secs. 4 and 5, Ch. 715, L. 1985).

Chapter 733 in (5) of temporary version near beginning of first sentence, inserted "less the appropriation provided in section 1, Chapter 733, Laws of 1985". Amendment terminates July 1, 1986 (sec. 4. Ch. 733, L. 1985).

*1983 Amendments:* Chapter 250 enacted (6) referring to grant to a local government unit to pay credit for prepaid property taxes.

Chapter 690 made the following changes: inserted (4) referring to requiring local government unit to increase its bonded indebtedness; in opening clause of (5), after "grants" inserted "and loans"; in (5) inserted references to federally recognized Indian tribes and governing bodies thereof; and inserted last two sentences of (5) requiring grants and loans to be from current allocations only and referring to credit of loan repayments.

*Oversight Subcommittee Bill:* SB 186 (Ch. 690, L. 1983), which amended this section to allow Coal Board loans, was introduced by request of the Coal Tax Oversight Subcommittee. See committee report, Montana Legislative Council, November 1982.

### Administrative Rules

Title 8, chapter 101, subchapter 2, ARM Coal Board rules of practice.

Title 8, chapter 101, subchapter 3, ARM Coal Board substantive rules.

### Attorney General's Opinions

*Limitation on Appropriation:* The legislative interpretation of 90-6-205, as established by past appropriations, suggests that the Legislature intended to limit the Coal Board appropriations to

7/15 of the income projected to the local impact and education trust fund in each fiscal year and not up to 7/15 of the entire aggregate amount in the trust fund. 40 A.G. Op. 4 (1983), prior to 1987 amendments.

*Governmental Service or Facility:* The city of Billings and Yellowstone County proposed to purchase and renovate a building for use by a nonprofit corporation providing treatment for alcohol and drug-related problems. The city proposed to issue industrial revenue bonds (IRBs) to fund a portion of the project, and the county sought a grant from the Montana Coal Board. Under the proposal, title to the building would vest in the nonprofit corporation once the IRBs have been retired. The questions presented were whether: (1) the building in question is a "governmental facility"; (2) a city or county has the power to expend funds for a building the title to which will eventually vest in a private corporation; and (3) contracting with a private corporation is a legitimate means of providing a governmental service. In the opinion of the Attorney General, a local government unit with self-government powers and counties with general government powers are authorized to provide alcohol and drug abuse treatment services under Title 53, ch. 24. Local governments may contract with nonprofit corporations for the provision of such services. A program of alcohol and drug abuse treatment services provided by contract with a private nonprofit corporation is a "governmental service or facility" under 90-6-205 for the purpose of determining eligibility for coal impact assistance. 39 A.G. Op. 31 (1981).

*Eligibility for Coal Impact Grants:* "Local governmental units" eligible to receive impact grants from the Coal Board under 90-6-205 and 90-6-206 include counties, incorporated cities and towns, consolidated local governments, school districts, and any other statutorily created governmental unit or district empowered to exercise delegated sovereign powers over a defined geographical region of the state, viz., county water and sewer districts, rural improvement districts which include areas of more than one county and have separate governing bodies (counties may apply for grants to pay for rural improvement district expenses), and special improvement districts within cities, towns, and consolidated units. Opinion No. 74, Volume 36, of the Official Opinions of the Attorney General is overruled except that portion excluding Indian tribes from impact grant eligibility. 37 A.G. Op. 22 (1977), prior to 1983 amendments.

## 90-6-206. Basis for awarding grants.

### Compiler's Comments

*1997 Amendment:* Chapter 204 throughout section, in three places, inserted reference to increase or decrease in coal development and reference to consumption of coal by a coal-using energy complex; in (1), after "grants", deleted "and loans"; in (2) substituted "the year of application for assistance" for "coal development in that area or 1970, whichever is later, which impacts the local government units applying for assistance; in (3) substituted "the year of application for assistance" for "coal development in that area or 1970, whichever is later"; and made minor changes in style. Amendment effective July 1, 1997.

*1983 Amendment:* At beginning after "Grants" inserted "and loans".

### Attorney General's Opinions

*Eligibility for Coal Impact Grants:* "Local governmental units" eligible to receive impact grants from the Coal Board under 90-6-205 and 90-6-206 include counties, incorporated cities and towns, consolidated local governments, school districts, and any other statutorily created governmental unit or district empowered to exercise delegated sovereign powers over a defined geographical region of the state, viz., county water and sewer districts, rural improvement districts which include areas of more than one county and have separate governing bodies (counties may apply for grants to pay for rural improvement district expenses), and special improvement districts within cities, towns, and consolidated units. Opinion No. 74, Volume 36, of the Official Opinions of the Attorney General is overruled except that portion excluding Indian tribes from impact grant eligibility. 37 A.G. Op. 22 (1977), prior to 1983 amendments.

## 90-6-207. Priorities for impact grants.

### Compiler's Comments

*2003 Amendment:* Chapter 217 in (1)(b)(iv) at beginning substituted "an air quality permit has been issued by the department of environmental quality" for "a certificate of environmental compatibility and public need in accordance with the Montana Major Facility Siting Act has been granted by the board of environmental review"; and in (1)(d)(ii) near middle after "operated under" substituted "an air quality permit issued by the department of environmental quality" for "a certificate of environmental compatibility and public need in accordance with the Montana Major Facility Siting Act". Amendment effective April 3, 2003.

*Saving Clause:* Section 19, Ch. 217, L. 2003, was a saving clause.

*Severability:* Section 20, Ch. 217, L. 2003, was a severability clause.

*1997 Amendment:* Chapter 204 in (1), in introductory clause, substituted "biennially" for "annually"; in (1)(a), near middle after "increased", inserted "or decrease"; in (1)(b)(ii), after "increase", inserted "or decrease" and after "expanded" inserted "or reduced"; deleted (3)(a) that read: "(a) Except as provided in 90-6-205(5)(b), beginning July 1, 1993, and ending June 30, 1995, the coal board may not award more than 20% of the funds appropriated to it each year for grants and loans to governmental units and state agencies for meeting the needs caused by coal development to local governmental units other than those governmental units designated under subsection (1)"; in (3) substituted "90-6-205(4)(b)" for "90-6-205(5)(b)", after that citation deleted "beginning July 1, 1995, and thereafter", increased from 10% to 50% the maximum funds that Board may award to certain local governmental units, before "coal development" inserted "an increase or decrease", and after "coal development" inserted "or in the consumption of coal by a coal-using energy complex"; in (5), near end after "growth", inserted "or decline"; in (7), near beginning, inserted "based on an increase in coal development or in the consumption of coal by a coal-using energy complex", substituted "subsection (1)(a), (1)(b), or (1)(c)" for "this section", after "coal impact grants" deleted "and loans", substituted "50%" of Board funds for "20% and beginning July 1, 1995, not more than 10%", and after "board for grants" deleted "and loans"; in (7)(a) substituted "coal-using energy complex" for "mines"; substituted (7)(b) concerning cessation or reduction for "tax revenue is not available to mitigate the impact due to the closure of a mine or facility"; and made minor changes in style. Amendment effective July 1, 1997.

*1995 Amendments:* Chapter 418 in (1)(b)(i) substituted "department of environmental quality" for "department of state lands"; and in (1)(b)(iv) substituted "board of environmental review" for "board of natural resources and conservation". Amendment effective July 1, 1995.

Chapter 509 in (6) substituted "appropriated" for "placed in the local impact account established" and after "are" deleted "subject to appropriations by the legislature". Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1993 Amendment:* Chapter 503 in (1)(b)(i) and (1)(d)(i) substituted "300,000 tons" for "1 million tons"; in (1)(b)(i), at end after "year", inserted "and that the department of commerce determines will commence production within 2 years"; in (1)(b)(ii), at beginning, substituted "the department of commerce has determined that" for "or that will increase", after "mine" inserted "will increase", after "year and" deleted "for which the department of commerce determines", and after "production" deleted "authorized by the permit"; in (1)(b)(ii) and (1)(b)(iv), before "years", reduced time from 3 years to 2 years; inserted (1)(b)(iii) requiring Department to annually designate each county and all local governmental units within each county in which a newly constructed railroad serves a new, existing, or expanding coal mine; in (1)(b)(iv), before "steam-generating" and "coal-burning", inserted "new"; in (1)(c) increased distance from 50 miles to 100 miles and at end inserted reference to subsection (1)(b)(iv); substituted (3) relating to awarding grants and loans for former (3) that read: "(3) Except as provided in 90-6-205(5)(b), the coal board shall, subject to the appropriations of the legislature, award at least 50% of all grants awarded to governmental units and state agencies for meeting the needs caused by coal development each year to these designated governmental units"; inserted (7) relating to impact grant designation; and made minor changes in style. Amendment effective July 1, 1993.

*1987 Amendment:* In (6), after "local impact", deleted "and educational trust fund", after "this part" deleted "subject to the limitations imposed by 90-6-211", and at end, after "local impact", deleted "or for transfer to a permanent trust for education".

*Severability:* Section 13, Ch. 662, L. 1987, was a severability section.

*1985 Amendments:* Chapter 462 in (1)(a) at beginning, changed references to government entities from plural to singular and made corresponding change in predicate; and inserted (1)(b) through (2) referring to designation of counties and local governmental units.

Chapter 619 in (3) at beginning inserted "Except as provided in 90-6-205(5)(b)".

*1983 Amendment:* Near beginning of (1), inserted "annually"; after "counties," inserted "incorporated cities and"; in middle of first sentence, substituted "as a result of the impact of coal development a net increase" for "an increase"; at end of first sentence, substituted "over one of the 3-year periods specified in subsection (2)" for "during any 3 years since 1972 as a result of the impact of coal development"; and inserted (2) listing five 3-year periods.

**Attorney General's Opinions**

*Reversion of Coal Board Funds:* The provision of 17-7-304, requiring the reversion of unexpended and unencumbered portions of appropriations at the close of the fiscal year, applies to the appropriations to the Coal Board from the local impact and education trust fund. The Legislature appropriates money to the Coal Board as a discretionary matter under 90-6-207. There is no constitutional impediment to the reversion of the funds, nor is there any indication of legislative intent to except the Coal Board grant money from the operation of 17-7-304. The Board must follow the legislatively created financial requirements. 40 A.G. Op. 4 (1983), prior to 1987 amendments.

## 90-6-208. Applications for grants.

**Compiler's Comments**

*1997 Amendment:* Chapter 204 in first sentence, after "apply for a grant", deleted "or a loan", after "consequence of" inserted "an increase or decrease of", and after "coal development" inserted "or of an increase or decrease in the consumption of coal by a coal-using energy complex"; and made minor changes in style. Amendment effective July 1, 1997.

*1983 Amendment:* In first sentence, after "agency" inserted "or the governing body of a federally recognized Indian tribe" and after "a grant" inserted "or a loan".

**Administrative Rules**

ARM 8.101.302 Application form (LIF 1-75).
ARM 8.101.304 Agreement form (LIF 3-75).

**Attorney General's Opinions**

*Eligibility for Coal Impact Grants:* "Local governmental units" eligible to receive impact grants from the Coal Board under 90-6-205 and 90-6-206 include counties, incorporated cities and towns, consolidated local governments, school districts, and any other statutorily created governmental unit or district empowered to exercise delegated sovereign powers over a defined geographical region of the state, viz., county water and sewer districts, rural improvement districts which include areas of more than one county and have separate governing bodies (counties may apply for grants to pay for rural improvement district expenses), and special improvement districts within cities, towns, and consolidated units. Opinion No. 74, Volume 36, of the Official Opinions of the Attorney General is overruled except that portion excluding Indian tribes from impact grant eligibility. 37 A.G. Op. 22 (1977), prior to 1983 amendments.

## 90-6-209. Limitations on grants.

**Compiler's Comments**

*2021 Amendment:* Chapter 101 inserted (3) prohibiting awarding a new grant to a local government that is in violation of 2-1-602. Amendment effective March 31, 2021.

*Severability:* Section 10, Ch. 101, L. 2021, was a severability clause.

*1997 Amendment:* Chapter 204 in (1), in first sentence, substituted prohibition on obligation of unappropriated funds for "as long as the grant or loan does not extend over more than 10 years and does not exceed reasonable revenue expectations" and in second sentence, after "grants", deleted "and loans" and substituted "90-6-205(4)(b)" for "90-6-205(5)(b)"; deleted former (2) relating to loans (see 1997 Session Law for text); in (2), in introductory clause in two places, deleted reference to loan; and made minor changes in style. Amendment effective July 1, 1997.

*1985 Amendments:* Chapter 420 in (2)(a) inserted second sentence listing authorized sources of repayment; and Ch. 420 and Ch. 619 in (2)(e) corrected reference from "subsection (4)" to "subsection (2)(d)".

Chapter 619 in (1) near end inserted "except grants made pursuant to 90-6-205(5)(b)".

*1983 Amendment:* In (1), in first sentence after "grant" inserted "or loan", and substituted second sentence concerning limitation on amount of grants and loans for "No state agency may receive grants which exceed 5% of the money allocated to the board." Subsections (2) and (3) relating to loan repayment sources and loans to Indian tribes (see 1983 Session Law for text) were enacted as separate sections by sec. 5 and 6, Ch. 690, L. 1983; they have been codified as part of this section for convenience.

## 90-6-210. Coal area highway reconstruction program.

**Compiler's Comments**

*2019 Amendment:* Chapter 299 in (3) in first sentence near middle substituted "highway systems, as those terms are defined in 60-1-103" for "highways under the Federal-Aid Highway Acts" and at end substituted "60-3-205 or 60-3-206" for "the Federal-Aid Highway Acts". Amendment effective October 1, 2019.

*1997 Amendment:* Chapter 42 in (2), in two places, and in (3), in two places, substituted "section" for "subsection"; and made minor changes in style. Amendment effective March 12, 1997.

*1995 Amendment — Phrase Change:* Section 6, Ch. 75, L. 1995, directed the Code Commissioner to change references in the MCA to Highway Commission to Transportation Commission. In this section, the Code Commissioner has made the change in (2). Amendment effective July 1, 1995.

*1991 Amendment:* Substituted references to Department of Transportation for references to Department of Highways. Amendment effective July 1, 1991.

*1981 Amendment:* Added "in consultation with the governing bodies of the counties in the area" at the end of (1).

*Section Not Codified:* Section 50-1803(1), R.C.M. 1947, an appropriations clause, was not codified in the MCA. This clause has not been repealed and is still valid law. Citation may be made to sec. 4, Ch. 502, L. 1975, as amended by sec. 2, Ch. 540, L. 1977.

**90-6-213. Exemption from environmental review.**

**Compiler's Comments**

*Effective Date:* Section 4, Ch. 113, L. 2023, provided: "[This act] is effective on passage and approval." Approved April 18, 2023.

## Part 3
## Hard-Rock Mining Impact

**Part Compiler's Comments**

*Severability:* Section 15, Ch. 617, L. 1981, was a severability section.

**Part Administrative Rules**

Title 8, chapter 104, ARM Hard-Rock Mining Impact Board.

**Part Collateral References**

Hard Rock Mining Impact Board, https://comdev.mt.gov/Programs-and-Boards/Hard-Rock-Mining-Impact-Board.

**90-6-301. Declaration of necessity and purpose.**

**Compiler's Comments**

*1987 Amendment:* In first sentence, after "state", substituted "may cause an influx of people directly related to the area of the development" for "causes an influx of people into the area of the development many times larger than the number of people directly involved in the mining operation"; and in second sentence, after "services", substituted "may create" for "creates".

**90-6-302. Definitions.**

**Compiler's Comments**

*2001 Amendment:* Chapter 7 in definition of local government unit in (c) substituted "solid waste management district" for "refuse disposal district"; and made minor changes in style. Amendment effective October 1, 2001.

*1999 Amendment:* Chapter 464 in first sentence in (4) after "82-4-335" deleted "on or after May 18, 1981"; and inserted definition of property tax prepayment. Amendment effective April 22, 1999.

*1991 Amendment:* Inserted definition of facility; in definition of local government unit inserted (g) including a park district as a local government unit; and made minor changes in style. Amendment effective March 29, 1991.

*1985 Amendments:* Chapters 453 and 582 at end of definition of large-scale mineral development substituted "82-4-303" for "82-4-303(10)".

Chapter 582 in definition of local government unit after "means" substituted reference to county, city, town, school district, and the list of independent special districts for "a political subdivision of this state, including a county, city, town, school district, or other special district that provides any of the services referred to in subsection (1)(c) of 90-6-307"; and in in definition of large-scale mineral development, in first sentence after "milling facility", substituted reference to average number of persons on the payroll for a 6-month period for "that will:

(a) employ at any given time at least 100 people; or

(b) cause, or be expected to cause, an increase in estimated population of at least 15% in a local government unit when measured against the average population of the local government unit in the 3-year period immediately preceding the commencement of the construction of the mining facility".

### 90-6-303. Presiding officer — meetings — facilities — funding.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

*1983 Amendment:* In (4), substituted "deposited to the credit of the hard-rock mining impact trust account" for "generated".

### 90-6-304. Accounts established.

**Compiler's Comments**

*2019 Amendment:* Chapter 185 in (1) in first sentence substituted "custodial fund" for "agency fund". Amendment effective July 1, 2019.

*Extension of Termination Date:* Section 1, Ch. 213, L. 2017, amended sec. 5, Ch. 442, L. 2009, by extending the termination date imposed by Ch. 442 to June 30, 2027. Effective April 20, 2017.

*2009 Amendment:* Chapter 442 in (3) deleted last sentence that read: "The state treasurer shall draw warrants from this account upon order of the board." Amendment effective July 1, 2009, and terminates June 30, 2019.

*2005 Amendment:* Chapter 598 in (2) and in (2)(a)(ii) after "reserve" substituted "amount" for "account"; in (2)(b) after "trust" deleted "reserve"; in (2)(b)(ii) after "reserve" substituted "amount of" for "account"; and in (3) in second sentence near middle after "reserve" deleted "account in the". Amendment effective July 1, 2005.

*1999 Amendment:* Chapter 389 in (2)(a)(iii) substituted "90-6-331" for "90-6-331(1)". Amendment effective July 1, 1999.

*1993 Amendment:* Chapter 349 deleted (2)(c) that read: "(c) The board shall report to the legislature any expenditure from the hard-rock mining impact trust reserve account."

*1991 Amendment:* In (1), near beginning, substituted "agency fund type" for "special revenue fund"; in (2), at end of introductory clause, inserted provision that within the trust account, there is a reserve account not to exceed $100,000; inserted (2)(a), (2)(b), and (2)(c) relating to use of money in the impact trust account, use of money in the impact trust reserve account, and a report to the Legislature of expenditures from the reserve account; in (3), near beginning, substituted "the hard-rock mining impact trust account" for "this account", after "as provided in 90-6-303" inserted "and then establishing and maintaining the reserve account in the amount of $100,000, as provided in subsection (2) of this section, the remaining", and at end deleted "If money available to pay administrative and operating expenses is insufficient, the board may apply for supplemental money from the general fund"; and made minor changes in style. Amendment effective April 24, 1991.

*1989 Amendment:* In (2) inserted last sentence relating to availability of supplemental money from general fund to pay administrative and operating expenses of the Board. Amendment effective May 16, 1989.

*Saving Clause:* Section 22, Ch. 672, L. 1989, was a saving clause.

*Effective Date — Retroactive Applicability:* Section 23, Ch. 672, L. 1989, provided: "[This act] is effective on passage and approval [approved May 16, 1989] and applies retroactively, within the meaning of 1-2-109, to taxable years beginning after December 31, 1988."

*1983 Amendments:* Chapter 277 substituted references to state special revenue fund for references to earmarked revenue fund.

Chapter 619 inserted (2) referring to hard-rock mining impact trust account. The amendment made by Ch. 619 is effective July 1, 1985.

### 90-6-305. Hard-rock mining impact board — general powers.

**Compiler's Comments**

*2001 Amendment:* Chapter 307 deleted former (1)(c) that read: "(c) award grants to local government units subject to 90-6-306"; and made minor changes in style. Amendment effective July 1, 2001.

*1991 Amendment:* In (1)(a), after "staff", inserted "including its administrative staff, and retain"; in (1)(e), after "90-6-307", inserted "90-6-311, and 90-6-403(3)"; and made minor change in style. Amendment effective April 6, 1991.

*1989 Amendment:* Deleted former (1)(d) that read: "(d) award grants or loans to local government units from money paid into the hard-rock mining impact trust account subject to the provisions of 90-6-321 and 90-6-322"; and in (1)(e) deleted "90-6-321, and 90-6-322". Amendment effective May 16, 1989.

*Saving Clause:* Section 22, Ch. 672, L. 1989, was a saving clause.

*Effective Date — Retroactive Applicability:* Section 23, Ch. 672, L. 1989, provided: "[This act] is effective on passage and approval [approved May 16, 1989] and applies retroactively, within the meaning of 1-2-109, to taxable years beginning after December 31, 1988."

*1983 Amendments — Composite:* Chapter 489, in (1)(b), inserted "and administration of this part".

Chapter 619, in (1)(b), inserted "and determinations"; inserted (1)(d) referring to grants and loans made from hard-rock mining impact trust account of the version effective July 1, 1985; and in (1)(f) inserted "90-6-321 and 90-6-322".

The Code Commissioner has arranged the amendments to (1)(b) for grammatical sequence.

The amendments made by Ch. 619 are effective July 1, 1985.

*1983 Statement of Intent:* The statement of intent attached to HB 472 (Ch. 489, L. 1983) provided: "A statement of intent is required for this bill because it expands the rulemaking authority of the hard-rock mining impact board.

(1) The legislature intends, under Section 2 [which amended this section], that the hard-rock mining impact board be authorized to adopt rules under the Montana Administrative Procedure Act that will facilitate and effectuate its role as a Quasi-Judicial Board responsible for administering the Hard-Rock Mining Impact Act. The rules must ensure that implementation of the act is consistent with the purpose of mitigating local government impacts that may result from the commencement of large-scale hard-rock mineral developments in this state.

(2) The legislature intends that the board adopt rules for implementing Section 3 [which amended 90-6-307] by establishing criteria that the board will use when making decisions on whether or not to grant a requested 30-day extension to an impact review period.

(3) The legislature further intends that the board adopt rules implementing Section 5 [which enacted 90-6-311] that provide:

(a) a procedure for conducting hearings on objections to proposed impact plan amendments that is consistent with the Montana Administrative Procedure Act; and

(b) a list of factors that will be used to determine the validity of objections to the proposed impact plan amendments.

The rulemaking authority granted in this bill is intended to supersede the existing authority that the hard-rock mining impact board has pursuant to Chapter 617, Laws of 1981."

*1981 Statement of Intent:* The statement of intent attached to HB 718 (Ch. 617, L. 1981) provided: "A statement of intent is required for HB 718 because [90-6-305] grants rulemaking authority to the hard-rock mining impact board.

The legislature intends that the rules adopted by the board governing its proceedings be procedural in nature.

(1) The legislature intends that the board may adopt forms for notice required by the board and to be given by the board.

(2) The board is intended to act as a "referee" in hearing disputes between local government units and large-scale mineral developers over the impact plan submitted to the board under the provisions of [90-6-307]. The hearings are subject to Montana Administrative Procedure Act and any rules adopted by the board governing the hearings must be consistent with that act.

(3) The legislature intends that the rules adopted by the board governing the awarding of grants shall be consistent with the criteria set out in [90-6-306] [now repealed]."

**Administrative Rules**

Title 8, chapter 104, ARM Hard-Rock Mining Impact Board.

**90-6-307. Impact plan to be submitted.**

**Compiler's Comments**

*1995 Amendment:* Chapter 418 in (11) and (14) substituted "department of environmental quality" for "department of state lands"; and made minor changes in style. Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1991 Amendment:* In (2), in middle of first sentence, after "industrial" substituted "local government facility" for "educational". Amendment effective March 29, 1991.

*1987 Amendment:* In (1), at end of introductory material, substituted reference to the mineral developer and the affected local government units ensuring contents of impact plan for "The impact plan shall include"; inserted (4) requiring public hearing on impact plan; inserted (5) allowing objection by affected local government unit not identified in impact plan; in (6), in fourth sentence, substituted "the impact plan is approved without any review by the board" for "the impact plan shall be approved by the board" and inserted last sentence referring to alteration of approved plan; and in (13) substituted "subsections (5) and (6)" for "subsection (4)".

*1987 Amendment of Rule:* Rule 8.104.203A, ARM, was amended by sec. 6, Ch. 311, L. 1987.

*1987 Statement of Intent:* The statement of intent attached to Ch. 311, L. 1987, provided: "A statement of intent is required for this bill in order to clarify the role of the hard-rock mining impact board. The amendments to section 3 of this bill [90-6-307] are designed to ensure that the board is not involved in reviewing the plan unless objections are filed under 90-6-307 or amendments are sought under 90-6-311.

The amendment of Rule 8.104.203A, Administrative Rules of Montana, does not indicate a legislative intent to define population changes associated with a mineral development. This matter should be determined by the mineral developer and the affected local governments. The amendment further indicates that the legislature desires that the hard-rock mining impact board should not influence this determination by enacting rules on matters that should be the product of discussions between the mineral developer and the affected local governments, except when the board is required to address impact plan concerns during the objections and amendment processes.

This bill also attempts to stress the cooperation role of the mineral developer and the affected local governments in formulating the impact plan. The impact plan, as a result, should reflect the concerns and agreements among these entities. Furthermore, to ensure public involvement in the planning process, a mandatory public hearing is required."

*Applicability:* Sections 8 and 9, Ch. 311, L. 1987, provided that the amendments made by that chapter were effective on passage and approval (approved March 31, 1987) and apply to all impact plans submitted after that date.

*1985 Amendments:* Chapter 24 near end of (10) after "hard-rock mining impact" changed "fund" to "account".

Chapter 582 in (1)(c) after "services" deleted "including but not limited to police and fire protection, sewage, water treatment, schools, road construction and upkeep, education, and medical care"; in (2) in first sentence inserted "as identified in the impact plan" and inserted second sentence referring to other revenue sources and funding mechanisms; in first sentence of (3) substituted "the end" for "commencement"; in (5) in second sentence substituted language referring to extension of 30-day period for "If within 30 days the local government unit and the developer cannot resolve the objection", and in third sentence inserted "If the objections are not resolved"; in (7) substituted "guarantee" for "guaranty", and substituted "meet the increased costs of public services and facilities as specified" for "make all the payments to the board required"; in (8) substituted reference to payment to a local government unit or the Board and deposit and verification of payments for "The board shall deposit all payments received from the developer into the hard-rock mining impact account established by 90-6-304"; in (9) substituted "guarantee" for "guaranty", and after "payment" deleted "of each required payment"; in (10) inserted "if the hard-rock mining impact account is used to deliver payments to the local government unit"; in (11) inserted "or 90-6-311(3)"; inserted (12) referring to waiver of impact plan requirement; and inserted (13) referring to certification of compliance and failure to comply.

*1983 Amendment:* In (1), in first sentence substituted "After" for "When" and made minor change in sentence structure, and inserted second sentence referring to cooperation to eliminate duplication of effort in data collection; inserted (3) referring to financial assistance to prepare for and evaluate the impact plan; in (4), inserted second and third sentences referring to extension of 90-day period and in last sentence inserted "or any extension thereof"; in (5) near beginning substituted "within 10 days" for "promptly"; and in (11), in first sentence inserted "and it results in some remedial order by the board or court of competent jurisdiction", and near end inserted "administrative or judicial".

In (11) the Code Commissioner corrected subsection reference from "(3)" to "(4)" which was apparently overlooked when new (3) was inserted and former (3) renumbered as (4). Only (4) relates to filing of objection.

**Administrative Rules**

Title 8, chapter 104, subchapter 2, ARM Hard-Rock Mining Impact Board procedural rules.

**Case Notes**

*Issue Not Raised Before Agency Not Allowed to Be Raised on Judicial Review:* Lincoln County argued in District Court that Sanders County had not objected to an impact plan before the Hard-Rock Mining Board and therefore had no standing to appeal the Board's decision in District

Court. The Supreme Court held that Lincoln County had not argued that Sanders County was without standing when the issue was before the agency; therefore, Lincoln County could not raise the standing issue for the first time in District Court. Lincoln County v. Sanders County, 261 M 344, 862 P2d 1133, 50 St. Rep. 1352 (1993), followed in Hilands Golf Club v. Ashmore, 2002 MT 8, 308 M 111, 39 P3d 697 (2002), and North Star Dev., LLC v. Mont. Pub. Serv. Comm'n, 2022 MT 103, 408 Mont. 498, 510 P.3d 1232.

*Mining Board's Amendment of Mine's Allocation of Taxes Not Beyond Its Authority:* Lincoln County argued that the Hard-Rock Mining Board had exceeded its authority in amending Noranda's tax allocation plan because it allocated an additional amount of the taxes to Sanders County, which was not anticipated to be negatively impacted by an influx of workers. The Supreme Court ruled that the Board could modify tax allocation plans for any affected county not just counties impacted by an influx of workers and that the Board had not acted unreasonably in amending the plan on the basis that after 5 years, the majority of increased property valuation would be in Lincoln County and not Sanders County where the ore body was located. Lincoln County v. Sanders County, 261 M 344, 862 P2d 1133, 50 St. Rep. 1352 (1993).

### **90-6-308. Permit procedure and review of impact plan to run concurrently.**

**Compiler's Comments**

*1987 Amendment:* At end of section substituted "under 90-6-307(5) and (6), if review occurs" for "under 90-6-307".

### **90-6-309. Tax prepayment — large-scale mineral development.**

**Compiler's Comments**

*2019 Amendment:* Chapter 3 in (1) in last sentence substituted "15-10-109" for "15-10-108". Amendment effective October 1, 2019.

*2009 Amendment:* Chapter 57 in (1) near middle of second sentence after "under" substituted "15-10-108" for "20-25-423"; and made minor changes in style. Amendment effective March 25, 2009.

*Name Change — Short Form Amendment:* Section 55(1), Ch. 633, L. 1993, directed the Code Commissioner to change the term "foundation program", when it refers to equalization aid for schools, to "BASE funding program" in this section.

*1989 Special Session Amendment:* In (1), after "university levy" inserted "established under 20-25-423" and after "foundation program" substituted "established in 20-9-331 and 20-9-333" for "of 45 mills"; and made minor changes in phraseology. Amendment effective August 11, 1989, and applies retroactively to July 1, 1989.

*1985 Amendment:* In (1) at end of first sentence substituted "as specified in the impact plan" for "in an amount equal to at least three times the estimated property tax due the year the large-scale mineral development facility commences operation" and in last sentence increased mills from 40 to 45; and in (5) after "shall provide for", substituted reference to tax credit and limitations thereon for "repayment according to the following procedure:

(a) In each year after the commencement of mining, the local government shall:

(i) divide its budget by the average mill levy of its jurisdiction during the 3 years immediately preceding commencement of mining operations, to arrive at a taxable valuation needed to fund its budget using the average 3-year mill levy;

(ii) reduce the taxable valuation of property of a person who prepaid property taxes by the excess, if any, of the total taxable value of the taxing jurisdiction including the person's property over the taxable value determined under subsection (5)(a)(i), but in no case by an amount greater than the taxable value of the person's property.

(b) The reduction in taxable value, if any, determined under subsection (5)(a)(ii) times the average mill levy used in subsection (5)(a)(i) equals the property tax prepayment credit allowed for the taxable year for that local government unit. Any local government unit not receiving a payment shall not be affected by this section, and no reduction in value shall be used in the computation of taxes due that unit of local government. In no event shall the credit allowed under this part extend more than 10 years beyond the date the prepayment is made under this section.

(c) The procedure established under subsection (5)(a) shall continue from year to year until the total credit allowed the person who prepaid property taxes equals the total property taxes prepaid".

*1983 Amendment:* Near beginning of (1), substituted "governing body" for "board of county commissioners"; and in (3), substituted "through an appropriate financial institution" for "with appropriate bank guarantees".

**Administrative Rules**

ARM 8.104.214 Financial guarantee of tax prepayments.

ARM 8.104.215 Provision of tax credits.

## 90-6-310. Local government facility impact bonds.

**Compiler's Comments**

*1999 Amendment:* Chapter 464 in first sentence in (2) after "guarantee" inserted "through a third-party financial institution"; and made minor changes in style. Amendment effective April 22, 1999.

*1991 Amendment:* In (1), in first sentence near beginning, substituted "the construction, renovation, improvement, or acquisition of local government" for "new school", after "facilities" inserted language relating to mineral development, after "determined" inserted "under 90-6-307", after "agreement with the" substituted "local government unit having" for "trustees of a school district that has", and at end, after "the burden of the", deleted "issuance of bonds to cover the cost of such new construction" and inserted language referring to increased capital and operating costs and in second sentence, at beginning, substituted "local government unit" for "trustees of a school district" and near end, after "industrial", substituted "local government facility" for "educational"; in (2), near middle of first sentence, substituted "local government unit" for "school district", in third sentence substituted "local government unit" for "trustees or the school district" and inserted language making bonds special limited obligations, and inserted last sentence requiring levy and pledge of special fund; in (3) inserted references to 7-7-2203 and 7-7-4201 and deleted references to 20-9-410 and 20-9-421 through 20-9-432; inserted (4) relating to impact bond resolution; inserted (5) specifying registration and payment of bonds; inserted (6) authorizing sale of bonds; inserted (7) relating to combined bond offerings; inserted (8) specifying content of interlocal agreement; and made minor changes in style. Amendment effective March 29, 1991.

**Administrative Rules**

ARM 8.104.211 Implementation of approved impact plan.

## 90-6-311. Impact plan amendments.

**Compiler's Comments**

*1991 Amendment:* In (1)(a) changed subsection reference to 90-6-302. Amendment effective March 29, 1991.

*1985 Amendment:* In first sentence of (1) inserted "specified in the plan"; in (1)(a) substituted "75 persons, as determined under 90-6-302(4)" for "100 people"; and deleted former (1)(b) that read: "changes in the large-scale mineral development cause, or can be expected to cause, an increase in estimated population of at least 15% in a local government unit when measured against the average population of the local government unit in the 3-year period preceding the commencement of new construction or new operations of the mining facility; or".

**Administrative Rules**

ARM 8.104.217 Contents of petition for plan amendment.

## 90-6-331. Payment to counties — statutory appropriation.

**Compiler's Comments**

*Extension of Termination Date:* Section 1, Ch. 213, L. 2017, amended sec. 5, Ch. 442, L. 2009, by extending the termination date imposed by Ch. 442 to June 30, 2027. Effective April 20, 2017.

*2009 Amendment:* Chapter 442 in first sentence near middle following "must be" substituted "paid" for "transferred"; inserted second sentence making the payments statutorily appropriated; in third sentence near beginning following "funds" substituted "received by the county" for "transferred"; and made minor changes in style. Amendment effective July 1, 2009, and terminates June 30, 2019.

*2005 Amendment:* Chapter 598 in first sentence after second "impact trust" deleted "reserve" and in second sentence after "mine" substituted "trust" for "trust reserve". Amendment effective July 1, 2005.

*1999 Amendments — Composite Section:* Chapter 389 deleted former (2) that read: "(2) The transfer of funds required by this section is a statutory appropriation pursuant to 17-7-502"; and made minor changes in style. Amendment effective July 1, 1999.

Chapter 464 at beginning substituted "Prior to each October 31" for "On July 1, 1990, and prior to each October 1 thereafter" and substituted "September 30" for "September 1"; and made minor changes in style. Amendment effective April 22, 1999.

*1991 Amendments:* Chapter 376 in (1) substituted "prior to each October 1" for "on each July 1", substituted "money segregated by county" for "funds remaining", and substituted "as of September 1" for "after June 30". Amendment effective April 6, 1991.

Chapter 616 in (1) substituted "prior to each October 1" for "on each July 1", substituted "money segregated by county" for "funds remaining", inserted "following allocation to the hard-rock mining impact trust reserve account", and substituted "as of September 1" for "after June 30". Amendment effective April 24, 1991.

*Saving Clause:* Section 22, Ch. 672, L. 1989, was a saving clause.

*Effective Date — Retroactive Applicability:* Section 23, Ch. 672, L. 1989, provided: "[This act] is effective on passage and approval [approved May 16, 1989] and applies retroactively, within the meaning of 1-2-109, to taxable years beginning after December 31, 1988."

## Part 4
## Hard-Rock Mining Impact Property Tax Base Sharing

### 90-6-402. Definitions.

**Compiler's Comments**

*1989 Special Session Amendment:* In definition of taxable valuation deleted reference to subsection (2)(a) of 15-6-132. Amendment effective August 11, 1989, and applies retroactively to net proceeds taxes, severance taxes, and local government taxes on oil and gas, other than interim production and new production, produced after December 31, 1988.

### 90-6-403. Jurisdictional revenue disparity — conditioned exemption and reallocation of certain taxable valuation.

**Compiler's Comments**

*1999 Amendment:* Chapter 584 in fourth sentence in (1) and at beginning of (2) inserted reference to 15-10-420; inserted fifth sentence in (1) providing that increase in taxable valuation allocated to local government unit is considered newly taxable property pursuant to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

*Severability:* Section 172, Ch. 584, L. 1999, was a severability clause.

*Retroactive Applicability:* Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

*Name Change — Short Form Amendment:* Section 55(1), Ch. 633, L. 1993, directed the Code Commissioner to change the term "foundation program", when it refers to equalization aid for schools, to "BASE funding program" in this section.

*1987 Amendment:* In (1), near beginning of first sentence after "approved", deleted "by the board".

### 90-6-404. Allocation of taxable valuation for local taxation purposes.

**Compiler's Comments**

*1999 Amendment:* Chapter 464 at beginning of (1) deleted "If the board determines that", after "located" substituted "must be allocated" for "is not affected by the development and if this determination is shown on the impact plan", and after "proceeds" deleted "must be allocated to that local government unit" and deleted second sentence that read: "This provision is intended to establish a minimum allocation for the units and does not prohibit proof by a unit that actual direct impacts would exceed 20% of the total impacts of the development"; and made minor changes in style. Amendment effective April 22, 1999.

*1991 Amendment:* Inserted (1) requiring that if Board determines that local government unit in which ore body or mineral deposit being mined is located is not affected by development as shown on impact plan, 20% of total increase in taxable valuation of proceeds must be allocated to local government unit and providing that provision does not prohibit proof by unit that impacts would exceed 20% of total developmental impacts; at beginning of (2) substituted "remaining" for "total"; in (3) and (4), at beginning before "increase", deleted "total" and after "valuation" inserted "equal to that subject to subsection (2)"; and inserted (5) authorizing modification of distribution formula by approved or amended impact plan if needed to ensure reasonable correspondence between costs of mineral development and allocation of taxable valuation from development.

*Retroactive Applicability:* Section 3, Ch. 760, L. 1991, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to all large-scale mineral developments required to comply with 90-6-307 that did not have an impact plan approved pursuant to 90-6-307, as of December 31, 1990."

**Case Notes**

*Mining Board's Amendment of Mine's Allocation of Taxes Not Beyond Its Authority:* Lincoln County argued that the Hard-Rock Mining Board had exceeded its authority in amending Noranda's tax allocation plan because it allocated an additional amount of the taxes to Sanders County, which was not anticipated to be negatively impacted by an influx of workers. The Supreme Court ruled that the Board could modify tax allocation plans for any affected county not just counties impacted by an influx of workers and that the Board had not acted unreasonably in amending the plan on the basis that after 5 years, the majority of increased property valuation would be in Lincoln County and not Sanders County where the ore body was located. Lincoln County v. Sanders County, 261 M 344, 862 P2d 1133, 50 St. Rep. 1352 (1993).

## Part 5
## Reverse Annuity Mortgage Loan

**Part Compiler's Comments**

*1989 Statement of Intent:* The statement of intent attached to Ch. 178, L. 1989, provided: "A statement of intent is required for this bill because it grants the board of housing authority to adopt rules to secure, implement, and administer a reverse annuity mortgage loan program to be utilized by elderly Montanans. The legislature intends that the rules adopted by the board recognize the necessity for some elderly Montanans to draw income for essential living expenses and other purposes from the equity accumulated in their single-family homes during their lifetimes while continuing to enjoy the shelter and security afforded by those residences. The rules must afford the elderly homeowner monthly payments over 10 years, as provided in the loan agreement, under terms that assure life tenancy and the right to repay the loan balance at any time. The rules must be consistent with other statutory or regulatory provisions requiring sufficient security for a loan provided by the board. The rules must prescribe forms and procedures necessary to apply for and receive reverse annuity mortgages."

*Severability:* Section 9, Ch. 178, L. 1989, was a severability clause.

**Part Administrative Rules**

Title 8, chapter 111, subchapter 4, ARM Reverse annuity mortgage loan.

### 90-6-503. Definitions.

**Compiler's Comments**

*1997 Amendment:* Chapter 39 in definition of mortgagor, in (b) after "older", inserted exception clause; in (3)(c), at end, deleted "that is unencumbered by any prior mortgage, lien, or pledge"; in definition of single-family dwelling, at end, deleted "excluding a condominium as defined in 70-23-102"; and made minor changes in style. Amendment effective March 12, 1997.

### 90-6-504. Reverse annuity mortgage loan program.

**Collateral References**

Reverse Annuity Mortgage Program, https://housing.mt.gov/Homeownership/Reverse-Annuity-Mortgages.

## Part 6
## Veterans' Home Loan Mortgage Program

**Part Compiler's Comments**

*Preamble:* The preamble attached to Ch. 349, L. 2011, provided: "WHEREAS, the Legislature finds that members of the Montana National Guard, residents of Montana in the federal reserves, and Montana residents serving on active duty in the armed forces have all made sacrifices of various kinds in order to serve the state and their country in times of war or national emergency; and

WHEREAS, the Legislature further finds that while those sacrifices may be difficult to quantify or compare because they range from loss of time with family and friends due to demands of reserve duty to loss of life in the service of the country, those sacrifices have in common that they occurred because of the status of the individual as a member of the armed forces; and

WHEREAS, the Legislature further finds that it has the authority pursuant to Article II, section 35, of the Montana Constitution to recognize and reward this status by providing special consideration to the status of service members and veterans; and

WHEREAS, the Legislature finds that it is appropriate to reward this status and the sacrifices the status represents by facilitating the fulfillment of the American dream of home ownership for those who serve or have served in the American armed forces; and

WHEREAS, the purpose of the Montana Veterans' Home Loan Mortgage Program Act is not to provide the most substantial return on the investment of money in the coal tax trust fund used for the program but to use some of the money in the trust fund for a mortgage loan program so that first-time home buyers who are eligible veterans can acquire a mortgage loan at a rate lower than prevailing market rates and in this way reward those eligible veterans who have served this country well and reward the unremarried spouses of eligible veterans who have made the ultimate sacrifice in service to their country."

*Effective Date:* Section 9, Ch. 349, L. 2011, provided: "[This act] is effective July 1, 2011."

**Part Administrative Rules**

Title 8, chapter 111, subchapter 7, ARM Montana Veterans' Home Loan Act.

**Part Collateral References**

Montana Veterans' Home Loan Program, https://housing.mt.gov/Homeownership/Lenders/Veterans-Home-Loan-Program.

**90-6-603. Veterans' home loan mortgage program created — use of coal tax trust fund money.**

**Compiler's Comments**

*2019 Amendment:* Chapter 190 in (2) in first sentence substituted "$50 million" for "$40 million". Amendment effective July 1, 2019.

*2015 Amendment:* Chapter 396 in (2) substituted "$40 million" for "$30 million". Amendment effective July 1, 2015.

*2013 Amendment:* Chapter 213 in (2) substituted "$30 million" for "$15 million". Amendment effective July 1, 2013.

**90-6-604. Additional terms of program.**

**Compiler's Comments**

*2017 Amendment:* Chapter 431 in (4) inserted second sentence regarding minimum contribution toward closing costs and maximum loan amount. Amendment effective May 22, 2017.

*Applicability:* Section 3, Ch. 431, L. 2017, provided: "[This act] applies to loans made under the Montana Veterans' Home Loan Mortgage Program Act on or after [the effective date of this act]." Effective May 22, 2017.

**Collateral References**

Veterans' Home Loan Program Biennial Report, Board of Housing (2022).

## Part 7
## Montana Coal Endowment Program

**Part Compiler's Comments**

*Severability:* Section 11, Ch. 517, L. 1993, was a severability clause.

*Endowment Fund to Continue:* Section 7, Ch. 3, Sp. L. January 1992, provided: "The treasure state endowment fund created in 17-5-703 must be maintained even though transfers to the fund from the coal severance tax bond fund cease on June 30 of the 20th year following the initial transfer to the fund, as provided in [section 10]. Interest earnings from the treasure state endowment fund must continue to be paid annually to the treasure state endowment special revenue account as provided in 17-5-703(4)(b)."

*Trust Fund Inviolate:* Section 8, Ch. 3, Sp. L. January 1992, provided: "[Sections 1, 2, and 5 through 10] [Title 90, ch. 6, part 7] do not authorize or permit the expenditure of any part of the coal severance tax trust fund created by Article IX, section 5, of the Montana constitution."

*Coal Tax Transfer:* Section 10, Ch. 3, Sp. L. January 1992, provided: "On July 1, 1993, $10 million is transferred from the coal severance tax permanent fund to the treasure state endowment fund and is dedicated for the purposes provided in [this act]."

**Part Administrative Rules**

Title 8, chapter 94, subchapter 38, ARM Treasure state endowment program.

**Part Collateral References**

Montana Coal Endowment Program, https://comdev.mt.gov/Programs-and-Boards/Montana-Coal-Endowment-Program.

## 90-6-701. Montana coal endowment program created — definitions.

**Compiler's Comments**

*2021 Amendment:* Chapter 330 in (1)(a), (1)(a)(i), (1)(b), (2) in two places, (3)(c), and (3)(d) substituted references to the Montana coal endowment program and fund for references to the treasure state endowment program and fund. Amendment effective October 1, 2021.

*2019 Amendment:* Chapter 476 in (2) after "the treasure state endowment program" inserted "and the delivering local assistance grant program". Amendment effective May 10, 2019, and terminates June 30, 2021.

*Severability:* Section 28, Ch. 476, L. 2019, was a severability clause.

*2009 Amendment:* Chapter 458 in (2) near middle following "part" inserted "to provide funding to the department of commerce for the administrative costs of the treasure state endowment program"; and made minor changes in style. Amendment effective July 1, 2011.

*1999 Amendments — Composite Section:* Chapter 268 in definition of local government inserted "a tribal government"; and inserted definition of tribal government. Amendment effective October 1, 1999.

Chapter 498 at end of definition of local government inserted reference to regional water and wastewater authorities; and made minor changes in style. Amendment effective April 27, 1999.

*Severability:* Section 26, Ch. 498, L. 1999, was a severability clause.

*1993 Amendment:* Chapter 432 inserted (1)(b) authorizing program to borrow from Board of Investments; in (2), at end, inserted "and to repay loans from board of investments"; in (3)(b), at end, inserted "or a county or multicounty water, sewer, or solid waste district"; and made minor changes in style.

*Effective Date:* Chapter 3, Sp. L. January 1992, approved by the electorate June 2, 1992, did not contain an effective date. Pursuant to 1-2-201, this section is effective October 1, 1992.

**Administrative Rules**

Title 8, chapter 94, subchapter 38, ARM Montana coal endowment program.

## 90-6-702. Purpose.

**Compiler's Comments**

*2021 Amendment:* Chapter 330 in introductory clause near beginning substituted "Montana coal endowment program" for "treasure state endowment program". Amendment effective October 1, 2021.

*Effective Date:* Chapter 3, Sp. L. January 1992, approved by the electorate June 2, 1992, did not contain an effective date. Pursuant to 1-2-201, this section is effective October 1, 1992.

## 90-6-703. Types of financial assistance available.

**Compiler's Comments**

*2021 Amendment:* See 2021 Session Law for amendment made by sec. 135, Ch. 261, L. 2021. Amendment effective April 20, 2021.

*2013 Amendment:* Chapter 120 in (2) in second sentence substituted "legislative fiscal analyst" for "legislative finance committee" and inserted last sentence requiring report to be provided in electronic format. Amendment effective July 1, 2013.

*2011 Amendment:* Chapter 389 in (1)(b) substituted "infrastructure planning" for "preliminary engineering studies"; and in (3) in first sentence substituted "infrastructure planning" for "preliminary engineering studies for infrastructure projects" and in second sentence substituted "infrastructure planning" for "preliminary engineering". Amendment effective July 1, 2011.

*2005 Amendment:* Chapter 580 in (1)(b) substituted "matching grants for preliminary engineering studies" for "annual debt service subsidies on local infrastructure projects"; in (1)(c) substituted "emergency grants for local infrastructure projects" for "loans from the proceeds of coal severance tax bonds at a subsidized interest rate"; and substituted (2) and (3) allowing the department of commerce to provide local governments with emergency grants and matching grants for infrastructure projects for former (2) that read: "(2) The department of natural resources and conservation and the department of commerce:

(a) may adopt rules to commit to interest rate subsidies for local infrastructure projects and may allow the subsidies to be paid over the life of the loan or bonding period; and

(b) may make deferred loans to local governments for preliminary engineering study costs. The applicant shall repay the loans whether or not the applicant succeeds in obtaining financing for the full project. Repayment may be postponed until the overall construction financing is arranged." Amendment effective July 1, 2005.

*1995 Purported Amendment:* Chapter 418 purported to amend this section, but as enacted, no changes were made.

*1993 Amendment:* Chapter 432 inserted (2) authorizing the adoption of rules and making of deferred loans; and made minor changes in style.

*1993 Statement of Intent:* The statement of intent attached to Ch. 432, L. 1993, provided: "This bill requires a statement of intent because it grants the department of natural resources and conservation and the department of commerce additional rulemaking authority. It allows the departments to adopt rules allowing interest rate subsidies for local infrastructure projects to be paid over the life of the loan or bonding period. The rules adopted by the departments must be consistent with the priorities for projects contained in 90-6-710. The bill also allows the departments to make loans for preliminary engineering study costs. These loans must be repaid at the time overall construction financing is arranged."

*Effective Date:* Chapter 3, Sp. L. January 1992, approved by the electorate June 2, 1992, did not contain an effective date. Pursuant to 1-2-201, this section is effective October 1, 1992.

## 90-6-709. Agreements with tribal governments.

**Compiler's Comments**

*Effective Date:* This section is effective October 1, 1999.

## 90-6-710. Priorities for projects — procedure — rulemaking.

**Compiler's Comments**

*2021 Amendments — Composite Section:* Chapter 101 inserted (2)(b) prohibiting the department from recommending or prioritizing projects submitted by local governments that are in violation of 2-1-602; in (5) near beginning inserted "in accordance with 5-11-210"; and made minor changes in style. Amendment effective March 31, 2021.

Chapter 261 in (5) after "shall report to" substituted "the legislature in accordance with 5-11-210" for "each regular session of the legislature". Amendment effective April 20, 2021.

Chapters 101 and 261 in (5) inserted "in accordance with 5-11-210" in slightly different locations. The codifier chose the placement location in Ch. 101.

Chapter 330 in (1) in sixth sentence substituted "Montana coal endowment fund" for "treasure state endowment fund"; and in (4) at end substituted "Montana coal endowment program" for "treasure state endowment program". Amendment effective October 1, 2021.

Chapter 466 inserted (6) concerning when a local government may begin construction of a proposed infrastructure project prior to legislative approval of a grant award. Amendment effective July 1, 2021.

*Severability:* Section 10, Ch. 101, L. 2021, was a severability clause.

*2011 Amendment:* Chapter 389 in (1) in first sentence at end inserted "on a continual basis", in fourth sentence near middle substituted "two lists" for "a list" and at end inserted "and this subsection", inserted fifth, sixth, and seventh sentences regarding lists for ranked and recommended projects, recommendation of up to 20% of interest earnings for bridge projects, and adjustment of rankings, and in eighth sentence substituted "the lists" for "a list". Amendment effective July 1, 2011.

*2005 Amendment:* Chapter 580 in (1) in first sentence after "proposals for" inserted "infrastructure" and at end after "governments" deleted "as defined in 90-6-701(3)(b)" and at beginning of third sentence inserted "For the projects under 90-6-703(1)(a)"; inserted (5) requiring the department to report to each regular session of the legislature the status of all projects that have not been completed; and made minor changes in style. Amendment effective July 1, 2005.

*2000 Amendment:* (Version effective July 1, 2001) Chapter 10 inserted (1) concerning statutory appropriation for engineering work; and made minor changes in style. Amendment effective July 1, 2001, and terminates June 30, 2005.

*1999 Amendment:* Chapter 453 in (1) in fourth sentence after "form" inserted "and amount"; in (2) in introductory clause after "given to" inserted "infrastructure"; inserted (2)(b) establishing a priority for projects that reflect greater need for financial assistance than other projects; in (2)(d) after "projects that" substituted "reflect substantial past efforts to ensure sound, effective, long-term planning and management of public facilities and that attempt to resolve the infrastructure problem with local resources" for "result in a benefit to the public commensurate with the amount of financial assistance. However, the benefit to the public may not be measured by population alone"; deleted former (2)(e) that read: "(e) projects that reflect greater need for financial assistance than other projects"; in (2)(f) near end before "expansion" substituted "encourage" for "do not discourage"; and made minor changes in style. Amendment effective July 1, 1999.

*Saving Clause:* Section 2, Ch. 453, L. 1999, was a saving clause.

*Applicability:* Section 4, Ch. 453, L. 1999, provided: "[This act] applies to projects funded with interest earnings from the treasure state endowment fund earned after June 30, 2001."

*1993 Amendment:* Chapter 432 in (1), in fifth sentence after "by the department", deleted "of natural resources and conservation under Title 85, chapter 1, part 6"; inserted (2)(c) concerning long-term solutions, (2)(d) concerning benefit to the public, and (2)(e) concerning need for financial assistance; deleted former (2)(f) and (2)(g) that read: "(f) projects that result in a benefit to the public commensurate with the amount of financial assistance;

(g) projects that reflect greater need for financial assistance than other projects"; in (4), after "The department", deleted "of natural resources and conservation shall adopt rules to implement the prioritization and recommendation of projects to be financed pursuant to 17-5-701" and at end, before "shall adopt", deleted part of former (5) that read: "Except as provided in subsection (4), the department of commerce"; and made minor changes in style.

*1992 Statement of Intent:* The statement of intent attached to Ch. 3, Sp. L. January 1992, provided: "A statement of intent is necessary for [this act] [this part] because [section 6] [90-6-710] delegates rulemaking authority to the department of natural resources and conservation and to the department of commerce. It is the intent of the legislature that in adopting rules to implement the prioritization of projects, the agencies shall use the rules established for determining priorities for water development projects as guidelines. The department of commerce should use its existing procedures for determining the local governments that are eligible for financing as a guide in adopting rules to implement the treasure state endowment program. In adopting rules to implement [this act] [this part], the departments shall take into consideration any coordination between [this act] [this part] and the coal severance tax school bond contingency loan fund."

*Effective Date:* Chapter 3, Sp. L. January 1992, approved by the electorate June 2, 1992, did not contain an effective date. Pursuant to 1-2-201, this section is effective October 1, 1992.

**Administrative Rules**

Title 8, chapter 94, subchapter 38, ARM Treasure state endowment program.

**90-6-715. Special revenue account — use.**

**Compiler's Comments**

*2021 Amendment:* Chapter 330 in (1)(a) and in (2) in first sentence substituted references to the Montana coal endowment regional water system for references to the treasure state endowment regional water system. Amendment effective October 1, 2021.

*Extension of Termination Date:* Sections 1 through 3, Ch. 305, L. 2015, amended secs. 8 through 10, Ch. 390, L. 2013, by extending the termination date imposed by Ch. 390 to June 30, 2031. Effective July 1, 2015.

*Modification of Termination Date:* Sections 8 through 10, Ch. 390, L. 2013, amended sec. 6, Ch. 495, L. 1999, sec. 1, Ch. 70, L. 2001, and secs. 15 and 16, Ch. 389, L. 2011, by modifying the termination dates imposed by those sections to June 30, 2016. Effective July 1, 2013.

*Extension of Termination Date:* Sections 15 and 16, Ch. 389, L. 2011, amended sec. 6, Ch. 495, L. 1999, and sec. 1, Ch. 70, L. 2001, by extending the termination dates imposed by those sections to June 30, 2020. Effective July 1, 2011.

*2005 Amendments — Composite Section:* Chapter 352 inserted (1)(a)(iv) concerning payment of the costs of eligible projects on an interim basis; in (1)(b) after "expenses" inserted "and payment of the costs of eligible projects on an interim basis"; and made minor changes in style. Amendment effective April 21, 2005.

Chapter 580 inserted (1)(a)(ii) allowing use of the treasure state endowment regional water system special revenue account to pay the debt service for regional water system bond issues; in (1)(b) at beginning after "for the" inserted "debt service" and after "subsection" inserted "(1)(a)"; and made minor changes in style. Amendment effective July 1, 2005.

*2003 Amendments — Composite Section:* Chapter 114 in (2) at end deleted reference to subsection (4) of 90-6-710. Amendment effective October 1, 2003.

Chapter 158 in (1) at end of first sentence after "Montana" inserted "and to provide funding of administrative expenses for state and local entities associated with regional drinking water systems" and at beginning of second sentence inserted exception clause; in (4) near end substituted "department of natural resources and conservation" for "department of commerce"; and made minor changes in style. Amendment effective July 1, 2003.

*2001 Amendments — Composite Section:* Chapter 233 inserted (2) allowing up to 25% of local matching funds required for the treasure state endowment regional water system to be in the form of debt incurred by local government entities included in the regional water system to construct individual drinking water systems before the individual systems were connected to the regional system and limiting amount of debt that may be used for matching funds; and made minor changes in style. Amendment effective April 13, 2001.

Chapter 435 in (3) near beginning after "systems" inserted "that supply water to large geographical areas and serve multiple local governments". Amendment effective April 30, 2001.

*Extension of Termination Date:* Section 1, Ch. 70, L. 2001, amended sec. 6, Ch. 495, L. 1999, by extending the termination date imposed by Ch. 495 to June 30, 2016. Effective June 30, 2013.

*Effective Date:* Section 5, Ch. 495, L. 1999, provided that this section is effective July 1, 1999.

*Termination:* Section 6, Ch. 495, L. 1999, provided: "[This act] terminates June 30, 2013."

**90-6-716. Exemption from environmental review.**

**Compiler's Comments**

*Effective Date:* Section 4, Ch. 113, L. 2023, provided: "[This act] is effective on passage and approval." Approved April 18, 2023.

## Part 10
## Oil, Gas, and Coal Resource Funding

**90-6-1001. Oil, gas, and coal natural resource accounts.**

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 4, Ch. 717, L. 2023. Amendment effective July 1, 2023.

*2019 Amendment:* Chapter 414 in (1) substituted "15-36-331(2)(b)" for "15-36-304(7)(b)" and at end after "15-36-332(7)" deleted "and (8)". Amendment effective July 1, 2019.

*Applicability:* Section 8, Ch. 414, L. 2019, provided: "[This act] applies to oil and gas production occurring on or after July 1, 2019."

*2017 Amendment:* Chapter 351 in (2) substituted "15-35-108(9)" for "15-35-108(7)". Amendment effective July 1, 2017.

*Severability:* Section 19, Ch. 351, L. 2017, was a severability clause.

*2011 Amendment:* Chapter 128 in (1) at end substituted "15-36-332(7) and (8)" for "15-36-332(8) and (9)". Amendment effective July 1, 2011.

*2009 Amendment:* Chapter 33 in (1) in first sentence after "gas" deleted "and coal", after "resource" inserted "distribution", in second sentence after "from" substituted "15-36-304(7)(b)" for "15-35-108(7) and 15-36-331(2)(b)" and at end inserted "to be used as provided in 15-36-332(8) and (9)"; inserted (2) establishing the coal natural resource account and allocating money in the account; and made minor changes in style. Amendment effective July 1, 2009.

*Effective Date:* Section 9, Ch. 603, L. 2005, provided: "[This act] is effective July 1, 2005."

*Applicability:* Section 10, Ch. 603, L. 2005, provided: "[This act] applies to oil and gas production occurring after June 30, 2005."

# CHAPTER 7
# FACILITY FINANCE AUTHORITY

**Chapter Compiler's Comments**

*Source:* Chapter 703, L. 1983, is based on Sections 39-1441 through 39-1460, Idaho Code.

*Severability:* Section 28, Ch. 703, L. 1983, is a severability clause.

**Chapter Administrative Rules**

Title 8, chapter 120, ARM Montana Health Facility Authority.

## Part 1
## General Provisions

**90-7-101. Short title.**

**Compiler's Comments**

*2001 Amendment:* Chapter 137 substituted "Montana Facility Finance Authority" for "Montana Health Facility Authority". Amendment effective July 1, 2001.

*Saving Clause:* Section 18, Ch. 137, L. 2001, was a saving clause.

## 90-7-102. Definitions.

**Compiler's Comments**

*2009 Amendments — Composite Section:* Chapter 402 in definition of institution inserted (a)(iii) regarding for-profit or nonprofit corporation or other organization; and made minor changes in style. Amendment effective July 1, 2009.

Chapter 489 in definition of institution inserted (a)(iii) (see Ch. 402 note); and made minor changes in style. Amendment effective May 14, 2009.

*2001 Amendment:* Chapter 137 in definition of authority substituted "Montana facility finance authority" for "Montana health facility authority"; inserted definition of eligible facility; deleted definition of facility that read: ""Facility" means any health care facility or prerelease center provided for in 90-7-104"; in definition of institution in (a)(i) near end substituted "an eligible facility" for "a health facility"; in definition of participating institution substituted "an institution" for "a health institution or prerelease center" and after "construction or acquisition of" substituted "an eligible facility" for "a facility"; in definition of revenue in two places before "facilities" inserted "eligible"; and made minor changes in style. Amendment effective July 1, 2001.

*Saving Clause:* Section 18, Ch. 137, L. 2001, was a saving clause.

*1997 Amendments:* Chapter 477 substituted definition of facility for definition of health facility that read: ""Health facility" means any facility provided for in 90-7-104"; substituted institution for health institution as defined term and inserted (a)(ii) defining institution to include nonprofit prerelease center, corporation, or other organization authorized to operate state prerelease center; substituted participating institution for participating health institution as defined term, after "health institution" inserted "or prerelease center", and before "facility" deleted "health"; and made minor changes in style. Amendment effective July 1, 1997.

Chapter 479 in definition of institution inserted (b) to include a certain health care provider network, integrated delivery system, joint venture or partnership, purchasing alliance, or insurers and third-party administrators; and made minor changes in style.

*Severability:* Section 18, Ch. 477, L. 1997, was a severability clause.

*1991 Amendment:* Inserted definition of capital reserve account. Amendment effective July 1, 1991.

## 90-7-103. Allowable costs.

**Compiler's Comments**

*2001 Amendment:* Chapter 137 throughout section before "facility" inserted "eligible". Amendment effective July 1, 2001.

*Saving Clause:* Section 18, Ch. 137, L. 2001, was a saving clause.

*1997 Amendment:* Chapter 477 in (1), after "eligible", deleted "health"; and made minor changes in style. Amendment effective July 1, 1997.

*Severability:* Section 18, Ch. 477, L. 1997, was a severability clause.

## 90-7-104. Eligible facility.

**Compiler's Comments**

*2009 Amendments — Composite Section:* Chapter 402 inserted (1)(l) regarding application of definition to project or facility with qualified small issue bond financing; and made minor changes in style. Amendment effective July 1, 2009.

Chapter 489 inserted (1)(l) (see Ch. 402 note); and made minor changes in style. Amendment effective May 14, 2009.

*2001 Amendment:* Chapter 137 inserted (1)(k) regarding facility providing services for elderly; in (1)(l) near end of beginning clause substituted "an eligible facility" for "a health facility"; and made minor changes in style. Amendment effective July 1, 2001.

*Saving Clause:* Section 18, Ch. 137, L. 2001, was a saving clause.

*1997 Amendments — Composite Section:* Chapter 93 inserted (1)(b) regarding a public health center, as defined in 7-34-2102. Amendment effective March 19, 1997.

Chapter 472 in former (1)(c) substituted "facilities for persons with disabilities" for "center for persons with developmental disabilities"; and in (1)(d) substituted "chemical dependency treatment facilities" for "chemical dependency treatment center".

Chapter 477 throughout section, before "facility", deleted "health"; inserted (1)(i) regarding a prerelease center; in (1)(k), before "facility", deleted "health"; and made minor changes in style. Amendment effective July 1, 1997.

Chapter 479 in (1)(c) substituted "a facility" for "center"; inserted (1)(j) expanding eligible health facility definition to include diagnostic, treatment, or surgical center; and made minor changes in style.

Style changes in the chapters were slightly different. In each case, the codifier chose the most appropriate.

*Saving Clause:* Section 21, Ch. 93, L. 1997, was a saving clause.

*Severability:* Section 18, Ch. 477, L. 1997, was a severability clause.

*1995 Amendment — Phrase Change:* Section 21, Ch. 255, L. 1995, directed the Code Commissioner to change references in the MCA to a person who is developmentally disabled or to a developmentally disabled person to a person with developmental disabilities. The change was not to be made to the phrase "seriously developmentally disabled". In this section, the Code Commissioner has made the change in (1).

## 90-7-111. Credit of state not pledged — statement on obligation required.

### Compiler's Comments

*1997 Amendment:* Chapter 477 near end of (1), before "institution", deleted "health"; and made minor changes in style. Amendment effective July 1, 1997.

*Severability:* Section 18, Ch. 477, L. 1997, was a severability clause.

## 90-7-116. Taxation of certain projects financed by authority.

### Compiler's Comments

*Effective Date:* Section 6, Ch. 402, L. 2009, provided that this section is effective July 1, 2009.

## 90-7-121. Biennial audit.

### Compiler's Comments

*1989 Amendment:* In first sentence, after "each", changed "fiscal year" to "biennium". Amendment effective March 22, 1989.

### Collateral References

Montana Facility Finance Authority, Financial-Compliance Audit for the Two Fiscal Years Ended June 30, 2020, Mont. Leg. Audit Div. (2021).

# Part 2

# Authority

## Administration, Powers, and Limitations

## 90-7-201. Authority — quorum — mode of action — expenses.

### Compiler's Comments

*1997 Amendment:* Chapter 479 at end of first sentence in (2) substituted "as provided for in Title 2, chapter 3, part 2" for former second sentence that read: "Notice of meetings must be as provided in the bylaws of the authority"; and made minor changes in style.

*1987 Amendment:* Substituted (3) providing for compensation of members for former (3) that read: "Members of the authority may receive no compensation for services but are entitled to necessary expenses, as provided in 2-18-501 through 2-18-503, incurred in the discharge of their duties."

## 90-7-202. Powers of authority.

### Compiler's Comments

*2021 Amendment:* Chapter 444 in (3), (4), (8), and (13)(a) at beginning inserted exception clause; inserted (20) regarding the authority's duties and limits on the authority's powers for the commercial property-assessed capital enhancements program; and made minor changes in style. Amendment effective January 1, 2022.

*2001 Amendment:* Chapter 137 in (17) at end after "costs of eligible facilities" inserted "or to make grants for the purposes described in 90-7-211(2)(e)"; inserted (19) regarding program parameters for loan or grant approval; and made minor changes in style. Amendment effective July 1, 2001.

*Saving Clause:* Section 18, Ch. 137, L. 2001, was a saving clause.

*1999 Amendment:* Chapter 160 at beginning of (5) inserted exception clause; in (17) at beginning of second sentence inserted exception clause; inserted (18) allowing loans under 17-6-308; and made minor changes in style. Amendment effective July 1, 1999.

*1997 Amendments — Composite Section:* Chapter 477 in (15), after "eligible", deleted "health"; and made minor changes in style. Amendment effective July 1, 1997.

Chapter 479 near beginning of (5), after "funds", deleted "obtained from the issuance of bonds and notes" and at end, after "authority", inserted "to be used to carry out the purposes of this chapter"; at beginning of (10) inserted "establish programs to make" and at end inserted "from any funds"; at end of (17) inserted "and bond financing costs, and to provide funds to make loans to finance the costs of eligible facilities"; and made minor changes in style.

Style changes in the chapters were slightly different. In each case, the codifier chose the more appropriate.

*Severability:* Section 18, Ch. 477, L. 1997, was a severability clause.

*1983 Amendment:* In (5), substituted "an enterprise fund to the credit of the authority" for "the bond proceeds fund"; and in (17), substituted "enterprise fund" for "earmarked revenue account".

*Statement of Intent:* The statement of intent attached to HB 721 (Ch. 703, L. 1983) provided: "A statement of intent is required for this bill because it grants the Health Facility Authority the power to adopt rules to administer this chapter. The Legislature intends that these rules include:

(1) procedural rules to govern the Authority;

(2) procedures for assessing applications;

(3) the establishment of fees to be charged by health institutions [before amendment by Ch. 477, L. 1997] using the procedures of the authority; and

(4) procedures for determining the eligibility of a facility.

The legislature declares that the purpose of this bill is health care cost containment [before amendment by Ch, 477, L. 1997]. By making this bonding authority available, the legislature intends that health care costs will be contained by reducing the costs of facilities and equipment so that these savings may be passed on to consumers."

**Administrative Rules**

Title 8, chapter 120, ARM Montana Health Facility Authority.

Title 8, chapter 120, subchapter 2, ARM Procedural rules.

### 90-7-203. Staff of authority.

**Compiler's Comments**

*Code Commissioner Correction:* At end of section following "department", the Code Commissioner inserted "of commerce". "Department" is not defined in this chapter; however, reference to this section in 2-15-1815(4) indicates that "department" refers to "department of commerce".

### 90-7-204. Agent of the authority.

**Compiler's Comments**

*1997 Amendment:* Chapter 477 in two places in first sentence, after "participating" and "eligible", deleted "health". Amendment effective July 1, 1997.

*Severability:* Section 18, Ch. 477, L. 1997, was a severability clause.

### 90-7-211. Necessary expenses — fees.

**Compiler's Comments**

*2021 Amendment:* Chapter 444 in (1) at beginning inserted exception clause; and made minor changes in style. Amendment effective January 1, 2022.

*2001 Amendment:* Chapter 137 in (2) in first and second sentences near middle before "facilities" inserted "eligible"; in (2)(a) after "determine the need for" inserted "eligible"; inserted (2)(e) regarding grants to institutions; and made minor changes in style. Amendment effective July 1, 2001.

*Saving Clause:* Section 18, Ch. 137, L. 2001, was a saving clause.

*1997 Amendments — Composite Section:* Chapter 477 in first and third sentences in (2), after "participating", and in (3), after "eligible", deleted "health"; and made minor changes in style. Amendment effective July 1, 1997.

Chapter 479 at end of second sentence in (2), after "financed", deleted "and is not refundable by the authority, whether or not any application is approved"; in (2)(b) inserted "operating, and financing"; in (2)(c) inserted "or loan losses"; inserted (2)(d) relating to loans to finance the costs of eligible facilities; and made minor changes in style.

Style changes in the chapters were slightly different. In each case, the codifier chose the more appropriate.

*Severability:* Section 18, Ch. 477, L. 1997, was a severability clause.

### 90-7-213. Loan limitation.

**Compiler's Comments**

*2001 Amendment:* Chapter 137 in two places after "cost" deleted "or appraised value". Amendment effective July 1, 2001.

*Saving Clause:* Section 18, Ch. 137, L. 2001, was a saving clause.

*1997 Amendments — Composite Section:* Chapter 477 after "eligible" deleted "health"; and made minor changes in style.

Amendment effective July 1, 1997. Chapter 479 in two places, after "cost", inserted "or appraised value"; and made minor changes in style.

Style changes in the chapters were slightly different. In each case, the codifier chose the more appropriate.

*Severability:* Section 18, Ch. 477, L. 1997, was a severability clause.

### 90-7-214. Restriction on operating facility — leases.

**Compiler's Comments**

*2001 Amendment:* Chapter 137 in (3) in two places before "facility" inserted "eligible"; and made minor changes in style. Amendment effective July 1, 2001.

*Saving Clause:* Section 18, Ch. 137, L. 2001, was a saving clause.

*1997 Amendment:* Chapter 477 in (1), after "eligible", deleted "health"; in second sentence in (2), after "participating", deleted "health"; and made minor changes in style. Amendment effective July 1, 1997.

*Severability:* Section 18, Ch. 477, L. 1997, was a severability clause.

### 90-7-220. Montana developmental center loan.

**Compiler's Comments**

*2015 Amendment:* Chapter 444 in (2) at end of fourth sentence substituted "used to pay the remainder of the principal and interest of the loan" for "deposited to the general fund". Amendment effective May 6, 2015.

*2001 Amendment:* Chapter 137 in (1) in first sentence after "agreement with the" substituted "Montana facility finance authority" for "Montana health facility authority"; and made minor changes in style. Amendment effective July 1, 2001.

*Saving Clause:* Section 18, Ch. 137, L. 2001, was a saving clause.

*1997 Amendment:* Chapter 422 in (2), near middle after "due under the loan agreement", deleted former fourth sentence that read: "Principal and interest payments constitute a statutory appropriation within the meaning of 17-7-502." Amendment effective July 1, 1997.

*1995 Amendments — Phrase Change:* Section 21, Ch. 255, L. 1995, directed the Code Commissioner to change references in the MCA to a person who is developmentally disabled or to a developmentally disabled person to a person with developmental disabilities. The change was not to be made to the phrase "seriously developmentally disabled". In this section, the Code Commissioner has made the change in (1) and (2).

Chapter 546 at beginning of (1) substituted "department of public health and human services" for "department of corrections and human services". Amendment effective July 1, 1995.

*Saving Clause:* Section 571, Ch. 546, L. 1995, was a saving clause.

*1993 Amendment:* Chapter 513 in (1), in second sentence, increased maximum loan amount from "$8,665,000" to "$10.5 million" and inserted last sentence requiring investment earnings on bonds or funds held for bonds to be used to pay principal and interest on loan pursuant to loan agreement.

*Name Change:* The Code Commissioner changed "department of institutions" to "department of corrections and human services", pursuant to sec. 1, Ch. 262, L. 1991, directing the Code Commissioner to make the change wherever necessary in the Montana Code Annotated. Amendment effective July 1, 1991.

*Effective Date:* Section 5, Ch. 819, L. 1991, provided that this section is effective on passage and approval. Approved May 24, 1991.

### 90-7-221. Montana state hospital loan.

**Compiler's Comments**

*1997 Amendment:* Chapter 422 in (2), near middle after "due under the loan agreement", deleted former fourth sentence that read: "Principal and interest payments constitute a statutory appropriation within the meaning of 17-7-502." Amendment effective July 1, 1997.

*Code Commissioner Change:* Pursuant to sec. 6, Ch. 94, L. 1995, in four places, the Code Commissioner substituted Montana Mental Health Nursing Care Center for Montana Center for the Aged.

Pursuant to sec. 4, Ch. 546, L. 1995, the Code Commissioner substituted Department of Public Health and Human Services for Department of Corrections and Human Services.

*Severability:* Section 9, Ch. 557, L. 1995, was a severability clause.

*Effective Date:* Section 11, Ch. 557, L. 1995, provided that this section is effective April 26, 1995.

### 90-7-225. Procedure prior to financing qualified small bond issue projects.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 1, Ch. 137, L. 2023. Amendment effective April 18, 2023.

*Effective Date:* Section 6, Ch. 402, L. 2009, provided that this section is effective July 1, 2009.

### 90-7-226. Procedure prior to financing prerelease center projects.

**Compiler's Comments**

*Severability:* Section 18, Ch. 477, L. 1997, was a severability clause.

*Effective Date:* Section 20, Ch. 477, L. 1997, provided: "[This act] is effective July 1, 1997."

### 90-7-227. Public hearing.

**Compiler's Comments**

*Severability:* Section 18, Ch. 477, L. 1997, was a severability clause.

*Effective Date:* Section 20, Ch. 477, L. 1997, provided: "[This act] is effective July 1, 1997."

### 90-7-228. Additional reserves, funds, and accounts.

**Compiler's Comments**

*Severability:* Section 18, Ch. 477, L. 1997, was a severability clause.

*Effective Date:* Section 20, Ch. 477, L. 1997, provided: "[This act] is effective July 1, 1997."

### 90-7-229. Procedure prior to financing certain projects.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 2, Ch. 137, L. 2023. Amendment effective April 18, 2023.

*Effective Date:* Section 80, Ch. 489, L. 2009, provided: "[This act] is effective on passage and approval." Approved May 14, 2009.

### 90-7-230. Taxation of projects.

**Compiler's Comments**

*Effective Date:* Section 80, Ch. 489, L. 2009, provided: "[This act] is effective on passage and approval." Approved May 14, 2009.

## Part 3
## Notes and Bonds

### 90-7-301. Notes.

**Compiler's Comments**

*2001 Amendment:* Chapter 137 in first sentence near middle before "facility" inserted "eligible"; and made minor changes in style. Amendment effective July 1, 2001.

*Saving Clause:* Section 18, Ch. 137, L. 2001, was a saving clause.

### 90-7-302. Bonds and notes of authority.

**Compiler's Comments**

*2007 Amendment:* Chapter 278 in (1) increased bond and note authority amount from $250 million to $500 million; and made minor changes in style. Amendment effective April 26, 2007.

*2001 Amendment:* Chapter 137 in (5) in introductory clause near middle after "agreement, regarding the" inserted "eligible"; in (6) after "that any contract let for a" inserted "public" and after "issued under this part" deleted "on or after July 1, 1993"; and in (7) near end after "more than one" inserted "eligible". Amendment effective July 1, 2001.

*Saving Clause:* Section 18, Ch. 137, L. 2001, was a saving clause.

*1997 Amendment:* Chapter 479 in (1) increased bond authority from $150 million to $250 million; and made minor changes in style.

*1993 Amendment:* Chapter 464 inserted (6) requiring certification that an applicant has submitted a statement that the contractor will pay the standard prevailing wage for work on certain projects financed from bond proceeds; and made minor changes in style. Amendment effective April 21, 1993.

*1985 Amendment:* In (1) after "may", inserted "in each biennium" and after "issue bonds", substituted "and notes in an aggregate principal amount not to exceed $150 million, exclusive of bonds or notes issued to refund its outstanding bonds or notes" for "not in excess of $50 million for any 2-year period".

### 90-7-303. Procedure for issuance of bonds.

**Compiler's Comments**

*2001 Amendment:* Chapter 137 in (1) near middle after "find that the facility" inserted "is an eligible facility and", substituted "by an institution" for "by a health institution", and at end substituted "providing services contemplated by this chapter" for "fulfilling its obligation to provide health care facilities or by a prerelease center for the purpose of preparing persons to reenter society"; in (2) after "to be expended for any" inserted "eligible facility that is a"; in (3) substituted "any eligible facility unless the institution provides evidence that the eligible facility is" for "any facility until it has been shown that the facility is" and substituted "the institution reasonably expects that it will generate sufficient revenue to pay principal and interest payments" for "there will be sufficient revenues to ensure that principal and interest payments are made"; deleted former (4) and (5) that read: "(4) The authority may not allow the proceeds of any bonds or notes to be expended for any facility until it has considered the ability of the institution to operate the facility based on the institution's experience and expertise.

(5) The authority shall ensure that its financings consistently provide fair and realistic terms and covenants sufficient to protect the position of the lenders or bondholders"; and made minor changes in style. Amendment effective July 1, 2001.

*Saving Clause:* Section 18, Ch. 137, L. 2001, was a saving clause.

*1997 Amendment:* Chapter 477 near beginning of (1), after "eligible", deleted "health" and at end inserted "or by a prerelease center for the purpose of preparing persons to reenter society"; near beginning of (2), before "facility", inserted "health care"; in two places in (4), before "institution" and "institution's", deleted "health"; and made minor changes in style. Amendment effective July 1, 1997.

*Severability:* Section 18, Ch. 477, L. 1997, was a severability clause.

*1985 Amendment — Retroactive Application:* In (2) at beginning inserted "The authority may not allow the proceeds of any bonds or notes to be expended for any facility unless", which has the effect of substituting requirement of review and approval prior to expenditure of proceeds for requirement of review and approval prior to issuance of bonds.

Section 3, Ch. 326, L. 1985, provided: "This act is effective on passage and approval and applies retroactively, within the meaning of 1-2-109, to any health facility financing undertaken after October 1, 1983."

### 90-7-304. Security of bondholders.

**Compiler's Comments**

*2001 Amendment:* Chapter 137 in (2)(a) after "all or any part of the" inserted "property of the"; in (2)(b), (3)(a), (3)(c), and (3)(d) before "facility" inserted "eligible"; and made minor changes in style. Amendment effective July 1, 2001.

*Saving Clause:* Section 18, Ch. 137, L. 2001, was a saving clause.

*1997 Amendment:* Chapter 477 in (2)(a), after "participating", deleted "health"; and made minor changes in style. Amendment effective July 1, 1997.

*Severability:* Section 18, Ch. 477, L. 1997, was a severability clause.

### 90-7-305. Trust agreement to secure bonds.

**Compiler's Comments**

*1997 Amendments — Composite Section:* Chapter 477 in last sentence, near end of section after "eligible", deleted "health"; and made minor changes in style. Amendment effective July 1, 1997.

Chapter 479 at end of first sentence, after "Montana", inserted "or outside of Montana, if it is determined by the authority to be in the best interest of financing the bonds"; and made minor changes in style.

Style changes in the chapters were slightly different. In each case, the codifier chose the more appropriate.

*Severability:* Section 18, Ch. 477, L. 1997, was a severability clause.

### 90-7-307. Conveyance of title.

**Compiler's Comments**

*1997 Amendment:* Chapter 477 near beginning, after "eligible", deleted "health" and near beginning and at end, after "participating", deleted "health"; and made minor changes in style. Amendment effective July 1, 1997.

*Severability:* Section 18, Ch. 477, L. 1997, was a severability clause.

### 90-7-317. Capital reserve account.

**Compiler's Comments**

*1997 Amendments:* Chapter 477 at end of (2)(a) inserted "or bonds used to finance prerelease centers that contract with the state"; and made minor changes in style. Amendment effective July 1, 1997.

Chapter 479 inserted introductory clause in (3) providing authority to deposit into capital reserve account; and made minor changes in style.

*Severability:* Section 18, Ch. 477, L. 1997, was a severability clause.

*1995 Amendment:* Chapter 557 in (2)(a) substituted "facilities" for "facility" and inserted "and 90-7-221"; and made minor changes in style. Amendment effective April 26, 1995.

*Severability:* Section 9, Ch. 557, L. 1995, was a severability clause.

*1993 Amendment:* Chapter 513 at end of (2)(a) inserted "or bonds issued to finance the facility described in 90-7-220".

*Preamble:* The preamble attached to Ch. 673, L. 1991, provided: "WHEREAS, it is necessary to establish effective, low-cost financing options for the construction and development of health facilities in Montana; and

WHEREAS, health facility financing will promote affordable access and quality of health care services for the people of the state."

*Effective Date:* Section 7, Ch. 673, L. 1991, provided: "[This act] is effective July 1, 1991."

### 90-7-318. Administration of capital reserve account.

**Compiler's Comments**

*Effective Date:* Section 7, Ch. 673, L. 1991, provided: "[This act] is effective July 1, 1991."

### 90-7-319. Maintenance of capital reserve account.

**Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

*Effective Date:* Section 7, Ch. 673, L. 1991, provided: "[This act] is effective July 1, 1991."

### 90-7-320. Loans — purchase of bonds and notes.

**Compiler's Comments**

*Effective Date:* Section 7, Ch. 673, L. 1991, provided: "[This act] is effective July 1, 1991."

# CHAPTER 9
# AGRICULTURE DEVELOPMENT

**Chapter Administrative Rules**

Title 4, chapter 16, ARM Montana Agriculture Development Council.

## Part 1
## General Provisions

### 90-9-102. Purpose.

**Compiler's Comments**

*2019 Amendment:* Chapter 439 near beginning substituted "loans, grants, and farmer loan repayment assistance" for "loans and grants". Amendment effective July 1, 2019, and terminates June 30, 2029.

*2009 Amendment:* Chapter 106 near beginning after "industry" substituted "through loans and grants" for "by establishing a public-private sector partnership". Amendment effective July 1, 2009.

*Saving Clause:* Section 16, Ch. 106, L. 2009, was a saving clause.

**Administrative Rules**

ARM 4.16.104 Council review process prior to loan or grant.

**90-9-103. Definitions.**

**Compiler's Comments**

*2021 Amendment:* Chapter 58 in temporary version in definition of educational loan in first sentence after "20 U.S.C. 1078-2" inserted reference to a loan made for the payment of the borrower's college expenses and inserted last sentence concerning consideration of a portion of a consolidated loan; and made minor changes in style. Amendment effective March 8, 2021.

*2019 Amendment:* Chapter 439 inserted definitions of educational loan, educational loan servicer, farmer, and federal loan program; and made minor changes in style. Amendment effective July 1, 2019, and terminates June 30, 2029.

*2009 Amendment:* Chapter 106 deleted former definition of agricultural development project that read: ""Agricultural development project" means a marketing, agribusiness development, seed capital, or research and development project designed to discover, develop, transfer, market, use, or commercialize existing or new agricultural products or processes in order to strengthen and enhance agricultural economic development in the state"; deleted former definition of agricultural development project loan agreement that read: ""Agricultural development project loan agreement" or "loan" means an agreement entered into between the council and the loan recipient of a seed capital project loan or a research and development project loan that:

(a) creates a debt relationship between the parties;

(b) provides for a financial return to the council;

(c) provides economic development potential to the state; and

(d) contains various provisions and terms as required by the act"; deleted former definition of convertible debenture that read: ""Convertible debenture" means a debenture convertible into stock under certain conditions by an individual or company, but not by the council"; deleted former definition of debenture that read: ""Debenture" or "note" means a writing or certificate issued as evidence of debt"; deleted former definition of innovative agricultural technology that read: ""Innovative agricultural technology" means the involvement of an agricultural product or process that embodies the use of implements, machinery, equipment, chemical formulations, resources, materials, methods, or other items in a manner that departs from previous commercial developments, practices, or applications"; deleted former definition of investment that read: ""Investment" means an award of money, with or without repayment requirements, for the purposes provided for in this chapter"; in definition of matching funds near beginning after "received by the" substituted "loan or grant recipient" for "agricultural development project loan or investment recipient", after "contributed by the" substituted "recipient in support of a loan or grant application" for "loan or investment recipient to the project", and at end after "council" deleted "for use in the agricultural development project"; deleted former definition of portfolio company that read: ""Portfolio company" means a startup or expansion stage company that has received a seed capital project loan from the council"; deleted former definition of private sector that read: ""Private sector" means any entity or individual, not principally a part of or associated with a governmental unit"; deleted former definition of research and development project that read: ""Research and development project" means an agricultural development project that falls into the category of applied technology research or agricultural technology transfer and assistance"; deleted former definition of research and development project loan that read: ""Research and development project loan" means an agricultural development project loan agreement entered into between the council and a loan recipient for a research and development project"; deleted former definition of seed capital project that read: "(a) "Seed capital project" means an agricultural development project loan entered into between the council and a loan recipient for the purposes of providing the recipient with startup or expansion capital.

(b) The term does not include an investment"; deleted former definition of warrant that read: ""Warrant" means an instrument issued by a corporation giving a holder other than the council the right to purchase stock of a corporation at a fixed price, either for a limited time or perpetually"; and made minor changes in style. Amendment effective July 1, 2009.

*Saving Clause:* Section 16, Ch. 106, L. 2009, was a saving clause.

*2001 Amendment:* Chapter 171 in definition of agricultural development project inserted "marketing, agribusiness development" and after "transfer" inserted "market"; deleted former definition of expansion capital project that read: ""Expansion capital project" means an agricultural technology development project undertaken to enable an individual or a company to expand its manufacturing and marketing activities in order to move its agricultural products or services into new markets or to expand existing markets"; at end of definition of investment substituted "this chapter" for "90-9-401"; in definition of matching funds in (a) after "received" deleted "in cash", in two places after "loan" inserted "or investment", after "from" substituted "private, federal, state, or commodity checkoff funds" for "nonstate appropriated sources", and after "funds" substituted "disbursed" for "loaned" and inserted (b) providing that matching funds may not include other state grants; at end of definition of private sector after "unit" deleted "that is associated with or involved in commercial activity"; substituted definition of seed capital project for former definition that read: ""Seed capital project" means a startup or expansion capital project"; deleted former definition of seed capital project loan that read: ""Seed capital project loan" means an agricultural development project loan entered into between the council and a loan recipient for a seed capital project"; deleted former definition of technology transfer and assistance project that read: ""Technology transfer and assistance project" means an agricultural development project that:

(a) transfers technology research from the laboratory to the marketplace; or

(b) provides better access and exposure to business development assistance or information for researchers or early-stage agricultural businesses that commercialize agricultural technology products"; and made minor changes in style. Amendment effective March 30, 2001.

*Severability:* Section 13, Ch. 171, L. 2001, was a severability clause.

*Saving Clause:* Section 14, Ch. 171, L. 2001, was a saving clause.

*1991 Amendment:* In definition of investment deleted reference to 90-9-302.

*1989 Amendment:* Inserted definitions of act, agricultural development project, agricultural development project loan agreement, company, convertible debenture, debenture or note, department, expansion capital project, innovative agricultural technology, matching funds, portfolio company, private sector, research and development project, research and development project loan, seed capital project, seed capital project loan, state, technology transfer and assistance project, and warrant; in definition of investment substituted "90-9-302 and 90-9-401" for "this chapter"; and made minor change in phraseology. Amendment effective March 23, 1989.

*Severability:* Section 19, Ch. 284, L. 1989, was a severability clause.

**Administrative Rules**

ARM 4.16.201 Definitions.

**90-9-104. Growth through agriculture account.**

**Compiler's Comments**

*Effective Date:* Section 20(1), Ch. 351, L. 2017, provided: "(1) Except as provided in subsection (2), [this act] is effective July 1, 2017."

*Severability:* Section 19, Ch. 351, L. 2017, was a severability clause.

## Part 2

## Agriculture Development Council

**Part Compiler's Comments**

*Severability:* Section 13, Ch. 171, L. 2001, was a severability clause.

*Saving Clause:* Section 14, Ch. 171, L. 2001, was a saving clause.

**90-9-201. Council organization — meetings.**

**Compiler's Comments**

*2015 Amendment:* Chapter 30 in (3)(a) substituted "compensation as provided in 2-15-122" for "$50 compensation"; and made minor changes in style. Amendment effective February 18, 2015.

*2001 Amendment:* Chapter 171 at beginning of second sentence of (1) deleted "In addition to the chairmanship"; inserted (3) providing that members, other than department directors, are entitled to compensation while engaged in official business and to necessary travel expenses; and made minor changes in style. Amendment effective March 30, 2001.

**Administrative Rules**

Title 4, chapter 16, subchapter 7, ARM Agricultural marketing and business development program.

**Collateral References**

Montana Agriculture Development Council, https://agr.mt.gov/GTA.

## 90-9-202. Powers and duties of council.

**Compiler's Comments**

*2019 Amendments — Composite Section:* Chapter 343 inserted (1)(f) in temporary version and (1)(d) in July 1, 2029, version regarding distribution of food and agricultural development center funding; and made minor changes in style. Amendment effective July 1, 2019.

Chapter 439 inserted (1)(c) regarding loan repayment assistance for farmers; inserted (1)(d) regarding consultation with the cooperative extension service; in (1)(e) after "making the loans or grants" inserted "and providing the loan repayment assistance"; and made minor changes in style. Amendment effective July 1, 2019, and terminates June 30, 2029.

*2009 Amendment:* Chapter 106 in (1)(b) at beginning substituted "make loans or grants, pursuant to the provisions of Title 90, chapter 9, part 3" for "Make investments or loans in agricultural development projects" and at end after "Montana" deleted "including but not limited to:

(a) seed capital projects for development and commercialization of new products and processes;

(b) foreign and domestic market development activities;

(c) applied technological research;

(d) agricultural development projects; and

(e) agricultural technology assistance and transfer"; in (1)(c) near middle substituted "loans or grants" for "investments or loans"; inserted (2) allowing the council to defer or forgive a loan and to forgive accrued interest; and made minor changes in style. Amendment effective July 1, 2009.

*Saving Clause:* Section 16, Ch. 106, L. 2009, was a saving clause.

*Termination Provision Repealed:* Section 3, Ch. 453, L. 2007, repealed sec. 19, Ch. 512, L. 1999, sec. 5, Ch. 69, L. 2001, and secs. 3 and 4, Ch. 460, L. 2005, which terminated the 1999 amendments to this section June 30, 2009. Effective July 1, 2007.

*Extension of Termination Date:* Sections 3 and 4, Ch. 460, L. 2005, amended sec. 19, Ch. 512, L. 1999, and sec. 5, Ch. 69, L. 2001, by extending the termination date imposed by Ch. 512 to June 30, 2009. Effective April 28, 2005.

*2001 Amendment:* Chapter 171 at beginning of (2)(a) substituted "seed capital projects" for "seed capital loans"; deleted former (2)(b) that read: "(b) agricultural business incubators"; inserted (2)(d) concerning development projects; and made minor changes in style. Amendment effective March 30, 2001.

*Extension of Termination Date:* Section 5, Ch. 69, L. 2001, amended sec. 19, Ch. 512, L. 1999, by extending the termination date imposed by Ch. 512 to June 30, 2005. Effective March 19, 2001.

*1999 Amendment:* Chapter 512 at end of (1) inserted "including the Indian reservations in Montana"; and in (2) after "diversification in" inserted "rural, urban, and tribal settings in". Amendment effective April 28, 1999, and terminates June 30, 2001.

*Severability:* Section 15, Ch. 512, L. 1999, was a severability clause.

*1989 Amendment:* In (2), near beginning, inserted "or loans"; in (2)(a) substituted "loans" for "awards"; in (3) substituted "or loans authorized by" for "described in"; and deleted (4) that granted authority to adopt rules implementing this chapter. Amendment effective March 23, 1989.

*Severability:* Section 19, Ch. 284, L. 1989, was a severability clause.

**Administrative Rules**

Title 4, chapter 16, subchapter 1, ARM Procedural rules and citizen participation rules.

Title 4, chapter 16, subchapter 2, ARM Procedural rules.

Title 4, chapter 16, subchapter 5, ARM Loan programs.

Title 4, chapter 16, subchapter 7, ARM Agricultural marketing and business development program.

## 90-9-203. Rulemaking.

**Compiler's Comments**

*2019 Amendment:* Chapter 439 inserted (3) regarding application procedures and required documentation; in (4) at end inserted "or providing loan repayment assistance"; in (9) after "terms and conditions of loans and grants" inserted "and loan repayment assistance"; and made minor changes in style. Amendment effective July 1, 2019, and terminates June 30, 2029.

*2009 Amendment:* Chapter 106 in introductory clause after "including" deleted "but not limited to"; in (2) near beginning after "procedures" substituted "for loans and grants authorized in 90-9-202" for "that, at a minimum, require the submittal of an executive summary for an agricultural development project loan or investment, a business plan for a seed capital project, a research and development project proposal for a research and development project loan, and other documents necessary to meet the criteria established in the act"; in (3) after "making" substituted "a loan or grant" for "an agricultural development project loan or investment"; in (4) near beginning after "activities" substituted remainder of (4) regarding monitoring the use of a loan or grant for "that describe the ongoing involvement or follow-along management of the council that may be required in an agricultural development project loan or investment agreement"; inserted (5) requiring rules establishing interest rates for loans; inserted (6) requiring rules limiting the amount of loans or grants; inserted (7) requiring rules governing the deferral or forgiveness of loans and accrued interest; inserted (8) requiring rules establishing other loans and grant terms and conditions; and made minor changes in style. Amendment effective July 1, 2009.

*Saving Clause:* Section 16, Ch. 106, L. 2009, was a saving clause.

*2001 Amendment:* Chapter 171 in middle of (2), (3), and (4) after "project loan" inserted "or investment"; and in (2) after "capital project" deleted "loan". Amendment effective March 30, 2001.

*1989 Statement of Intent:* The statement of intent attached to Ch. 284, L. 1989, provided: "A statement of intent is required for this bill because [section 9] [90-9-203] grants rulemaking authority to the Montana agriculture development council to implement the agricultural development project loan program.

It is the legislature's intent that the council adopt rules:

(1) governing the conduct of council business;

(2) establishing application procedures that, at a minimum, require the submittal of an executive summary for an agricultural development project loan, a business plan for a seed capital project loan, a research and development project proposal for a research and development project loan, and other documents necessary to meet the criteria established in the act;

(3) establishing procedures to be followed by the council in its review process prior to making an agricultural development project loan;

(4) establishing postdisbursement activities that describe the ongoing involvement or follow-along management of the council that may be required in an agricultural development project loan agreement."

*Severability:* Section 19, Ch. 284, L. 1989, was a severability clause.

*Effective Date:* Section 20, Ch. 284, L. 1989, provided that this section is effective March 23, 1989.

**Administrative Rules**

ARM 4.16.201 Definitions.

Title 4, chapter 16, subchapter 5, ARM Loan programs.

## Part 3
## Grants and Loans

**Part Administrative Rules**

ARM 4.16.104 Council review process prior to loan or grant.

Title 4, chapter 16, subchapter 5, ARM Loan programs.

### 90-9-301. Agriculture seed capital account — matching funds.

**Compiler's Comments**

*2009 Amendment:* Chapter 106 in (1) inserted second sentence requiring that council money be deposited in the agriculture seed capital account; in (2) near beginning after "loan or" substituted "grant" for "invest" and at end after "account" substituted "pursuant to the provisions of 90-9-308 through 90-9-311" for "to support agricultural development projects and research relating to innovative organizational improvements in agricultural businesses and to the commercialization and marketing of new agricultural products or agricultural production processes"; deleted former (3) that read: "(3) The council may not make a loan or investment to an agricultural development project unless the recipient provides matching funds. Matching funds are required prior to any expenditure of state funds. The council may accept as matching funds those funds received by the loan recipient within 1 year prior to the execution of the loan agreement"; and made minor changes in style. Amendment effective July 1, 2009.

*Saving Clause:* Section 16, Ch. 106, L. 2009, was a saving clause.

*2001 Amendment:* Chapter 171 near beginning of (2) after "loan" inserted "or invest" and after "support" inserted "agricultural development projects and"; and in first sentence in (3) after "loan" inserted "or investment" and after "projects" substituted "unless the recipient provides matching funds" for "for which the matching funds have not been received" and at end of second sentence deleted "for research and development or seed capital projects". Amendment effective March 30, 2001.

*Severability:* Section 13, Ch. 171, L. 2001, was a severability clause.

*Saving Clause:* Section 14, Ch. 171, L. 2001, was a saving clause.

*1989 Amendment:* In (2), near beginning, substituted "loan" for "invest"; inserted (3) requiring matching funds for agricultural development project loans and for research and development or seed capital projects; and deleted former (3) and (4) that read: "(3) Investments from the account must be matched by at least an equal amount raised by the applicant from sources that are not state-appropriated.

(4) Preference must be given to applications that:

(a) can be reasonably expected to provide an economic return to the applicant within a reasonable time;

(b) demonstrate a potential commercial value to other entrepreneurs in Montana;

(c) require such a grant to obtain additional private capital;

(d) involve processing or adding value to agricultural commodities produced in Montana; or

(e) provide jobs that will be substantially filled by current Montana residents." Amendment effective March 23, 1989.

*Severability:* Section 19, Ch. 284, L. 1989, was a severability clause.

## 90-9-306. Appropriation authority and funding — prohibitions.

### Compiler's Comments

*2019 Amendment:* Chapter 439 inserted (2) limiting funds spent in the biennium beginning July 1, 2019, for the Montana farmer loan repayment assistance program to $100,000; and made minor changes in style. Amendment effective July 1, 2019, and terminates June 30, 2029.

*2009 Amendment:* Chapter 106 in (1) near end of first sentence after "interest on" substituted "loans" for "investments"; and made minor changes in style. Amendment effective July 1, 2009.

*Saving Clause:* Section 16, Ch. 106, L. 2009, was a saving clause.

*2001 Amendment:* Chapter 171 near middle of (2) inserted "if the council member is a board member or officer of the organization"; and made minor changes in style. Amendment effective March 30, 2001.

*Severability:* Section 13, Ch. 171, L. 2001, was a severability clause.

*Saving Clause:* Section 14, Ch. 171, L. 2001, was a saving clause.

*1989 Amendments:* Chapter 284 deleted former (2) that read: "(2) No investment may be made in projects for which matching funds or participation of financial intermediaries is required until such funds have been committed"; and in (2), near end of first sentence before "funds", deleted "investment". Amendment effective March 23, 1989.

Chapter 628 in (1), at end after "as provided in 17-7-502", inserted "for the purposes of this chapter" and inserted exception clause requiring the expenditures to be from temporary appropriations; and made minor changes in punctuation and phraseology. Amendment effective July 1, 1989.

*Severability:* Section 19, Ch. 284, L. 1989, was a severability clause.

## 90-9-307. Accountability.

### Compiler's Comments

*2009 Amendment:* Chapter 106 near middle after "ensure that" deleted "investments and", after "loans" inserted "and grants", and at end substituted "specified purposes" for "purposes identified in its investment and loan agreements". Amendment effective July 1, 2009.

*Saving Clause:* Section 16, Ch. 106, L. 2009, was a saving clause.

*1989 Amendment:* In two places inserted references to loans; and deleted former (2) that read: "(2) The council's investment agreements must contain provisions considered necessary by the council to ensure the proper inspection and review of projects, the attainment of project goals, and the maintenance of adequate financial records by recipients of council funds." Amendment effective March 23, 1989.

*Severability:* Section 19, Ch. 284, L. 1989, was a severability clause.

## 90-9-308. Application for loans and grants — additional criteria.

### Compiler's Comments

*Saving Clause:* Section 16, Ch. 106, L. 2009, was a saving clause.

*Effective Date:* Section 17, Ch. 106, L. 2009, provided: "[This act] is effective July 1, 2009."

### 90-9-309. Terms and conditions of loans.

**Compiler's Comments**

*Saving Clause:* Section 16, Ch. 106, L. 2009, was a saving clause.

*Effective Date:* Section 17, Ch. 106, L. 2009, provided: "[This act] is effective July 1, 2009."

### 90-9-310. Terms and conditions of grants.

**Compiler's Comments**

*Saving Clause:* Section 16, Ch. 106, L. 2009, was a saving clause.

*Effective Date:* Section 17, Ch. 106, L. 2009, provided: "[This act] is effective July 1, 2009."

### 90-9-311. General criteria underlying loans and grants.

**Compiler's Comments**

*2009 Amendment:* Chapter 106 in introductory clause after "make" substituted "a loan or grant only if the council determines that" for "an agricultural development project loan or investment only upon a favorable determination that the proposed agricultural development project"; in (1) at beginning inserted "the loan or grant", after "purposes of" substituted "this chapter" for "the act", before "adds" inserted "primarily", and deleted former second sentence that read: "Priority must be given to projects that incorporate innovative agricultural technology"; deleted former (2) that read: "has prospects for collaboration between the public and private sectors of the state's economy"; in (2) at beginning inserted "the project for which the loan or grant is made" and at end after "success" inserted "given the current personnel, experience, and resources of the applicant"; in (3) substituted "the project for which the loan or grant is made is anticipated to create new jobs or retain existing jobs" for "and for creating new jobs"; deleted former (4) through (7) that read: "(4) has potential for commercial success related to the specific product, process, or business development methodology proposed;

(5) can provide matching funds;

(6) has potential to benefit existing agricultural business;

(7) can be reasonably expected to provide an economic return within a reasonable period of time"; in (4) at beginning substituted "the loan or grant is primarily intended to be used for" for "involves" and after "produced" inserted "or potentially produced"; in (5) at beginning inserted "the applicant", after "allows" substituted "the council to reasonably conclude that the applicant will comply with ongoing reporting requirements and postdisbursement monitoring activities established" for "ongoing postdisbursement involvement"; and made minor changes in style. Amendment effective July 1, 2009.

*Saving Clause:* Section 16, Ch. 106, L. 2009, was a saving clause.

*2001 Amendment:* Chapter 171 in middle of first sentence of introductory clause after "loan" inserted "or investment"; at end of first sentence in (1) inserted "adds value to Montana's agricultural products" and at beginning of second sentence inserted "Priority must be given to projects that"; and made minor changes in style. Amendment effective March 30, 2001.

*Severability:* Section 13, Ch. 171, L. 2001, was a severability clause.

*Saving Clause:* Section 14, Ch. 171, L. 2001, was a saving clause.

*Severability:* Section 19, Ch. 284, L. 1989, was a severability clause.

*Effective Date:* Section 20, Ch. 284, L. 1989, provided that this section is effective March 23, 1989.

## Part 4
## Marketing — Export Assistance

### 90-9-401. Agricultural marketing enhancement.

**Compiler's Comments**

*2009 Amendment:* Chapter 106 at beginning of introductory clause substituted "As directed by the council, the department" for "The council"; and made minor changes in style. Amendment effective July 1, 2009.

*Saving Clause:* Section 16, Ch. 106, L. 2009, was a saving clause.

*1989 Amendment:* In (1), at beginning, substituted "assist in placing" for "place" and after "Japan" inserted "or another Pacific Rim country". Amendment effective March 23, 1989.

*Severability:* Section 19, Ch. 284, L. 1989, was a severability clause.

**Administrative Rules**

Title 4, chapter 16, subchapter 7, ARM Agricultural marketing development program.

**90-9-402. Export finance assistance.**

**Compiler's Comments**

*2009 Amendment:* Chapter 106 at beginning substituted "As directed by the council, the department" for "The council". Amendment effective July 1, 2009.

*Saving Clause:* Section 16, Ch. 106, L. 2009, was a saving clause.

### Part 5
### Farmer Loan Repayment Assistance Program

**Part Compiler's Comments**

*Effective Date:* Section 15, Ch. 439, L. 2019, provided: "[This act] is effective July 1, 2019."

*Termination:* Section 16, Ch. 439, L. 2019, provided: "[This act] terminates June 30, 2029."

**Part Administrative Rules**

Title 4, chapter 23, ARM Student loan assistance program.

**90-9-502. Eligibility — amount of loan repayment assistance.**

**Compiler's Comments**

*2021 Amendment:* Chapter 14 deleted former (1)(c) that read: "(c) has undertaken the primary occupation of operating a farm within the applicable time period specified in 90-9-103(8)(c)"; and made minor changes in style. Amendment effective October 1, 2021.

*Code Commissioner Correction:* The code commissioner inserted brackets around subsection (1)(c) because the specified applicable time periods were deleted from 90-9-103(8)(c) by an amendment to that section.

# CHAPTER 11
# INDIAN AFFAIRS
# PLANNING AND COORDINATION

**Chapter Law Review Articles**

Tribal Disruption and Federalism, Fletcher, 76 Mont. L. Rev. 97 (2015).

### Part 1
### State Director of Indian Affairs

**90-11-101. Legislative policy.**

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 6, Ch. 594, L. 2023. Amendment effective July 1, 2023.

*2009 Amendment:* Chapter 164 in (9) in introductory clause and in (10) substituted reference to state director of Indian affairs for reference to coordinator of Indian affairs. Amendment effective April 6, 2009.

*2001 Amendment:* Chapter 178 inserted introductory clause; in (2) at beginning substituted "since statehood" for "in the course of the past 80 years", near beginning after "Montana have" substituted "lived" for "been driven from their native valleys and plains and are at present living and residing", and at end after "exist" deleted "and no suitable progress has been made to solve such problems by reason of the fact that the Indians and those who are attempting to aid them in the solution of their problems have never been able to present a coordinated and united effort in solving such problems"; in (3) at beginning deleted "Whereas, it is hereby declared that it is the legislative policy of this state that", near beginning after "served by" substituted "engaging in government-to-government relationships designed to recognize the" for "the fostering of a program which is designed to establish and place our Indian citizens in a position to take their rightful place in our society and assume the", and at end substituted "are entitled to as citizens of this state" for "it is therefore necessary that a state office of the coordinator of Indian affairs be established so that the problems of the Indians of Montana can be approached and reconciled from a state level in cooperation with the United States of America"; in (4) at beginning inserted "because tribes are domestic dependent nations" and after "jurisdiction" substituted "and a fiduciary duty throughout the state" for "on Indian reservations in the state"; deleted former (5) that read: "(5) Whereas, Indians who reside off reservations generally qualify for participation in federal programs but are often prohibited from voting on tribal affairs and for tribal officers"; inserted (5) stating that differences exist between the tribes and their respective relationships with the federal government; in (6) near middle after "needs for" inserted "social", after "environmental" inserted "educational, and economic", after "borne" inserted "in part", and at end after "agencies" deleted "and these needs are derived from problems shared by all Indians, whether they reside on reservations or not, and in consideration of their desire for official voice and representation in seeking solutions to their problems"; in (7) near beginning after "federal government" inserted "or tribal governments"; inserted (8) referring to the state and tribe working together in various types of agreements; in (9) at beginning substituted "to facilitate the discussion and resolution of issues and concerns that Indian tribes have in relation to the state, the federal government, and among themselves, the coordinator of Indian affairs shall" for "Then therefore, let it be resolved that the coordinator of Indian affairs should"; inserted (9)(a) requiring maintenance of tribal-state communication; in (9)(b) near beginning substituted "tribal and individual Indian concerns and interests to" for "the problems of all Indians to include those who reside off known reservations and who" and near middle after "communicating" substituted "these concerns and interests to relevant state agencies and to the legislature" for "their opinions and needs to agencies of responsibility"; in (9)(c) near beginning after "act as" substituted "a liaison for tribes and Indian people" for "representative and spokesman for organized bodies of Indian people"; inserted (10) requiring the coordinator to assist the tribes in creating agreements with the state and consensus with other parties; and made minor changes in style. Amendment effective April 2, 2001.

## 90-11-102. Duties and assistance.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 7, Ch. 594, L. 2023. Amendment effective July 1, 2023.

*2021 Amendment:* See 2021 Session Law for amendment made by sec. 137, Ch. 261, L. 2021. Amendment effective April 20, 2021.

*2009 Amendment:* Chapter 164 in (1), in (2) in introductory clause, and in (2)(g) substituted reference to state director of Indian affairs for reference to coordinator of Indian affairs. Amendment effective April 6, 2009.

*Termination Provision Repealed:* Section 3, Ch. 453, L. 2007, repealed sec. 19, Ch. 512, L. 1999, sec. 5, Ch. 69, L. 2001, and secs. 3 and 4, Ch. 460, L. 2005, which terminated the 1999 amendments to this section June 30, 2009. Effective July 1, 2007.

*Extension of Termination Date:* Sections 3 and 4, Ch. 460, L. 2005, amended sec. 19, Ch. 512, L. 1999, and sec. 5, Ch. 69, L. 2001, by extending the termination date imposed by Ch. 512 to June 30, 2009. Effective April 28, 2005.

*2001 Amendments — Composite Section:* Chapter 69 in temporary version in (2)(i) substituted "responsible for acting as a liaison between the legislature and the tribal governments" for "having jurisdiction over the office of the coordinator"; and made minor changes in style. Amendment effective March 19, 2001.

Chapter 178 at beginning of (2)(a) inserted "meet at least quarterly with tribal governments and"; inserted (2)(b) requiring coordinator to meet with executive branch directors on certain issues; inserted (2)(c) requiring coordinator to report to governor's cabinet on certain Indian issues; at end of (2)(d) and (2)(e) inserted "and issues"; in (2)(g) near beginning after "act" substituted "as a liaison" for "on behalf of" and at end substituted reference to tribal governmental entities for "tribal entities"; in (3) near end after "relating to" substituted "education, health, natural resources, and economic development" for "coal development" and at end after "lands" deleted reference to coordinator making an appropriate charge for assistance; and made minor changes in style. Amendment effective April 2, 2001.

Style changes were slightly different in the chapters. In each case, the codifier chose appropriate text.

*Extension of Termination Date:* Section 5, Ch. 69, L. 2001, amended sec. 19, Ch. 512, L. 1999, by extending the termination date imposed by Ch. 512 to June 30, 2005. Effective March 19, 2001.

*1999 Amendment:* Chapter 512 inserted (2)(f) concerning service on state-tribal economic development commission; inserted (2)(g) concerning report to legislative committee; inserted (2)(h) concerning hiring certain personnel; and made minor changes in style. Amendment effective April 28, 1999, and terminates June 30, 2001.

*Severability:* Section 15, Ch. 512, L. 1999, was a severability clause.

*1981 Amendment:* Changed internal reference in (1) to correspond to renumbering.

**Collateral References**

Governor's Office of Indian Affairs, https://tribalnations.mt.gov/.

Partners in the Montana Comeback: 2021 State-Tribal Relations Report, Governor's Office of Indian Affairs (2021).

# CHAPTER 14
# COMMUNITY SERVICE

## Part 1
## Montana Community Service Act

**Part Compiler's Comments**

*Severability:* Section 12, Ch. 534, L. 1993, was a severability clause.

*Effective Date:* Section 14, Ch. 534, L. 1993, provided: "[This act] [90-14-101 through 90-14-109] is effective on passage and approval." Approved April 24, 1993.

### 90-14-102. Definitions.

**Compiler's Comments**

*1999 Amendment:* Chapter 150 substituted "commission" for "advisory council" and "director" for "coordinator" as defined terms; deleted definitions of corps, corpsmember, and crewleader that read: "(4) "Corps" means the Montana community service corps, which includes any organization established to provide community services under this part and the Montana conservation corps created under 23-1-301.

(5) "Corpsmember" means a participant in the corps.

(6) "Crewleader" means a participant in the corps who supervises corpsmembers"; in definition of program after "service" deleted "corps", after "all of the" deleted "corps, education projects", and at end deleted "and under the Montana conservation corps in 23-1-301"; and made minor changes in style. Amendment effective October 1, 1999.

### 90-14-103. Office of community service.

**Compiler's Comments**

*2007 Amendment:* Chapter 85 in (6) after "system innovative projects" deleted "the Montana conservation corps established in 23-1-301"; and made minor changes in style. Amendment effective March 30, 2007.

*Preamble:* The preamble attached to Ch. 85, L. 2007, provided: "WHEREAS, in 1989, the Montana Conservation Corps was statutorily placed under the Parks Division of the Department of Fish, Wildlife, and Parks, subject to the oversight of the Office of Community Service; and

WHEREAS, in about 1993, the Montana Conservation Corps was reorganized as a nonprofit organization and removed from direct state governmental oversight, yet the statutes related to the Montana Conservation Corps were not addressed to reflect the revised status of the Montana Conservation Corps; and

WHEREAS, it is appropriate to repeal the obsolete statutes to accurately reflect the current purpose and structure of the Montana Conservation Corps."

*1999 Amendment:* Chapter 150 throughout section substituted "director" for "coordinator" and "commission" for "advisory council"; in (2)(f) near beginning substituted "programs" for "corps" and at end deleted "by the corps"; in (5) near end of first sentence after "operation of" deleted "corps and"; in (6) near middle substituted "service learning program" for "serve America program" and after "military affairs" substituted "service" for "corps"; and made minor changes in style. Amendment effective October 1, 1999.

**Collateral References**

Serve Montana: Governor's Office of Community Service, https://serve.mt.gov.

### 90-14-104. Commission on community service.

**Compiler's Comments**

*1999 Amendment:* Chapter 150 throughout section substituted references to commission for references to advisory council; in (5) near end after "recruitment of" deleted "corpsmembers and" and before "crewleaders" inserted "volunteer"; inserted (6) concerning payment of commission members; and made minor changes in style. Amendment effective October 1, 1999.

**Collateral References**

Montana Commission on Community Service Agendas and Minutes, https://serve.mt.gov/who-we-are/Commission.

## 90-14-105. Duties and powers of state agencies.

**Compiler's Comments**

*1999 Amendment:* Chapter 150 at beginning of (1), deleted "In addition to the office of community service in the governor's office"; near beginning of (1)(a) after "instruction" substituted "implements" for "is the agency for corps and" and near end substituted "federal service learning grants" for "the federal serve America grants"; in (1)(c) at beginning of first sentence inserted references to departments of environmental quality, natural resources and conservation, and transportation and deleted reference to corps projects, near middle inserted reference to tribal parks, and near end inserted reference to environmental projects and inserted second sentence concerning other types of projects; in (1)(d) near beginning substituted "may support" for "is the agency for corps", near middle before "crewleaders" inserted "volunteer", and near end substituted "activities" for "corps"; in (1)(e) near beginning substituted "director" for "coordinator" and "commission" for "advisory council" and near middle before "homes" inserted "or otherwise modifying"; near beginning of (2) substituted "designated by the governor" for "listed in this section"; near beginning of (3) substituted "involved in community service" for "listed in this section"; in (5) substituted "engaged in community service" for "listed in this section"; in (5)(c) substituted "volunteer crewleaders and other volunteers" for "crewleaders and corpsmembers"; in (5)(h) near beginning substituted "volunteers" for "the corps" and near end substituted "volunteers" for "corpsmembers"; and made minor changes in style. Amendment effective October 1, 1999.

*Code Commissioner Correction:* Chapter 429, L. 1995, repealed Title 20, chapter 26, part 14. Pursuant to the authority contained in sec. 73, Ch. 18, L. 1995, the Code Commissioner has deleted the last sentence of (1)(b) that read: "The Montana university system shall provide assistance to the Montana student volunteer program established in Title 20, chapter 26, part 14."

*1993 Statement of Intent:* The statement of intent attached to Ch. 534, L. 1993, provided: "A statement of intent is required for this bill because [section 5] [90-14-105] authorizes the office of community service to adopt rules relating to the Montana community service corps.

It is the intent of the legislature that a variety of opportunities be developed, enhanced, and coordinated that maximize the resources and abilities of citizens of Montana to renew the ethic of civic involvement and responsibility by:

(1) encouraging Montanans, regardless of age, income, or ability, to engage in full-time or part-time service;

(2) involving youth in programs that benefit the state and improve their own lives;

(3) enabling young adults to make a sustained commitment to service; and

(4) involving participants in activities to help meet human, educational, environmental, service, and public safety needs that would not otherwise be performed by paid workers.

It is also the intent of the legislature that the rules address the following:

(1) procedures for recruitment and involvement in service;

(2) procedures for review and approval of volunteer or work experience projects;

(3) a service code of conduct and grievance procedure;

(4) standards and procedures to evaluate and report on the performance of participants and projects;

(5) training guidelines for service leaders and participants;

(6) requirements necessary to ensure cooperation and compliance with any federal programs or requirements related to national public service legislation; and

(7) other requirements necessary to accomplish the purposes of the Montana community, conservation, and volunteer service corps."

## 90-14-106. Prohibited activities.

**Compiler's Comments**

*1999 Amendment:* Chapter 150 in (1) after "90-14-105" inserted "that are designated by the governor and engaged"; and in first sentence of (2) substituted "volunteer, or volunteer crewleader" for "corpsmember, or crewleader". Amendment effective October 1, 1999.

### 90-14-107. Office of community service — accounts.

**Compiler's Comments**

*Termination:* Section 15, Ch. 534, L. 1993, provided: "[Section 7(4) [90-14-107(4)], the first sentence in section 7(6) [90-14-107(6)], and section 9 [amending 17-7-502]] terminate July 1, 1995."

### 90-14-108. Indemnification for Montana community service act.

**Compiler's Comments**

*1999 Amendment:* Chapter 150 near middle after "service" deleted "crewleaders, corpsmembers, and". Amendment effective October 1, 1999.

### 90-14-110. Contracts and cooperative agreements authorized under part.

**Compiler's Comments**

*Effective Date:* This section is effective October 1, 2019.

*Applicability:* Section 4, Ch. 431, L. 2019, provided: "[This act] applies to contracts and cooperative agreements executed on or after [the effective date of this act]." Effective October 1, 2019.

*Preamble:* The preamble attached to Ch. 431, L. 2019, provided: "WHEREAS, the Montana Community Service Act promotes public service that provides a benefit to the State of Montana; and

WHEREAS, the Montana Community Service Act asks state agencies, including the Departments of Environmental Quality, Natural Resources and Conservation, Transportation, and Fish, Wildlife, and Parks, to develop and implement community service opportunities consistent with the mission and function of each agency; and

WHEREAS, the Montana Community Service Act authorizes state agencies engaged in community service to execute contracts or cooperative agreements; and

WHEREAS, the omission of the Montana Community Service Act from the list of exemptions to the Montana Procurement Act creates obstacles to the development and implementation of contracts for community service projects to benefit the state; and

WHEREAS, the addition of the Montana Community Service Act to the list of exemptions to the Montana Procurement Act is consistent with current practice for state agencies entering into contracts and cooperative agreements; and

WHEREAS, this act reconciles the intention of the Montana Community Service Act with the Montana Procurement Act to facilitate the development and implementation of community service opportunities consistent with section 90-14-105, MCA, and it clarifies that agencies, when operating under the Montana Community Service Act, may be exempted from state procurement requirements."

## CHAPTER 15
## NATURAL RESOURCE INFORMATION SYSTEM

**Chapter Compiler's Comments**

*Preamble:* The preamble attached to HB 785 (Ch. 650, L. 1983) provided: "WHEREAS, various departments of state government, including the Departments of Natural Resources and Conservation; Fish, Wildlife, and Parks; State Lands [functions now transferred to Department of Environmental Quality]; Health and Environmental Sciences [functions now transferred to Department of Environmental Quality]; and Agriculture and various branches of the university system independently collect natural resource information for different purposes, using manual and automated methods; and

WHEREAS, although ideally there should be an integrated natural resource information system, such a sophisticated system would be extremely costly because of the unique and distinctly different requirements of each department; and

WHEREAS, efforts should be made to expedite the development of separate but compatible systems and to catalog this data and make it available for department and statewide use; and

WHEREAS, a natural heritage program begins by developing a classification system to conceptually organize the elements of natural diversity in the state, and this classification serves as a framework for categorizing natural landscape information to facilitate comparison of similar elements and recognize dissimilar elements; and

WHEREAS, 33 states have already developed programs to collect and manage information on their natural heritage, and the methods used by those state programs are available to Montana; and

WHEREAS, the classification system embodied in the natural heritage program should be a working one that retains the flexibility to be changed as need dictates so that new categories may be added or preexisting categories subdivided and, within classes, elements may be added or deleted as new information becomes available; and

WHEREAS, a natural heritage program is needed to eliminate costly duplication and enhance the efficiency of natural resource data collection and to provide a valuable source of that information for state government, industry, and other groups.

THEREFORE, the State of Montana, as a first step in developing a natural resource information system establishes a Montana Natural Heritage Program."

## Part 1
## General

### 90-15-101. Purpose.

**Compiler's Comments**

*1985 Amendment:* Near middle after "information system", inserted "to implement the system".

### 90-15-102. Definitions.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 14, Ch. 110, L. 2023. Amendment effective July 1, 2023.

*1995 Amendment:* Chapter 418 in definition of principal data source agencies deleted "department of state lands" and substituted "department of environmental quality" for "department of health and environmental sciences". Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1991 Amendment:* Substituted references to Department of Transportation for references to Department of Highways. Amendment effective July 1, 1991.

*1985 Amendment:* Substituted definition of "Library" for ""Department" means the department of administration created by 2-15-1001."

### 90-15-103. Funding.

**Compiler's Comments**

*1989 Amendment:* At end deleted "and any such funds are statutorily appropriated to the library or to the appropriate principal data source agency for such purposes as provided in 17-7-502". Amendment effective July 1, 1989.

*1985 Amendment:* At beginning substituted "The library and each principal data source agency" for "The department of administration"; and near end substituted "are statutorily appropriated to the library or to the appropriate principal data source agency for such purposes as provided in 17-7-502" for "are appropriated to the department for such purposes".

## Part 3
## Information System

### 90-15-301. Establishment of information system.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 15, Ch. 110, L. 2023. Amendment effective July 1, 2023.

*1985 Amendment:* In (1) in first sentence, at beginning substituted "library" for "department" and at end inserted "and shall begin implementation of the plan"; in (2) at beginning substituted "library" for "department"; and in (3) in first sentence, after "fieldwork", deleted "or literature searches".

### 90-15-302. Natural heritage program.

**Compiler's Comments**

*1985 Amendment:* In (1) at end of first sentence, substituted "library" for "department", and substituted second and third sentences referring to employment of an independent contractor or staff and the use of state resources and facilities by an independent contractor for "In order to establish the program, the department may contract with an independent contractor for a period not to exceed 2 years".

**Collateral References**

Montana Natural Heritage Program, https://mtnhp.org.

### 90-15-303. Interagency cooperation.

**Compiler's Comments**

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 16, Ch. 110, L. 2023. Amendment effective July 1, 2023.

*1997 Amendment:* Chapter 45 in (2), in first sentence before "Montana", inserted "natural resource information system and the".

*1985 Amendment:* Throughout section changed references to department of administration to references to the state library.

### 90-15-304. Availability of information.

**Compiler's Comments**

*1985 Amendment:* Throughout section changed references to department of administration to references to the state library.

### 90-15-305. Water information system.

**Collateral References**

Water Information System, https://msl.mt.gov/geoinfo/water_information_system.

[illegible] system

[illegible]

and

WHEREAS, the classification system embodied in the natural heritage [illegible] a working one that retains the flexibility [illegible] may be added or preexisting categories subdivided and, within classes, elements may be added or deleted as new information becomes available; and

WHEREAS, a natural heritage program is needed to eliminate [illegible] [illegible] information for state government, industry, and other groups. [illegible] information system establishes a Montana Natural Heritage Program [illegible]

## Part 1
## General

### 90-15-101. Purpose.

Compiler's Comments

*1985 Amendment:* Near middle after "information system", [illegible] system".

### 90-15-102. Definitions.

Compiler's Comments

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 14, Ch. 110, L. 2023. Amendment effective July 1, 2023.

*1995 Amendment:* Chapter 418 in definition of principal data source agencies deleted "department of state lands" and substituted "department of environmental quality" for "department of health and environmental sciences". Amendment effective July 1, 1995.

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1991 Amendment:* Substituted references to Department of Transportation for references to Department of Highways. Amendment effective July 1, 1991.

*1985 Amendment:* Substituted definition of "Library" for ""Department" means the department of administration created by 2-15-1001".

### 90-15-103. Funding.

Compiler's Comments

*1989 Amendment:* At end deleted "and any such funds are statutorily appropriated to the library or to the appropriate principal data source agency for such purposes as provided in 17-7-502". Amendment effective July 1, 1989.

*1985 Amendment:* At beginning substituted "The library and each principal data source agency" for "The department of administration"; and near end substituted "are statutorily appropriated to the library or to the appropriate principal data source agency for such purposes as provided in 17-7-502" for "are appropriated to the department for such purposes".

## Part 3
## Information System

### 90-15-301. Establishment of information system.

Compiler's Comments

*2023 Amendment:* See 2023 Session Law for amendment made by sec. 15, Ch. 110, L. 2023. Amendment effective July 1, 2023.

*1985 Amendment:* In (1) in first sentence, at beginning substituted "library" for "department" and at end inserted "and shall begin implementation of the plan"; in (2) at beginning substituted "library" for "department"; and in (3) in first sentence, after "fieldwork", deleted "or literature searches".

### 90-15-302. Natural heritage program.

Compiler's Comments

*1985 Amendment:* In (1) at end of first sentence, substituted "library" for "department", and substituted second and third sentences referring to employment of an independent contractor [illegible]

# TITLES 91 THROUGH 99
## RESERVED